

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1068

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 3, 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 3, 2022 (decision # 103700). Claimant filed a timely request for hearing. On September 28, 2022, ALJ Nyberg conducted a hearing, and on September 30, 2022 issued Order No. 22-UI-203979, reversing decision # 103700 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On October 20, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Ajinomoto Windsor Inc. employed the claimant as a weigh room associate from May 6, 2019 until July 7, 2022.

(2) The employer maintained an absence policy under which employees would accrue points if they left early or were late or absent. This point system called for progressive discipline leading up to termination once an employee had reached 10 points. However, the employer did not strictly follow the progressive discipline outlined in their absence policy. The employer also maintained a separate timekeeping policy that required employees to "accurately report the actual time they work each day." Transcript at 9.

(3) On May 24, 2021, claimant received a written warning for violations of the attendance policy.

(4) On April 1, 2022, the employer reset all employees' attendance points to zero.

(5) On July 6, 2022, claimant contacted her supervisor and informed him that she would arrive to work late. This brought claimant's attendance points to 38. The employer intended to issue claimant a final written warning on July 7, 2022.

(6) On July 7, 2022, claimant was scheduled to begin her shift at 6:00 a.m. Claimant clocked into her shift at 6:03 a.m. She then immediately returned to her car because she was feeling the effects of a migraine. Once in her car, claimant took some medication and waited for the effects of the migraine to subside. Claimant did not clock out when she went to her car.

(7) While in her car, claimant did not contact her supervisor both because she believed he was on vacation and because her cell phone was dead. She also did not contact the company's call-in line or any other supervisor.

(8) Claimant reentered the employer's facility at 6:54 a.m. and returned to her work area at 7:28 a.m. When she returned, she began working and did not report that she had left to go out to her car. Claimant intended to report the timekeeping error caused earlier by not clocking out, but believed that human resources employees began work at 9:00 a.m. and that her supervisor was on vacation.

(9) Later that day, claimant's supervisor contacted claimant and told her that she would need to meet with a human resources representative. She then met with a human resources representative and discussed going to her car that morning while she remained clocked in. After the discussion, the employer discharged claimant.

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 record shows that the employer discharged claimant for failing to notify them that she left work without clocking out on July 7, 2022. Although the employer cited previous issues with claimant's attendance, these were not the proximate cause of the discharge. The human resources representative for the employer testified that on July 7, 2022, they planned to give claimant a final written warning regarding her attendance, but the timekeeping incident instead led them to discharge her. Transcript at 7-8. Additionally, the employer's witness testified that claimant was not fired as the result of a progressive discipline policy related to her attendance, but based on a separate provision relating to their "attendance policy and timekeeping procedure." Transcript at 28. Accordingly, the misconduct analysis must focus on the July 7, 2022 incident. *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).

The employer's expectation that employees accurately report the time they work was reasonable. By failing to notify the employer that she remained clocked in when she went out to her car, claimant breached this policy. However, claimant's actions were not misconduct because the employer has not shown that claimant committed this breach willfully or with wanton negligence.

To the extent that claimant was discharged for the absence itself, it is uncontested that claimant was experiencing a migraine. Thus, the absence was the result of an illness, and absences due to illness are not misconduct. OAR 471-030-0038(3)(b). Additionally, claimant's failure to immediately inform the employer of the timekeeping error, caused by not clocking out, does not show a willful or wantonly negligent disregard of the employer's policy. Claimant testified that she believed her supervisor was on vacation¹ and that human resources employees were not in the office until 9:00 a.m. Transcript at 31. Given these beliefs, it is reasonable that claimant would return to her work area without immediately reporting the timekeeping error.

Though the employer had previously warned claimant about violations of the absence policy, the record does not show claimant knew or should have known either from prior warnings or as a matter of common sense how soon the employer expected her to report timekeeping errors. At hearing, the employer testified that claimant's discharge was not part of progressive discipline for absences and that they discharged claimant for a wholly different provision within the employer's handbook. Transcript at 28. Given that the July 7, 2022 error was a different type of violation, the previous attendance policy warnings did not therefore put claimant on notice of the urgency of reporting timekeeping errors. Without this or other notice, claimant was unaware of how soon the employer expected her to correct this error or the consequences of failing to act with urgency. The record does not show that claimant was paid for time she did not work, or that there was another urgent reason for her to notify the employer of the timekeeping error before she met with human resources. Therefore, while her failure to immediately report the error may have been negligent, the employer has not met their burden to show that the error was the result of claimant's indifference to the consequences of her actions. As such, it was not a willful or *wantonly* negligent breach of the employer's policy, and was not misconduct.

For the above reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-203979 is affirmed.

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

DATE of Service: December 29, 2022

¹ At hearing, the employer offered testimony that claimant had texted her supervisor on July 6, 2022, and that none of the employer's witnesses told claimant the supervisor was on vacation. Transcript at 41. However, neither of these claims contradict claimant's statement that she *believed* her supervisor was on vacation.

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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