

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0462

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective March 21, 2021 (decision # 152004). Claimant filed a timely request for hearing. On June 3, 2021, ALJ Micheletti conducted a hearing, and on June 4, 2021 issued Order No. 21-UI-168138, affirming decision # 152004. On June 7, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bridgetown Bakery employed claimant as a machine operator from August 2, 2019 until March 22, 2021.

(2) The employer had a written attendance policy that required employees to report for work as scheduled or notify the employer if they were going to be late or absent. The policy provided that any employee who accrued four or more attendance violations was subject to discharge. Claimant received a copy of the employer's attendance policy and was aware of the employer's expectations regarding attendance.

(3) Between January 26, 2021 and March 1, 2021, claimant accrued five attendance violations. On March 1, 2021, claimant received a final written warning for unexcused absences that notified her that additional unexcused absences could result in the termination of her employment.

(4) On March 22, 2021, claimant was scheduled to start her regular shift at 3:00 p.m. At 2:15 p.m., claimant dropped her 19-year-old daughter off at the airport to catch a flight and then began to drive to work. Shortly thereafter, claimant received a call from her daughter reporting that she had missed her flight and could not take another until the next day. She asked claimant to return to the airport to take her home, which claimant did. Claimant did not notify the employer that she might be late because there "was so much going on" that she "didn't even think to call." Transcript at 11. Claimant arrived at work at approximately 3:15 p.m.

(5) On March 22, 2021, the employer discharged claimant for accruing an attendance violation by reporting to work approximately 15 minutes late without notifying the employer she would be late.

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). 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 failing to timely report for work, or at least notify the employer that she would be late, on March 22, 2020. To the extent the employer discharged claimant for reporting to work 15 minutes late that day, the employer failed to establish misconduct. Although the employer had the right generally to expect claimant to report for work on time, it did not have the right to expect claimant to leave her young daughter stranded at the airport in order to do so. Viewed objectively, such an expectation was unreasonable and a decision not to comply with an unreasonable employer policy or expectation is not misconduct, as Order No. 21-UI-168138 correctly concluded. Order No. 21-UI-168138 at 3. *See*, OAR 471-030-0038(3)(b)(C).

However, Order No. 21-UI-168138 also concluded that to the extent the employer discharged claimant for failing to notify the employer that she would be late, the discharge was for misconduct. Order No. 21-UI-168138 at 3. The order reasoned that claimant’s failure to notify the employer violated a reasonable employer expectation and that claimant was wantonly negligent because she “chose” not to notify the employer. Order No. 21-UI-168138 at 3-4. However, the record does not support that conclusion.

The employer failed to meet its burden to show that on March 22, 2021, claimant made a conscious decision not to notify the employer she would or might be late. When asked at hearing why she did not contact the employer for that reason, claimant responded, “[I]t was so much going on that I didn’t even think to call. To even alert [the employer] because I was just trying to get . . . my daughter and get her home and get to . . . work.” Transcript at 11. Claimant further explained that she had no other family in the area available to pick up her daughter, and that her concern was to get her young daughter “home safe.” Transcript at 13. The record also fails to show that claimant knew that she would be late to work.

Viewed objectively, the record fails to show that claimant’s conduct in failing to notify the employer that she would be late was either a willful or wantonly negligent violation of a standard of behavior the employer had the right to expect of claimant. Although claimant may have been negligent in failing to inform the employer that she would or might be late, her conduct did not rise to the level of wanton negligence as defined under OAR 471-030-0038(3)(a) because the record fails to show that she

consciously neglected to notify the employer, or consciously engaged in other conduct that she knew or should have would probably result in her failure to do so.

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

DECISION: Order No. 21-UI-168138 is set aside, as outlined above.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: July 14, 2021

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 desisyong ito.

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 الإستئناف 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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