

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0190

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 1, 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 October 3, 2021 (decision # 110952). Claimant filed a timely request for hearing. On January 13, 2022, ALJ Kaneshiro conducted a hearing and issued Order No. 22-UI-184053, reversing decision # 110952 by concluding that the employer discharged claimant, but not for misconduct, and that claimant therefore was not disqualified from receiving benefits based on the work separation. On February 1, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Is Living employed claimant as a therapeutic mentor from June 25, 2020 to October 7, 2021. Claimant's shifts began at 6:00 p.m. and ended the next morning. Claimant's commute to her job using her car, and taking the fastest route via "back roads," took 30 minutes one-way. Transcript at 29.

(2) The employer maintained an attendance policy for their employees that prohibited tardiness. The employer considered an employee tardy if they reported to work more than seven minutes after the start of their shift. The employer considered each instance of tardiness to constitute "half of an occurrence," and they imposed progressive discipline based on an employee's accumulation of two total occurrences (verbal warning), three total occurrences (written warning), four total occurrences (final written warning), and five total occurrences (termination) within a three-month window. Transcript at 6.¹ Claimant was aware of and understood the employer's attendance policy.

¹ For example, under the employer's attendance policy, four tardiness violations in a three-month window equaled two occurrences ("half of an occurrence" x 4 = two occurrences), and resulted in a verbal warning. If the employee was tardy on

(3) In May 2021, claimant was involved in an accident that resulted in the loss of her vehicle. Due to the loss of her vehicle, claimant had to rely upon her partner for transportation to the employer. Claimant's partner's work schedule often conflicted with claimant's 6:00 p.m. start time and, as a result, claimant was not always able to leave her residence in time to make it on time to her shift.

(4) Between September 5, 2021 and September 8, 2021, claimant was over seven minutes tardy for four separate shifts and accumulated two occurrences. Per the employer's attendance policy, the employer gave claimant a verbal warning for her tardiness violations. Claimant had not been late for a shift prior to September 5, 2021.

(5) Between September 12, 2021 and September 14, 2021, claimant was over seven minutes tardy for two additional shifts, which increased her total number of occurrences within a three-month window to three. Per the employer's attendance policy the employer gave claimant a written warning.

(6) Between September 19, 2021 and September 20, 2021, claimant was over seven minutes tardy for two additional shifts, which increased her total number of occurrences within a three-month window to four. Per the employer's attendance policy, the employer gave claimant a final written warning. Claimant spoke with the employer's area director and explained that she had been late because she had to share a car "and sometimes the people weren't back in time." Transcript at 14.

(7) Between September 20, 2021 and October 5, 2021, the area director conducted training to reiterate to all employees the employer's attendance policy. Claimant spoke with her supervisor about her transportation issues and asked about her eligibility for the employer's ride share service and the possibility of switching to a day shift. Claimant was not eligible for the employer's rideshare service and although switching to a daytime shift was an option, no daytime shifts were then available. Claimant also spoke to her friends about trying to get a ride to work but was unsuccessful. Claimant did not pursue commercial ride share services as a transportation option because she believed they were expensive and she had "financial issues." Transcript at 29. Claimant did not research public transportation as an option because she did not think there was a bus route to her work. Claimant was over seven minutes tardy for one additional shift during this period, which increased her total of occurrences within a three-month window to four and a half.

(8) On October 6, 2021, claimant reported 20 minutes late to work, which increased her total number of occurrences within a three-month window to five.

(9) On October 7, 2021, the employer discharged claimant pursuant to their tardiness policy because she accumulated five tardiness occurrences within a three-month window.

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

two additional occasions within the same three-month window, their occurrence total would reach three ("half of an occurrence" x 6 = three occurrences) and the employer would impose a written warning. Ultimately, if the employee was tardy on ten occasions within a three-month window (i.e., five occurrences), the employer's policy called for the employee to be terminated.

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).

Although the employer may have discharged claimant for exceeding the number of occurrences allowed under the attendance policy, the proper initial focus of the misconduct analysis is claimant’s last tardiness violation occurring on October 6, 2021. *See generally* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge). On that date, claimant reported to work 20 minutes late. The employer’s expectation that claimant would report to work on time on October 6, 2021 was reasonable, particularly given the employer’s progressive disciplinary approach, and in light of the area director’s reiteration of the attendance policy to all employees in late September 2021. Furthermore, between September 5, 2021 and October 5, 2021, claimant was over seven minutes late to work on nine separate occasions and therefore violated the employer’s expectation that she would arrive for work on time during those days.

However, the employer failed to meet their burden to show that claimant’s tardiness on October 6, 2021 (or any of the prior days), was the result of either willful or wantonly negligent conduct. The record shows that claimant’s inability to make it to work on time beginning September 5, 2021, resulted from the loss of her vehicle in May 2021, and that to overcome her vehicle loss claimant relied on her partner for her rides to work. Despite the inconsistency with which claimant’s partner arrived at their residence to transport her to the employer, and the impact this inconsistent arrival had on claimant’s ability to arrive to work on time, claimant managed to arrive on time for her shift without issue until September 5, 2021. The record shows that after September 5, 2021, claimant began to have trouble making it to work on time, but made several unsuccessful efforts to try to find a solution to her tardiness issues. Claimant informed the area manager and her supervisor about her transportation difficulties and inquired about the employer’s ride share program and the possibility of working day shifts. Claimant also reached out to her friends to seek a ride and learned through her conversations that commercial ride share services were too expensive given her “financial issues.” The greater weight of this evidence therefore suggests that rather than arriving to her shifts late due to willful action, or indifference, claimant was concerned about her tardiness and the interests of the employer, made reasonable efforts to try to find a solution for her tardiness, but was unable to do so prior to her discharge despite her best efforts.

While it can be reasonably argued that claimant could have conducted more research to determine the viability of public transportation as an alternative, claimant’s explanation that she did not think that there was a bus route from her home to the employer was reasonable and the employer has otherwise failed to meet their burden to show that a viable bus route was available to claimant. As such, the record shows that claimant’s violation of the employer’s attendance policy was not the result of willful action or an indifference to the consequences of her actions. Therefore, claimant’s conduct did not amount to

misconduct connected with work, and she is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 22-UI-184053 is affirmed.

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

DATE of Service: April 5, 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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