

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0949

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 5, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective February 21, 2021 (decision # 62021). Claimant filed a timely request for hearing. On August 23, 2022, ALJ Vaughn conducted a hearing, and on August 24, 2022 issued Order No. 22-UI-201115, affirming decision # 62021. On September 9, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pacific Fibre Products, Inc. employed claimant as an operator from April 9, 2015 until February 25, 2021.

(2) The employer maintained a written policy that required employees to notify their immediate supervisor at least one hour prior to the start of a scheduled shift if they were going to be late or absent. Claimant was aware of and understood the policy.

(3) On February 16, 2021, claimant contacted the employer 15 minutes after his shift started to notify them that he had injured his shoulder over the previous weekend. The employer told claimant that he “needed to go to the doctor and get a note stating what his restrictions were or if he could return to work.” Transcript at 29. The employer required claimant to pay for the visit to the doctor in order to obtain the note. Claimant was absent from work for the remainder of that week, and had “limited” contact with employer during that time. Transcript at 29.

(4) On February 19, 2021, the employer gave claimant a “disciplinary form” which informed him that the employer required a doctor’s note excusing him for his absences that week. Transcript at 30. Claimant’s supervisor told claimant that he could not return to work until he obtained a note from his doctor.

(5) On February 21, 2021, claimant did not report to work as scheduled or contact the employer to notify them of his absence before the start of his scheduled shift. Claimant's supervisor contacted him that day and again told claimant to obtain a doctor's note.

(6) On February 22, 2021, claimant did not report to work as scheduled or contact the employer to notify them of his absence before the start of his scheduled shift. That afternoon, claimant visited his doctor, who gave claimant a note excusing him from work for that day. Claimant provided the note to the employer. However, the employer told claimant that he needed a doctor's note that excused him for the entirety of his absences the prior week, not just his absence on February 22, 2021. Claimant later attempted to obtain another note covering the prior absences, but his doctor was on vacation.

(7) On February 23, 2021, claimant reported for his shift, but the employer sent him home early and suspended him.

(8) On February 25, 2021, the employer discharged claimant because of his attendance issues.

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 discharged claimant because he had failed to report for his shifts or notify the employer of his absences on February 21 and February 22, 2021, and because he had failed to provide the employer with a doctor's note that excused him for the entirety of his period of absence following his shoulder injury. The order under review found that the final incident which led the employer to discharge claimant was claimant's failure to report for work or notify the employer of his absence on February 22, 2022. Order No. 22-UI-201115 at 3. Based on this finding, the order under review concluded that claimant was discharged for misconduct. Order No. 22-UI-201115 at 3. The record does not support this conclusion.

First, the record suggests that the employer would not have discharged claimant when they did if he had provided a doctor's note that covered the entirety of his absence following the shoulder injury. To the extent that the employer discharged claimant for this reason, claimant was not discharged for misconduct. Claimant was aware of the employer's expectation that he provide a doctor's note for his absence. However, it is not clear from the record whether the employer had notified him previously that the required doctor's note must cover the entire period of absence. Assuming that the employer had so notified claimant, however—and that claimant's failure to comply therefore was a violation of their

expectation—his failure to comply was not a violation of a standard of behavior that an employer has the right to expect of an employee.

Under ORS 659A.306(1), it is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate. The record shows that the employer's expectation amounted to a violation of this statute, as they required that claimant pay for the doctor's note (and visit) himself. An employer does not have the right to expect that an employee will comply with a condition of employment that violates state labor laws. Therefore, to the extent that the employer discharged claimant for violating that expectation, that violation did not constitute misconduct.

To the extent that the employer discharged claimant for either the absences themselves or claimant's failure to notify the employer of those absences, the employer has not met their burden to show that these failures constituted misconduct. Claimant's supervisor told claimant on February 19, 2021 that he was required to obtain a doctor's note before he could return to work, and gave claimant a similar instruction on February 21, 2021. The employer had also notified claimant on February 16, 2021—the first day of his absence following the injury—that he needed a doctor's note "stating what his restrictions were or if he could return to work." Transcript at 29.

From these statements, it was reasonable for claimant to conclude that he was not permitted to return to work until he obtained a doctor's note. The record does not show why claimant did not obtain a doctor's note until February 22, 2021. In the absence of this information, and given that he saw his doctor less than a week later, it is reasonable to conclude that claimant booked the first appointment with his doctor that was available to him, and that he remained absent from work until he was able to obtain a doctor's note. As this was in line with the employer's instructions, claimant's continued absences prior to obtaining a doctor's note did not constitute a violation of the employer's standards of behavior.

Further, while claimant was aware of the employer's general expectation that he contact his supervisor prior to being absent from work, the employer has not met their burden to show that claimant had reason to know that he was expected to contact his supervisor every day until he was able to obtain a doctor's note. For instance, claimant's supervisor contacted claimant twice during claimant's absence to remind him to bring in a doctor's note, but the employer did not show that the supervisor also advised claimant to contact them on a daily basis until he obtained the note. Because the record does not show that claimant either knew or should have known that this was expected of him, his failure to notify his supervisor of each individual absence during that period was not the result of a disregard for the consequences of his actions or failures to act. As such, claimant's failure to notify the employer of his absences was not wantonly negligent.

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

DECISION: Order No. 22-UI-201115 is set aside, as outlined above.

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

DATE of Service: December 2, 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 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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