

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0890

Affirmed
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On October 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 84159). On October 21, 2021, the employer mailed a letter to the Department stating their opposition to decision # 84159; however, a hearing was not scheduled based on the letter. On October 25, 2021, decision # 84159 became final. On November 30, 2022, the employer mailed a second letter to the Department requesting a hearing. ALJ Kangas considered the request, and on March 1, 2022 issued Order No. 22-UI-187571, dismissing the request as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by March 15, 2022. On March 11, 2022 the employer filed a timely response to the appellant questionnaire. On May 26, 2022, the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 22-UI-187571 was vacated and that a new hearing would be scheduled to determine whether claimant had good cause to file the late request for hearing and, if so, the merits of decision # 84159. On June 13, 2022, ALJ Monroe conducted a hearing and on July 28, 2022, issued Order No. 22-UI-199208, concluding that employer's request for hearing was timely filed and affirming decision # 84159. On August 12, 2022, the employer filed an application for review 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).

FINDINGS OF FACT: (1) Claimant worked for Top of the Class Clean, LLC from May 4, 2020, until September 20, 2021 as a cleaning technician.

(2) Claimant's job duties occasionally required claimant to clean buildings alone in areas that the employer considered dangerous after dark. The employer informed claimant of the areas they deemed dangerous after dark and directed claimant not to perform her job duties at these locations after dark.

(3) On September 12, 2021, claimant completed an assigned work project at 9:11 p.m. in an area that the employer considered dangerous after dark. The employer had previously directed claimant not to complete this project after dark.

(4) Claimant suffered from depression, anxiety, and Attention Deficit Disorder (ADD). The symptoms of these conditions would regularly affect claimant's timeliness, work efficiency, and work performance. Additionally, claimant took medication for ADD that affected her ability to sleep.

(5) On September 20, 2021, the employer notified claimant via letter that she was being discharged for, among other things, completing a work assignment after dark on September 12, 2021 in a location the employer considered dangerous after dark.

CONCLUSIONS AND REASONS: The employer's late request for hearing is allowed. Claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

Late Request for Hearing. 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 concluding that the employer's late request for hearing is allowed is **adopted**.

Discharge. 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).

While the employer listed multiple issues with claimant's performance, the analysis must focus on the proximate cause of the discharge, which is the incident that led the employer to discharge claimant 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); *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). Here, the final incident occurred on September 12, 2021, when claimant did not follow the employer's instructions and completed her work assignment later than allowed by the employer at a location the employer deemed as dangerous after dark.

Claimant's failure to follow the employer's direction and complete the work assignment before dark was a violation of a reasonable employer expectation. An employer can reasonably expect that their employees will complete tasks when they are assigned. Further, if an employer directs an employee not to complete tasks during specified hours, it is reasonable for the employer to expect the employee will

not complete these tasks during those hours. At hearing, claimant testified that she knew this was her employer's expectation and that, though she couldn't remember the specific times, she believed it was likely she completed her work assignment after dark on September 12, 2021. Transcript at 23-24.

However, the employer has failed to show that claimant's breach of this expectation was either willful or wantonly negligent. Claimant testified that she tried to arrive at all of her work projects on time, but that her medication and depression routinely interfered with her ability to sleep. Transcript at 24, 27-28. Claimant's un rebutted testimony was that she was late to begin this work project because her medication interfered with her ability to sleep. Transcript at 24. Claimant's lateness to begin the work project was not willful because she did not intend to be late. Further, claimant's continued attempts to address her timeliness issues by trying to arrive on time, despite the effects of her medication and depression, including on September 12, 2021, show that her lateness was not wantonly negligent because she was not indifferent to the consequences of her actions. Therefore, claimant's actions were not misconduct because they were not willful or wantonly negligent.

Claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-199208 is affirmed.

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

DATE of Service: November 18, 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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