

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0421

Order No. 22-UI-189044 - Reversed ~ No Disqualification
Order No. 22-UI-188995 - Affirmed ~ Ineligible Week 30-21

PROCEDURAL HISTORY: On August 11, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective July 25, 2021 (decision # 125708). Also on August 11, 2021, the Department served notice of an administrative decision concluding that claimant failed to actively seek work for the week of July 25, 2021 through July 31, 2021 (week 30-21) and was therefore ineligible to receive benefits for that week (decision # 131710). Claimant filed timely requests for hearing on decisions # 125708 and 131710. On March 16, 2022, ALJ Janzen conducted hearings on decisions # 125708 and 131710, and on March 17, 2022 issued Order No. 22-UI-189044, affirming decision # 125708; and Order No. 22-UI-188995, affirming decision # 131710. On March 28, 2022, claimant filed applications for review of Orders No. 22-UI-189044 and 22-UI-188995 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 22-UI-189044 and 22-UI-188995. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2022-EAB-0420 and 2022-EAB-0421).

Based on a *de novo* review of the entire record in Order No. 22-UI-188995, and pursuant to ORS 657.275(2), Order No. 22-UI-188995 is **adopted**. The remainder of this decision relates to Order No. 22-UI-189044, the order under review concluding that the employer discharged claimant for misconduct.

FINDINGS OF FACT: (1) The Oregon Clinic PC employed claimant as a patient services representative from February 19, 2020 until July 27, 2021.

(2) The employer expected claimant to report to work on time and to notify her manager in advance of her shift start time if she was going to be late for a shift. Claimant's shifts began at 8:15 a.m., and the employer expected her to text her manager by 8:05 a.m. if she anticipated being late. Claimant was aware of and understood the employer's expectations.

(3) In 2018, claimant was diagnosed with narcolepsy, a condition that interfered with her brain's ability to regulate sleep. Claimant saw a sleep specialist and took medication to treat the condition, but nevertheless had extreme difficulty waking up in the morning because of her condition.

(4) Over the course of claimant's employment for the employer, her narcolepsy condition caused her to be late for work on multiple occasions. On some of the occasions that she was late for work, claimant failed to notify her manager that she would be late.

(5) In the beginning of 2021, claimant was diagnosed with insomnia, which compounded the difficulty she had waking up in the morning. Claimant continued to be late for work on multiple occasions and to fail to notify her manager she would be late on some of those occasions.

(6) On February 19, 2021, the employer issued a last chance agreement to claimant regarding continuing to report for work late and failing to notify her manager of her tardiness. Claimant committed to a number of measures to address the tardiness issue including to discuss the issue with her sleep specialist to see if her medication needed to be adjusted. Nevertheless, claimant continued to be late for work on multiple occasions because of her narcolepsy and insomnia. On some of these occasions, claimant failed to notify her manager that she would be late.

(7) From July 15, 2021 through July 26, 2021 claimant was on vacation and did not work. On July 26, 2021, claimant's manager contacted the employer's human resources (HR) department and advised that claimant's tardiness and failure to give notification of arriving late remained persistent problems. The HR director told claimant's manager that on claimant's "next late arrival we'll move forward with letting her go." Transcript at 34.

(8) On July 27, 2021, claimant was late for work, arriving five minutes after her 8:15 a.m. start time. Claimant did not text her manager by 8:05 a.m. to advise that she anticipated being late. Claimant was late because her narcolepsy and insomnia caused her to oversleep, all but one of the elevators in the employer's parking garage were out of order, and claimant did not know to expect the elevators to be out of order because they broke down while she was on vacation. Claimant failed to notify her manager that she would be late by 8:05 a.m. because she was rushing to get to work on time, did not anticipate the elevator difficulties, believed she would be punctual because a mapping program indicated she would arrive at 8:10 a.m., and preferred not to text her manager when she was close to being on time because texting her manager caused claimant anxiety.

(9) On July 27, 2021, the employer discharged claimant for violating their attendance expectations on July 27, 2021.

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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant was discharged for misconduct because she violated the employer’s attendance expectations with wanton negligence and her conduct did not fall within the exculpatory provisions of OAR 471-030-0038(3)(b). Order No. 22-UI-189044 at 3-4. The record does not support these conclusions.

More likely than not, the proximate cause of claimant’s discharge was her late arrival on July 27, 2021, rather than her failure to notify her manager that she would be late that day. The record shows that the employer’s H.R. director informed claimant’s manager on July 26, 2021 that the employer would “move forward with letting [claimant] go” on claimant’s “next late arrival[.]” Transcript at 34. This evidence suggests that claimant’s late arrival on July 27, 2021 was the proximate cause of the discharge because it was the factor without which the discharge would not have occurred. *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). In other words, the record evidence indicates that had claimant arrived late on July 27, 2021 but properly texted her manager of her late arrival, she would have been discharged anyway.

The record shows that claimant did not intend to be late on July 27, 2021 and was late only because her narcolepsy, insomnia, and unanticipated problems with the employer’s elevators caused her to be late. This evidence shows that claimant’s late arrival was not misconduct because it was not willful or the result of conscious indifference to the consequences of her actions such that it would amount to wanton negligence. Moreover, absences due to illness or other physical or mental disabilities are not misconduct under OAR 471-030-0038(3)(b). Claimant’s narcolepsy and insomnia were disabilities that caused her to be late on July 27, 2021. Further, tardiness comes within the ambit of the absence due to illness provision. *See Scevers v. Employment Div.*, 26 Or. App. 659, 554 P.2d 575 (1976). Accordingly, claimant’s late arrival on July 27, 2021 was not misconduct because it was a tardiness due to illness or other physical or mental disability.

To the extent the employer discharged claimant for failing to text her manager by 8:05 a.m. on July 27, 2021 that she would be late, the record shows that claimant’s failure to notify was not misconduct because it was not willful or wantonly negligent. Claimant failed to text her manager of her late arrival by 8:05 a.m. that day because she was rushing to get to work on time, did not anticipate that the employer’s elevators would be out of order, believed she would be punctual, and preferred not to text her manager when she was close to being on time because texting her manager caused claimant anxiety. This evidence supports that claimant’s failure to notify her manager was not willful because claimant believed she would be on time and thus did not intend to violate the employer’s expectation. That claimant reasonably believed that she would arrive on time is credible given that claimant was only five

minutes late for work on July 27, 2021, a mapping program she used indicated she would arrive five minutes early, and the tardiness was partially caused by unanticipated elevator problems. Although claimant's preference to avoid texting her manager to avoid anxiety factored into her failure to notify, claimant's breach of the employer's expectation to notify was not wantonly negligent because she considered the information at hand, including that her mapping program indicated that she would be five minutes early, and reasonably believed she would not be late. Therefore, claimant's failure to text her manager was not the result of an indifference to the consequences of her conduct that she knew or should have known would probably result in a violation of the employer's standards of behavior.

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

DECISION: Order No. 22-UI-189044 is set aside, as outlined above. Order No. 22-UI-188995 is affirmed.

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

DATE of Service: June 16, 2022

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 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 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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