

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0012

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 7, 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 April 11, 2021 (decision # 94628). Claimant filed a timely request for hearing. On November 24, 2021, ALJ Scott conducted a hearing, and on December 2, 2021 issued Order No. 21-UI-180973, reversing decision # 94628 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits. On December 22, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Douglas County Forest Products employed claimant as a cogeneration boiler assistant from March 31, 2020 until April 21, 2021.

(2) The employer had a policy that prohibited employees from failing to report for a scheduled shift without notice before the shift began, except in cases of emergencies. Failure to report to two consecutive shifts without notice was grounds for discharge. The employer also required employees to give the employer truthful information about why they failed to report for scheduled shifts. Claimant was aware of and understood these expectations.

(3) In late April or early May 2020, claimant failed to report for a scheduled shift without notice before the shift began. After the shift began, claimant called in and spoke to his supervisor. The supervisor reminded claimant about the importance of adhering to the employer's expectation regarding giving notice prior to an absence.

(4) Claimant was scheduled to work shifts on April 15, 2021 and April 16, 2021. On April 15, 2021, around 6:00 p.m., claimant and his girlfriend were driving home from a fishing trip in Reedsport,

Oregon. While traveling near the boundary between Coos County, Oregon and Douglas County, Oregon, a police officer pulled claimant over for a traffic violation. The officer discovered there was a Lane County, Oregon warrant for claimant's arrest for non-payment of child support, and the officer placed claimant under arrest. As the officer did so, Claimant, who was scheduled to work at 7:00 p.m. that evening, told his girlfriend to call the employer to inform them claimant was in jail. Claimant was transported to Douglas County jail, and shortly thereafter transferred to Lane County jail.

(5) Claimant's girlfriend thought claimant next worked the morning of April 16, 2021. On April 16, 2021 in the early morning hours, claimant's girlfriend called the employer's cogeneration department and spoke to claimant's coworker. The two agreed that claimant's girlfriend should call the employer's human resources (H.R.) office. Later that day, five hours after the beginning of claimant's shift, claimant's girlfriend called the employer's H.R. office and reached claimant's H.R. manager. Claimant's girlfriend told the H.R. manager that claimant was in jail.

(6) Thereafter, on April 16, 2021, the H.R. manager called the Coos County jail, the Douglas County jail, and the Lane County jail, but the jail staff she spoke to indicated claimant was not in custody in any of the jails. On April 17, 2021, the H.R. manager again called the Coos County jail, the Douglas County jail, and the Lane County jail but again was told claimant was not in custody in any of the jails.

(7) On April 18, 2021, claimant was released from Lane County jail.

(8) On April 20, 2021, the H.R. manager asked claimant to send her copies of jail documents to verify that he was in jail on April 15 and 16, 2021, during the times he was scheduled to work. On April 21, 2021, claimant took pictures of some documents and emailed them to the employer. The H.R. manager reviewed the documents, compared them to forms that were publicly available online, and decided the documents were not authentic. On April 21, 2021, the employer discharged claimant for failing to report for his scheduled shifts on April 15 and 16, 2021 without notice before the shifts began, and for allegedly giving the employer false information for why he failed to report for his shifts on those days.

(9) Thereafter, claimant provided proof to Lane County that he had paid child support and, on June 22, 2021, Lane County dropped the non-payment of child support charge.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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 report for his scheduled shifts on April 15 and 16, 2021 without prior notice, and for allegedly giving the employer false information for why he failed to report for his shifts on those days. The employer did not carry their burden to show that claimant's conduct constituted misconduct in either instance.

With respect to whether claimant gave the employer false information for why he failed to report for his shifts on April 15 and 16, 2021, aspects of the record raise some doubt about claimant's account that he was in jail on those days. Specifically, although claimant testified at hearing that he failed to report for his scheduled shifts because he was in jail, he made no mention of jail in his request for hearing, in which claimant stated, "I was sick at the time and my girlfriend had to call in work for me." *Compare* Transcript at 22-29 *with* Exhibit 2. The employer also argued that certain aspects of the documents claimant submitted suggest they are inauthentic. For example, one Lane County jail document, a "Receipt for Pre-Trial/Post-Trial Prison or Detained Person," appears to bear a type written date of "2021/04/13," which predates the events of April 15 and 16, 2021. Exhibit 1 at 12. If so, however, this is not very persuasive evidence that the document was inauthentic, because it is plausible the "2021/04/13" date was an error by jail staff, and the document appears to be dated April 18, 2021 at the bottom of the page. The employer also took issue with the fact that a separate document "Lane County Jail Booking and Release Notification Processes" was signed by an individual who was no longer sheriff. Exhibit 1 at 9-10. That too is not very persuasive evidence that the document was not genuine because it is possible that the jail would issue an out-of-date form. The employer also stated that they determined that documents claimant submitted were available on the internet and argued that that fact raised suspicions. Transcript at 11. However, it is plausible that a county jail might use forms that are available online.

To determine that claimant gave the employer false information would require giving more weight to the hearsay evidence regarding what the jail employees said to the H.R. manager than to the direct testimony of claimant and claimant's girlfriend at hearing. However, the direct testimonial evidence of claimant and claimant's girlfriend is entitled to more weight. While the inconsistent statement in claimant's hearing request form is concerning, it does not undermine claimant's credibility to a degree sufficient to accord more weight to the hearsay of jail staff than to the accounts of claimant and his girlfriend. Therefore, the preponderance of the evidence favors the account of claimant and claimant's girlfriend. As such, the employer did not meet their burden to establish that claimant gave them false information for why he failed to report for his scheduled shifts.

Further, the employer did not establish that claimant's failure to report for his scheduled shifts on April 15 and 16, 2021 without prior notice was willful or wantonly negligent conduct. Because the preponderance of evidence shows that claimant did not provide notice in advance of his shifts on April 15 and 16, 2021 not because he intended not to do so but because he was in police custody, the record shows that claimant did not intentionally violate the employer's expectation. Likewise, the record does not support that claimant's failure to report for the shifts without notice was wantonly negligent because he requested that his girlfriend inform the employer that he was in jail. This shows that claimant was not acting with indifference to the consequences of his actions and therefore was not acting with wanton negligence.

Moreover, under *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991), where off-duty conduct makes it impossible for an individual to comply with the employer's attendance requirements, the relevant question is whether a claimant willfully created the situation that made it

impossible for them to attend work or to comply with the employer's policy. Here, the record shows that the situation that made it impossible for claimant to comply with the employer's policy—his alleged failure to pay child support—was not a situation claimant willfully created. This is because, more likely than not, claimant had not failed to pay child support given the fact that subsequent to his discharge, claimant provided proof that he had paid child support and Lane County dropped the non-payment of child support charge.

For these reasons, claimant was discharged, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-180973 is affirmed.

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

DATE of Service: January 31, 2022

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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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