

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0692

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 6, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, and that claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 103256). The employer filed a timely request for hearing. On September 7, 2021, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for September 20, 2021. On September 20, 2021, claimant failed to appear at the hearing, and ALJ Kaneshiro issued Order No. 21-UI-175180, reversing decision # 103256 by concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective March 21, 2021.

On September 20, 2021, claimant filed a request to reopen the hearing. On May 2, 2022, OAH served notice of a hearing scheduled for May 12, 2022 on whether claimant's request to reopen should be allowed, and if so, the merits of decision # 103256. On May 12 and 25, 2022, ALJ Kaneshiro conducted the hearing, and on May 31, 2022 issued Order No. 22-UI-194911, allowing claimant's request to reopen and affirming decision # 103256 by concluding that claimant's discharge was not for misconduct, and did not disqualify claimant from receiving benefits. On June 16, 2022, the employer filed an application for review of Order No. 22-UI-194911 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 as required by OAR 471-041-0080(2)(a) (May 13, 2019). The employer also asserted that the hearing proceedings were unfair because a notification error prevented one of their witnesses from appearing at the May 25, 2022 hearing. Under OAR 471-040-0025(5), an erroneous evidentiary ruling "shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party." In this case, the employer's rights were not substantially prejudiced.

This witness had already testified at the September 20, 2021 hearing. It also is unlikely that the witness would be able to offer additional rebuttal testimony, given their testimony that they had “no relationship” to the claimant. September 20, 2021 recording at 10:40 to 11:00. Further, when asked about the final incident, the employer’s witness corroborated the claimant’s testimony that she notified the employer. September 20, 2021 recording at 14:44 to 15:00. The witness did not have further details about the incident, but did believe that the claimant notified the employer. On this record, the employer has failed to show that their rights were substantially prejudice by holding the hearing on May 25, 2022.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing claimant’s request for a reopening is **adopted**. The remainder of this decision addresses whether claimant should be disqualified from receiving benefits based on her work separation from the employer.

FINDINGS OF FACT: (1) YRC Inc. employed claimant as a dockworker from January 7, 2019 until March 24, 2021.

(2) The employer maintained an attendance policy that provided progressive discipline for employee absences. Claimant was aware of and understood this policy.

(3) Claimant had previously received discipline for violations of the attendance policy on November 26, 2019, December 19, 2019, February 4, 2020, February 20, 2020, September 1, 2020, and October 22, 2020.

(4) On March 19, 2021, claimant checked her accrued vacation time and believed she had more than 2 days of accrued vacation time. Claimant then completed a pay shortage request form requesting March 20 and 21, 2021 off from work because she did not have childcare for those days. Claimant had requested time off in this manner previously and in every instance it was approved.

(5) The employer denied this request for time off. The employer made no attempts to contact claimant to notify her that the request was denied. Claimant was unaware employer denied her request for time off.

(6) Claimant was absent from work on March 20 and 21, 2021.

(7) On March 24, 2021, claimant returned to work and saw that her request for time off on March 20 and 21, 2021 was denied. The employer discharged claimant for missing work on those two days.

CONCLUSIONS AND REASONS: Claimant’s discharge was 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 on March 24, 2021, because of her absences from work on March 20 and 21, 2021. Though claimant had several prior absences, the focus of a discharge analysis is the final incident that caused 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); *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).

Here, the employer has failed to carry their burden and demonstrate that claimant’s absences from work on March 20 and 21, 2021 constituted a willful or wantonly negligent disregard of employer’s attendance policy. The record shows that on March 19, 2021, claimant believed she had sufficient time off and then completed a pay shortage request form requesting time off for March 20 and 21, 2021. Transcript at 25:30 to 25:45. Claimant had previously requested time off in a similar manner and each previous time, the request was granted. Transcript 25:40 to 26:10. The employer denied the March 19, 2021 request for time off, but made no attempt to contact claimant to notify her of this denial. Transcript 23:20 to 23:30. Claimant thus did not become aware of this denial until she arrived at work on March 24, 2021. Transcript at 37:42 to 37:56.

Claimant’s attempt to comply with the time off request procedure shows that claimant did not willfully violate the employer’s attendance policy. To the contrary, by requesting the time off, claimant’s actions show that she was aware of the attendance policy and was attempting to comply with it. Claimant’s time off request also shows that she was not wantonly negligent in violating the employer’s policy because she was not indifferent to the consequences of these absences.

The record instead shows that claimant’s absences on March 20 and 21, 2021 were the result of a good faith error. A “good faith error” usually involves a mistaken, but honest belief, that one is in compliance with the employer’s expectations. *See accord Goin v. Employment Dep’t.*, 203 Or App 758, 126 P3d 734 (2006). Here, claimant used the same time-off request process that she had used before, and credibly testified that she believed she had enough accrued vacation time that her request would be granted, as it had in the past. Claimant’s belief remained reasonable because the employer never informed her that the request was denied. Claimant made active efforts to ensure that these absences did not violate the employer’s attendance policy. The record therefore shows that claimant’s violation of the employer’s attendance a good faith error, and not misconduct.

Claimant’s discharge was not for misconduct. Claimant is not disqualified from benefits based on the work separation.

DECISION: Order No. 22-UI-194911 is affirmed.

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

DATE of Service: September 20, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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