

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0754

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 24, 2021, 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 therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 92211). On October 14, 2021, decision # 92211 became final without the employer having requested a hearing. On October 22, 2021, the employer filed a late request for hearing. ALJ Kangas considered the employer's request, and on January 13, 2022 issued Order No. 22-UI-183978, dismissing the request as late, subject to the employer's right to renew the request by responding to an appellant questionnaire by January 27, 2022. On January 20, 2022, the employer filed a timely response to the appellant questionnaire. On April 7, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 22-UI-183978 was vacated and that a new hearing would be scheduled to determine if the employer's late request for hearing should be allowed, and if so, the merits of decision # 92211. On June 2 and 23, 2022, ALJ Kaneshiro conducted a hearing, and on June 23, 2022 issued Order No. 22-UI-196757, allowing the employer's late request for hearing on decision # 92211 but affirming the decision. On July 4, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

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 the employer's late request for a hearing on decision # 92211 is **adopted**. The remainder of this decision addresses the merits of decision # 92211, regarding whether the employer discharged claimant for misconduct.

WRITTEN ARGUMENT: The employer asserted in its written argument that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004). EAB did not consider the employer's argument that claimant's discharge was for misconduct because the employer 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) VenaCare NW employed claimant as a mobile phlebotomist from January 2021 until August 25, 2021.

(2) In January 2021, the employer wrote claimant up for sexual harassment and disrespecting his coworkers. Following this write-up, the employer directed claimant to complete two online trainings. Claimant completed one of these trainings.

(3) During the weekend of July 4, 2021, claimant was working an on-call shift for the employer. The employer called and directed claimant to go perform blood work for a client. Claimant did not have the necessary supplies, and believed the supplier was closed for the holiday weekend. Claimant refused to complete the task.

(4) On July 9, 2021, the employer held a meeting with claimant to discuss claimant's refusal to perform the blood work over the July 4, 2021 weekend. The employer instructed claimant to bring a letter of apology. Claimant did not apologize at the meeting and did not bring a letter of apology.

(5) On July 13, 2021, the employer met with claimant again to discuss claimant's refusal to perform tasks over the July 4, 2021 weekend. The employer issued claimant a performance improvement plan to address the issue that occurred over the July 4, 2021 weekend. The performance improvement plan outlined four areas of concern: disrespecting colleagues, verbally combative behavior, insubordination, and failure to take accountability.

(6) On July 16, 2021, one of claimant's regular clients called the owner of the company seeking claimant's personal information in order to provide financial assistance to claimant. Another employee told the owner that claimant had previously discussed having financial troubles with this client. June 2, 2022 Transcript at 19-20. The employer believed that this incident violated the performance improvement plan.

(7) Claimant attempted to adhere to the performance improvement plan. The employer noticed that claimant had been making improvements, specifically in the area of relationships with co-workers.

(8) On August 25, 2021, at a meeting to review the performance improvement plan, the employer discharged claimant. The employer believed that claimant had improved his respect for colleagues, but had not made improvements in the other areas outlined in the performance improvement plan. The employer already had decided to discharge claimant before the meeting began.

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).

The employer listed multiple reasons for discharging claimant. However, the weight of the evidence shows that the employer discharged claimant for allegedly failing to comply with the performance improvement plan initiated on July 13, 2021. The employer cited this as a reason for discharge, but also referred to claimant’s behavior over the July 4, 2021 weekend, and claimant’s “insubordination” during the August 25, 2021 meeting as contributing factors. However, the record fails to show that claimant’s actions over the July 4, 2021 weekend or during the August 25, 2021 meeting were the proximate cause of his 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).

Claimant’s failure to perform work assignments over the July 4, 2021 weekend resulted in him receiving a performance improvement plan. This performance improvement plan was a disciplinary action taken as an alternative to discharging claimant. It does not follow logically that the employer would allow claimant to continue working after the incident that weekend, receiving only a disciplinary action, only to discharge him nearly two months later for the incident in July. The record therefore fails to show that the employer discharged claimant for failing to perform work duties over the July 4, 2021 weekend. The employer’s witness also testified that the employer had decided to discharge claimant before the August 25, 2021 meeting. June 2, 2022 Transcript at 15. Because the employer had already made the decision before the meeting, claimant’s actions during the meeting did not cause the employer to discharge claimant. The record therefore shows that the employer decided to discharge claimant because they believed claimant had not adhered to the performance improvement plan.

While the employer believed that claimant failed to adhere to the performance improvement plan, the employer has not met their burden to show that claimant’s alleged failure was misconduct. First, the employer’s witness testified that after he was given the performance improvement plan, claimant made progress at respecting his colleagues. June 2, 2022 Transcript at 32. Next, while the employer briefly described an example of “verbally combative behavior” that occurred in January 2021, the employer did not provide an example of such behavior that occurred after the performance improvement plan was issued. June 2, 2022 Transcript at 29-30.

Similarly, the employer has not shown that claimant failed to address “insubordination” issues. On this point, the employer cited claimant’s failure to perform work tasks over the July, 4, 2021 weekend, as well as claimant’s actions during the discharge meeting. June 2, 2022 Transcript at 14, 28. As noted above, however, claimant was given the performance improvement plan specifically to address his refusal to perform work tasks over the July, 4, 2021 weekend, and the employer had already decided to discharge claimant before the discharge meeting on August 25, 2021. As the former occurred before the issuance of the performance improvement plan, and the latter occurred after the employer had already decided to discharge claimant, neither of these issues could have been violations of the performance improvement plan that led the employer to discharge claimant.

Additionally, the employer testified that claimant failed to take accountability for the incident that occurred over the July 4, 2021 weekend because he never apologized for the incident. June 2, 2022 Transcript at 24. At a meeting on July 9, 2021, the employer instructed claimant to bring a letter of apology, and claimant did not comply. However, the employer did not show that claimant knew or should have known that the employer still expected an apology after issuing the performance improvement plan. Claimant's failure to do so therefore was not a willful or wantonly negligent violation of the employer's standards of behavior.

Lastly, the employer articulated a specific client interaction that they believed demonstrated that claimant had not improved his performance. On July 16, 2021, a client called the employer and attempted to obtain claimant's information in order to support claimant financially. The employer's witness believed that this occurred as the result of conversations that claimant had with the client. June 2, 2022 Transcript at 19-20. However, the employer's witness further testified, "I truly don't know what he was telling her like when he would go to perform the service." June 2, 2022 Transcript at 19. Without additional information, the employer has failed to demonstrate what specific actions, if any, claimant took that led to this phone call. Similarly, the record does not show that these actions, if they occurred, violated either the terms of the performance improvement plan or any other of the employer's standards of behaviors that claimant knew or should have known about.

Because the employer has not met their burden to show that claimant's alleged failure to adhere to the performance improvement plan was a willful or wantonly negligent violation of their standards of behavior, the employer failed to establish that claimant's discharge was for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-196757 is affirmed.

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

DATE of Service: October 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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.

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