

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0036

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 13, 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 July 25, 2021 (decision # 113436). Claimant filed a timely request for hearing. On December 21, 2021, ALJ Logan conducted a hearing, and on December 22, 2021 issued Order No. 21-UI-182442, affirming decision # 113436. On December 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) St. Vincent De Paul employed claimant as a warehouse worker for about a month until July 29, 2021.

(2) The employer did not have a written attendance policy. At the time of hire, the manager typically advised employees that they were expected to notify him if they were not able to work a scheduled shift. When claimant was hired, the manager told her that she should not leave messages for him on the store's voicemail system if she called after hours, as he did not check the store's voicemail. The manager did not provide claimant with an alternate means of contacting him outside of store hours, nor did he provide claimant with written information on what to do if she needed to call out from a scheduled shift.

(3) On July 23, 2021, claimant sustained an injury to her "tailbone" while at work, which caused claimant to be "in a lot of pain" and prevented her from being able to perform several of her duties at work. Transcript at 14.

(4) On July 24, 2021, claimant was scheduled to work, but was unable to do so because of the injury she sustained the previous day. Claimant contacted her supervisor by phone and notified her that she would be unable to work that day. Claimant's supervisor advised claimant to let the employer know when she was able to return to work.

(5) On the evening of July 25, 2021 or the morning of July 26, 2021, claimant called the employer and left a voicemail notifying them that she would be unable to work her next shift, which was scheduled for July 27, 2021. The employer did not respond to claimant's voicemail. Claimant did not work her scheduled shift on July 27, 2021.

(6) On the evening of July 27, 2021 or the morning of July 28, 2021, claimant called the employer and left a voicemail notifying them that she would be unable to work her next shift, which was scheduled for July 28, 2021. The employer did not respond to claimant's voicemail. Claimant did not work her scheduled shift on July 28, 2021.

(7) On July 29, 2021, claimant was scheduled to work. That day, claimant called the manager "to see when he wanted [her] to come back to work." Transcript at 13. At that point, the manager discharged claimant because she had been missed her shifts on July 27, 28, and 29, 2021, and the manager believed that claimant had not notified the employer of her absences.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for having missed her shifts on July 27, 28, and 29, 2021, and having failed to notify the employer of the same. The order under review concluded that claimant was discharged for misconduct because she "understood the expectation that she call and report a pending absence," and because she notified the manager of the absences via the store's voicemail despite her knowledge that the manager did not check voicemails. Order No. 21-UI-182442 at 2–3. However, the record fails to show that claimant's discharge was for misconduct.

As a preliminary matter, the parties offered differing accounts of the conversation that claimant had with her supervisor on July 24, 2021. Although the employer's witness—the manager—testified that the supervisor had told claimant "that if she wasn't going to be able to work to let us know," claimant testified that the supervisor "said [to] just let us know when you can come back," Transcript at 20, 24.

There is no indication in the record that the manager was present for the phone call between claimant and the supervisor, and the supervisor did not testify at the hearing. Despite this, the order under review concluded that the “employer’s testimony was the more reliable, as it is more likely than not that [the] employer would maintain the expectation of which claimant was notified when she began the job: that she needed to call to report her absence if she could not attend a scheduled shift.” Order No. 21-UI-182442 at 3. This conclusion is not supported by substantial reason.

The record shows that the employer did not have a written attendance policy, did not check the store’s voicemails, and did not provide claimant with an alternate means of contacting them about absences outside of operating hours. In light of the employer’s informal approach to their attendance policy, claimant’s testimony that her supervisor told her to notify the employer when she would return to work—essentially granting claimant an open-ended leave of absence—is credible. Further, because claimant was a first-person witness to the supervisor’s statement, while the manager was not, her testimony is afforded more weight. Therefore, the record shows that, more likely than not, the supervisor told claimant to contact the employer when she intended to return to work. As claimant followed the directions given to her by her supervisor—she contacted the employer on July 29, 2021 and inquired about returning to work—claimant was actually in compliance with the most recent version of the employer’s expectations that had been communicated to her. Any failure to otherwise notify the employer of her subsequent daily absences, then, was not a willful or wantonly negligent violation of the employer’s standards of behavior because claimant had no reason to believe that she was required to do so.

Even if the employer’s version of events is correct, however, the employer has still not met their burden to show that they discharged claimant for misconduct. The record shows that claimant made efforts to notify the employer of each of her absences on or prior to the day of the shifts she was unable to work—in most instances by leaving voicemails for the employer. It is not entirely clear from the record why claimant chose to inform the employer of her absences in this manner, as she acknowledged in her testimony that the manager told her that he “doesn’t check his machine.” Transcript at 13. However, claimant also testified that she did not call the manager during operating hours to notify him of the absences because she “figured [the manager] would get the message, and [claimant] had talked to [the supervisor] and she said just let us know when you can come back[.]” Transcript at 20. Claimant’s testimony suggests that she believed that she was complying with the employer’s expectation that she notify them of her absences. Although claimant’s belief may have been mistaken, her multiple efforts to notify the employer of her absences indicates that she was not indifferent to the consequences of her actions. Therefore, claimant’s failure to notify the employer of her absences in the manner they had indicated was, at worst, a good faith error, and not willful or wantonly negligent conduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 21-UI-182442 is set aside, as outlined above.

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

DATE of Service: February 9, 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 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 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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