

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0050

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective June 14, 2020 (decision # 113559). Claimant filed a timely request for hearing. On January 12, 2021, ALJ Frank conducted a hearing, and on January 15, 2021, issued Order No. 21-UI-159243, concluding the employer discharged claimant, but not for misconduct and claimant was not disqualified from receiving benefits. On January 21, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Superior Steel Fabrication employed claimant, last as a welder, from May 27, 2014 until June 19, 2020. Claimant's work shift began at 5:30 a.m.

(2) The employer expected its employees to report for work as scheduled or notify the employer as soon as possible prior to the start of their shift if they would be absent or late. The employer's attendance expectations were contained in its handbook, a copy of which claimant acknowledged receiving and reading at hire. Claimant was aware and understood the employer's expectations regarding attendance.

(3) Prior to August 13, 2015, claimant often violated the employer's attendance policy and received a written warning for those violations. Between August 13, 2015 and December 2019, claimant received verbal warnings for being absent or late to work. In December 2019, claimant received a written warning for a "no call/ no show" on December 12, 2019. The employer's records showed the only "recurrent theme" for claimant's attendance policy violations concerned "issues at home." Audio Record at 16:30 to 16:55. Claimant did not receive any warnings for attendance issues in 2020.

(4) On June 18, 2020, claimant called in to the employer at 4:30 a.m. and reported to the employee that answered his call that he would be absent from work that day due to illness. The person at work whom claimant notified did not create a record of claimant's call. As a result, the employer considered claimant a "no call/ no show" that day.

(5) On June 19, 2020, claimant overslept and did not report for work at 5:30 a.m. as scheduled. At approximately 6:00 a.m., claimant woke up and notified his supervisor by phone that he had overslept. Claimant immediately left for work and arrived at approximately 6:30 a.m. Claimant did not know why he overslept that morning but had set an alarm to wake in time to report for his scheduled shift. Later that day, the employer discharged claimant for violating its attendance policy on June 18, 2020 based on what it considered a “no call / no show,” and on June 19, 2020 for reporting to work late without notice.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct.” OAR 471-030-0038(3)(a) (September 22, 2020). “[W]antonly negligent’ means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.” OAR 471-030-0038(1)(c). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for violating its attendance policy on both June 18 and June 19, 2020. Barring illness or exigent circumstances, the employer had the right to expect claimant to report for work as scheduled unless he notified the employer in advance that he would be absent or late. However, claimant asserted at hearing that he failed to report for work on June 18, 2020 due to illness and notified the employee who answered his call at 4:30 a.m. that day that he would be absent for that reason. Audio Record at 17:45 to 19:30. When the employer’s witness was asked whether he and claimant discussed claimant’s absence on June 18, 2020, the witness replied that he did not recall and that there was nothing in the employer’s notes regarding claimant’s absence that day. Audio Record at 17:45 to 19:30. Viewed objectively, the parties’ evidence on whether claimant was absent on June 18, 2020 due to illness and whether he notified the employer in advance of his shift that he would be absent for that reason was no more than equally balanced. In a discharge case, when the evidence on a disputed issue is equally balanced, the uncertainty must be resolved in claimant’s favor because the employer has the burden of proof. Accordingly, the record establishes that on June 18, 2020, claimant was absent from work due to illness and that he followed the employer’s policy by notifying the employer in advance of his shift that he would be absent. Because absence due to illness is not misconduct, to the extent the employer discharged claimant for what it considered a “no call / no show” that day, the employer failed to establish misconduct.

To the extent the employer discharged claimant for reporting late to work on June 19, 2020, the employer also failed to establish misconduct. Although claimant violated the employer’s expectation that he report for work as scheduled, claimant had taken the reasonable step of setting an alarm to ensure that he would wake himself in time for him to report for work by the start of his shift. For unknown reasons, claimant apparently slept through his alarm and did not wake up until shortly after his shift began. Claimant immediately notified his supervisor of what had occurred and traveled to work, arriving

at around 6:30 a.m. When asked, the employer's witness explained that claimant's past tardiness involved "issues at home" and did not assert or imply that any other incidents of tardiness involved oversleeping or sleeping through an alarm. Audio Record at 16:30 to 16:55. Claimant was not conscious that he would be late for work during the time he overslept, and by setting an alarm and then calling the employer immediately upon waking and reporting he had overslept and would be late for work, claimant demonstrated that he was not indifferent to the consequences of his conduct for the employer. Accordingly, the employer failed to show that claimant's failure to report for work at 5:30 a.m. on June 19, 2020 was a willful or wantonly negligent violation of the employer's expectation that he report for work as scheduled.

The employer discharged claimant but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Order No. 21-UI-159243 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: February 23, 2021

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. See ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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