

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0659

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective February 13, 2022 (decision # 85830). Claimant filed a timely request for hearing. On May 16, 2022, ALJ Blam-Linville conducted a hearing, and on May 24, 2022 issued Order No. 22-UI-194574, reversing decision # 85830 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 9, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Leathers Enterprises Inc. employed claimant as a cashier from September 1, 2020 until February 17, 2022.

(2) The employer maintained an attendance policy which required employees to notify the employer four hours before their shift, unless it was an emergency, if they would be absent and the reason for the absence. The policy did not specify a protocol for tardiness, but did state that the employer expected employees to be “punctual and conscientious regarding attendance.” Transcript at 13. The policy was contained within the employer’s employee handbook. Claimant received a copy of the handbook and discussed these policies with the employer.

(3) Throughout her employment, claimant received warnings and disciplinary actions for attendance issues. On February 10, 2022, claimant was late for work and the employer issued a warning regarding lateness.

(4) On February 13, 2022, claimant was unable to work her assigned shift because of an illness. Before her shift began, she entered into a group chat with her manager and another employee. In this group chat, the other employee agreed to cover claimant’s shift. This exchange occurred more than four hours before claimant’s shift was scheduled to begin.

(5) On February 17, 2022, claimant was no longer feeling sick and arrived at work for her scheduled shift.¹ When she arrived, the employer discharged her because of her violations of the company's attendance policy.

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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant due to her alleged violation of their absence policy. The analysis for a discharge case must begin with the proximate cause of the discharge: the final incident which led the employer to discharge the individual when they did. *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). In this case, the parties disagreed about the final incident that led to the discharge. The employer's witness testified that he believed claimant's manager was planning to meet with claimant to discuss on-going attendance issues on February 17, 2022, but was unsure whether the manager had previously planned to discharge claimant at this meeting. Transcript at 7. According to the employer's witness, claimant arrived late to the February 17, 2022 meeting, and then her manager immediately discharged her. Transcript at 7. Claimant, on the other hand, testified that she arrived on time on February 17, 2022, and her manager immediately discharged her. Claimant testified to a first-hand account of the incident, while the employer's witness was not present to the events in question and instead offered hearsay testimony. When comparing conflicting accounts, more weight is given to first-hand testimony. Further, the employer's witness directly stated that he was unsure about whether claimant's manager was already planning to discharge claimant based on the February 13, 2022 absence. Given the uncertainty in the employer's testimony and the first hand testimony from claimant, the weight of evidence shows that claimant was not late to the meeting on February 17, 2022.

The employer and claimant also disagreed regarding the nature of claimant's absence on February 13, 2022. Claimant testified that she was sick that day, that she informed her manager prior to the start of her shift that she was unable to work, that she did so at least 4 hours before her shift started, that she was

¹ It is unclear from the record whether claimant was scheduled to work February 14, 15, or 16. The employer has not alleged that claimant was absent from work, or failed to properly notify the employer of any such absence, on these dates.

ill, and that she found another employee to work for her.² Transcript at 21–23. By contrast, the employer’s witness stated that claimant did not inform her manager of the absence until after the scheduled shift had already started, and that claimant never provided the employer with a reason for the absence. Transcript at 9. Claimant’s testimony is again given more weight as she provided first-hand testimony compared to the employer’s hearsay account. Neither party offered any evidence outside of their individual testimony. The greater weight of the evidence thus supports claimant’s position that she was absent on February 13, 2022 because of illness, and that she notified the employer of this more than four hours before her shift was scheduled to begin.

The employer failed to meet their burden to show that they discharged claimant for misconduct. First, to the extent that the employer discharged claimant because of the absence on February 13, 2022, this would not be for misconduct because she was absent due to an illness, and absences due to illness are not misconduct under OAR 471-030-0038(3)(b). To the extent that the employer discharged claimant due to either claimant’s alleged failure to timely notify the employer of her absence on February 13, 2022, or her alleged failure to report to work on time on February 17, 2022, the employer has not, as discussed above, met their burden. Thus, to the extent that the employer discharged claimant for either of these alleged violations of their policies, claimant was not discharged for misconduct. For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-194574 is affirmed.

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

DATE of Service: August 29, 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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² Claimant’s testimony was specific that she notified the employer 4 hours prior to her absence. Transcript at 23. Further, while the record does not explicitly show that claimant notified the employer *why* she was absent on February 13, 2022, claimant testified at the hearing that “they knew I was sick.” Transcript at 21. It is reasonable to infer from this testimony that the employer had already learned of her illness by the time she called out from work that day.



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 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 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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