

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0359

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 11, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 92947). The employer filed a timely request for hearing. On February 28, 2022, ALJ Demarest conducted a hearing, and on March 1, 2022 issued Order No. 22-UI-187482, affirming decision # 92947. On March 10, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Breath of Fresh Air PDX LLC employed claimant as a wholesale supervisor and a mixing supervisor from June 10, 2020 to July 12, 2021.

(2) Since childhood, claimant had depression, anxiety, and post-traumatic stress disorder, which she treated with prescribed medication.

(3) The employer maintained a policy prohibiting excessive absences. The policy required employees to provide a doctor's note when absent from work for longer than two days due to illness. The policy stated that the employer would treat such absences as unexcused until the employer received the doctor's note, and allowed employees two days from the last absence to provide the note.

(4) In June 2021, claimant missed several days of work because she was "really struggling" with her depression, which had been exacerbated by the recent deaths of two family members and her decision to change her mental health medications. Transcript at 17.

(5) On June 25, 2021, claimant emailed her manager to inform them that she had changed her medication again because she had discovered that the changes she made to her medication in June 2021 had contributed to her illness.

(6) On June 28, 2021, the manager responded that they were “glad [claimant] figured out why [she was] feeling so sick,” and that they “appreciate[d] [her] letting [them] know” Exhibit 1 at 13. Notwithstanding, the employer issued a verbal warning to claimant that same day for her repeated absences, and to clarify the employer’s attendance expectations for claimant going forward. The verbal warning was the first time the employer made claimant aware of their doctor’s note policy.

(7) On July 6, 2021, claimant notified the employer she would miss several days of work due to the recent death of her cat and the impact it had on her “mental health, more specifically [her] depression.” Exhibit 1 at 9. Claimant provided a doctor’s note to the employer when she notified them of her absences. In the note, the doctor recommended that claimant be allowed, “2-3 days off . . . for a recent death.” Exhibit 1 at 12. Claimant told the employer she would return to work on Monday, July 12, 2021.

(8) From July 6, 2021 through July 9, 2021, the employer excused claimant from work based on the doctor’s note claimant provided. Notwithstanding, on July 9, 2021, the employer emailed claimant a final attendance warning based on her excessive absences from work.

(9) On July 12, 2021, prior to her shift, claimant notified the employer that she would miss work that day because she was “too depressed” to work. Exhibit 1 at 14. The employer discharged claimant later that day via email. In their email, the employer stated that they were “sorry to hear that [claimant was] still not feeling up to coming to work” and “acknowledge[d] that [claimant] was going through a challenging season right now.” Exhibit 1 at 6. Had claimant reported to work on July 12, 2021, the employer would not have discharged her.

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). Isolated instances of poor judgment, good faith errors, and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The “proximate cause” of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the

discharge. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). At hearing, the employer's witness testified that the employer discharged claimant because she failed to report for work on July 12, 2021 and had twelve unexcused absences dating back to June 9, 2021. Transcript at 6. However, the employer's witness also testified that but for claimant's failure to show up to work on July 12, 2021, she would not have been discharged. Transcript at 6-7. Thus, the record shows that the incident without which claimant's discharge would not have occurred was claimant's failure to report to work on July 12, 2021.

Claimant's absence from work on July 12, 2021 was due to illness and therefore was not misconduct. The record shows that claimant suffered from long-term mental impairments, including depression, and missed several days of work in June 2021 due to certain events in her life that exacerbated her conditions. The employer was aware of claimant's illness during this time and the difficulties she was having. On July 6, 2021, claimant notified the employer that she would be absent from work again due to her mental health and depression, and supported her notification with a doctor's note as required by the employer's policy. Although claimant anticipated returning to work on July 12, 2021, she was unable to return that day because she remained "too depressed," and informed the employer of her absence that day prior to her shift.

At hearing, the employer's witness testified that the employer discharged claimant on July 12, 2021 in part because she failed to provide a new doctor's note showing that her July 12, 2021 absence was due to mental illness, as opposed to being due to the recent death referenced in the prior doctor's note. Transcript at 9. However, it can be inferred from claimant's reference in her notification to being "too depressed" to work that day that claimant continued to suffer from the same depression-related symptoms that formed the basis for the July 6, 2021 doctor's note, although they were tied directly to the recent death of her cat. To the extent the employer discharged claimant for failing to provide a clarifying doctor's note that excused her from work on July 12, 2021, the employer did not allow claimant the two days authorized under their policy for this purpose, and therefore did not show that she violated the policy.

Because the record does not show that claimant's absence from work on July 12, 2021 or failure to provide a doctor's note excusing that absence was misconduct, claimant is not disqualified from receiving benefits based on her discharge by the employer.

DECISION: Order No. 22-UI-187482 is affirmed.

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

DATE of Service: May 17, 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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