

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1029

Modified
Late Request for Hearing Allowed
No Disqualification

PROCEDURAL HISTORY: On November 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation (decision # 125107). On December 20, 2021, decision # 125107 became final without the employer having filed a request for hearing. On February 15, 2022, the employer filed a late request for hearing. On September 13, 2022, ALJ Amesbury conducted a hearing, and on September 20, 2022 issued Order No. 22-UI-203041, allowing the employer's late request for hearing, and reversing decision # 125107 by concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits beginning October 24, 2021. On October 10, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's late request for hearing is **adopted**. The remainder of this decision addresses whether claimant should be disqualified from receiving benefits based on her work separation from the employer.

WRITTEN ARGUMENT: EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) The Boat employed claimant as a cook from June 21, 2018 through October 25, 2021.

(2) The employer expected that its employees would appear for work on time. Claimant understood this expectation.

(3) Claimant's work performance was satisfactory until sometime in 2020, when claimant began arriving for work late and working at an unacceptably slow pace. These problems continued until her discharge.

(4) Claimant received numerous verbal warnings regarding arriving late for work. She also received written warnings in May 2020 and February 2021. On October 7, 2021, claimant signed a final written warning stating that if she continued to be late for work her employment may be terminated.

(5) On October 24, 2021, claimant knew was scheduled to begin work at 10:30 a.m. because she had volunteered to take that shift as recently as the previous day. Claimant did not appear at the scheduled time. At some time at least 15 minutes after the start of the shift, claimant was reached by telephone and stated she was late because she did not set her alarm clock. Another cook scheduled to work later in the day was called in to work claimant's shift. Claimant appeared at 3:00 p.m. that day to cover the replacement cook's shift.

(6) On October 25, 2021, when claimant appeared for work, the employer discharged her for being late to work the previous day after receiving a final warning.

(7) Since 2001, claimant has, at times, been treated for borderline personality disorder. She attributed her inability to reliably report to work on time to this disorder. She also suffered from anemia, which caused exhaustion.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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). "[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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The order under review concluded that although claimant suffered from "multiple mental and physical health conditions," she did not prove that they caused her to fail to report to work on time, and OAR 471-030-0038(3)(b) therefore did not excuse her failure to do so on October 21, 2021. Order No. 22-UI-203041 at 4-5. However, because claimant was discharged, it is the employer who bears the burden of establishing misconduct, including proving that claimant's conduct is not excused under OAR 471-030-0038(3)(b).

There is no dispute that claimant did not appear for work on time on October 24, 2021, because she failed to set her alarm. She knew she was scheduled to work at that time because she had volunteered to take that shift, most likely the day before. There is also no dispute that claimant had been late for work for the same reason numerous times over the preceding eighteen months, even after receiving warnings that this conduct violated the employer's reasonable expectations.

However, claimant alleged that she was absent for the beginning of her shift due to illness or mental disability, specifically borderline personality disorder. When asked to explain how this disorder prevented her from setting her alarm clock, she replied that her shift changed a lot and she lost her focus. Transcript at 39. In contrast, the employer testified that claimant had a regular schedule and was not required to volunteer for other shifts, as she had done on this occasion. Transcript at 53. Claimant related what symptoms she understood to be common among people diagnosed with the disorder, as well as symptoms she personally experienced but were not necessarily related to her difficulties setting the alarm or appearing for work on time. She testified she was exhausted all the time due to anemia. Transcript at 56.

Viewing the record in its entirety, claimant's assertion that she suffers from illness and mental disability is credible, and was not contradicted by the employer. The employer bears the burden of proving that these conditions were not the proximate cause of her inability to report to work on time on the date of the final incident that prompted the employer to discharge her. The employer has failed to meet this burden, and because absences due to illness or other physical or mental disabilities are not misconduct, claimant's tardiness on October 24, 2021 is not misconduct under OAR 471-030-0038(3)(b).

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

DECISION: Order No. 22-UI-203041 is modified, as outlined above.

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

DATE of Service: December 16, 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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