

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1056

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 9, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective July 17, 2022 (decision # 72928). Claimant filed a timely request for hearing. On September 29, 2022, ALJ Passmore conducted a hearing, and on October 3, 2022, issued Order No. 22-UI-204094, affirming decision # 72928. On October 18, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Verto Education Inc. employed claimant from January 6, 2020, until July 20, 2022 as a senior admissions counselor. Claimant was a remote worker.

(2) The employer maintained a policy that required employees to communicate absences and tardiness to their supervisors, through any available means. This policy was contained in the employer's handbook and claimant was aware of this policy.

(3) On July 18, 2022, claimant was returning from a camping trip and got a flat tire in an area without cell phone service. Claimant was eventually able to get a ride into a town and began trying to address the car's flat tire. The town had cell phone service, but claimant's cell phone was dead. Claimant did not attempt to borrow a cell phone to contact the employer while in this town with cell phone service because he did not think of that as an option.

(4) When claimant arrived home on July 18, 2022, he immediately contacted his employer to inform them of his tardiness, and reported to work. This contact occurred around 12:20 p.m. Claimant's typical start time was 9:00 a.m.

(5) On July 20, 2022, the employer discharged claimant for failing to communicate his tardiness earlier on July 18, 2022.

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) (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 order under review found that the employer discharged claimant for misconduct because he breached the employer’s absence and tardiness policy with at least wanton negligence, and the violation exceeded mere poor judgment because it created an irreparable breach of trust in the employment relationship. Order No. 22-UI-204094 at 3-4. The record does not support this conclusion.

The employer’s witness testified that they discharged claimant for continued workplace misconduct. Transcript at 6. The employer cited three incidents, dating as far back as April 28, 2021. However, the focus of the discharge analysis is the incident that was the proximate cause of the discharge, that is, the incident without which the discharge would not have occurred when it did. Here, the proximate cause was claimant’s initial failure to communicate his tardiness on June 18, 2022 because absent that incident, claimant would not have been discharged on July 20, 2022. *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).

On July 18, 2022, claimant was absent and did not contact the employer to notify them that he was going to be late until more than three hours into claimant’s shift. The employer expected employees to contact their supervisor, through any available means, if they were going to be absent or late. It is reasonable for an employer to expect that their employees will contact them if they are going to be absent or late. This expectation was included in the employer’s handbook, which was available to claimant, and claimant understood this expectation. Therefore, claimant’s failure to timely notify the employer of his tardiness constituted a breach of a standard of behavior that the employer had a right to expect.

However, for a violation of an employer expectation to constitute misconduct under 657.176(2)(a), the violation must be willful or wantonly negligent. Here, the record shows that, at worst, claimant committed this breach with mere negligence. Claimant was initially unable to contact the employer because he was experiencing car trouble in an area without cell phone service. At that point, contacting the employer was not possible and any breach was the result of a circumstance beyond claimant’s control, not a willful or wantonly negligent act on claimant’s part. Eventually, claimant reached a town with cell phone service, but his cell phone was dead. While claimant could have borrowed a phone to call his employer, his failure to do so was not wantonly negligent. Claimant simply did not think of that as an option. Given the pressing need to address the car’s flat tire, it is entirely reasonable that claimant

might not think of all potential options to contact the employer. Further, once claimant arrived home he immediately contacted his supervisor and reported for work. This immediacy shows that claimant was not indifferent to the consequences of his actions because he sought to mitigate them as soon as he thought of a way of doing so and that method became available to him. Because claimant was not indifferent to the consequences of his actions, claimant's actions were not wantonly negligent.

Claimant therefore 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-204094 is set aside, as outlined above.

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

DATE of Service: December 22, 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 الاستئناف 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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