

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1115

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 15, 2022, 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 August 14, 2022 (decision # 125646). Claimant filed a timely request for hearing. On October 19, 2022, ALJ Adamson conducted a hearing, and on October 25, 2022 issued Order No. 22-UI-205861, affirming decision # 125646. On November 7, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Next Glass Inc. employed claimant as a software engineer from March 21, 2022 until August 19, 2022.

(2) The employer expected its employees to be readily available to perform work while on an on-call shift, and to perform such work as instructed.

(3) The employer assigned claimant to work on-call during weekends on a rotating basis with other employees. His primary duties during these shifts included immediately acknowledging alerts to problems with the employer's app and leading the response to resolving those problems.

(4) Claimant was not sufficiently trained in the priority of his duties while on call, nor in how to perform the duties related to alerts. Claimant believed that responsibility for resolving the problems in the alerts fell to system administrators, who were more knowledgeable of such duties, and that the employer wanted him to prioritize other software engineering troubleshooting duties during these shifts. Claimant was fearful of asking questions of others regarding his job duties because the employer regarded the need to ask such questions as "low performance." Transcript at 32.

(5) In July 2022, the employer's app experienced an outage which triggered alerts while claimant was on call. Claimant did not timely acknowledge the alerts or lead the response to them to the satisfaction of the employer. However, claimant followed the instructions of his superiors that he was given during the incident, and a system administrator took responsibility for resolving the problems in the alerts. The employer did not impose discipline or counsel claimant that his performance of these duties did not meet their expectations.

(6) On August 13, 2022, the employer's app experienced an outage triggering alerts in a situation similar to that of the July 2022 outage. Claimant was on-call at the time and handled the situation as he did during the previous outage, working on other matters within his field of expertise and allowing a system administrator to assume responsibility for resolving the outage.

(7) On August 19, 2022, the employer discharged claimant for violating its expectations with regard to his job performance during the August 13, 2022 outage.

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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The order under review concluded that claimant knew he was responsible for responding to alerts when on call and his failure to do on August 13, 2022 constituted a wantonly negligent violation of the employer's expectations. Order No. 205861 at 4. However, the record does not show that claimant knew what was expected of him in such a situation, and does not demonstrate that claimant failed to act because of indifference to the consequences of his inaction.

The employer's witness testified that claimant was trained at the commencement of his employment on how to respond to alerts during on-call shifts. Transcript at 11. The expected response was to click to acknowledge the alert within ten to fifteen minutes and immediately work on resolving the issue that caused the alert. Transcript at 6. The employer's witness did not have personal knowledge of the outage of July 2022 during which claimant was on call, but testified that she was told that claimant did not timely acknowledge the alerts or work to resolve them. Transcript at 11-12. She said she was told claimant was "given formal coaching" about not "fulfilling his duties" after this incident. Transcript at 12-13. The employer thereby contended that claimant knew what was expected of him during the August 13, 2022 outage and was at least wantonly negligent in failing to perform his duties accordingly.

In contrast, claimant testified that his training during onboarding instructed him only to work on resolving software engineering troubleshooting tickets during on-call shifts. Transcript at 19. He stated he knew nothing about the existence of alerts and was not given access to the app in which the alerts were received until two months into his employment. Transcript at 20. Claimant maintained that he was not thereafter trained about what to do in the event of an alert prior to the July 2022 outage. Transcript at 21. During that outage, claimant said he was told to monitor the alerts, which he did, and that a system administrator quickly took responsibility for resolving the outage. Transcript at 21-22. According to claimant, he received no additional instruction from the employer about how to handle alerts following this incident, and believed he should take the same course of action if the situation were to arise again. Transcript at 22.

Claimant also denied knowing that the alerts during the first hours of the August 13, 2022 outage signified that the system was down or that the employer expected him to do anything at that time other than work on software engineering troubleshooting tickets, which he did, even though that work had nothing to do with resolving the outage. Transcript at 26-29. Claimant was aware that a system administrator and other more experienced employees were trying to resolve the outage, but did not think that it was his duty to attempt to fix the outage. Transcript at 30. He believed that his reaction to the second outage was the same as to the first outage, of which the employer apparently approved. Transcript at 22.

Claimant's first-hand account of the July 2022 outage and of what training he received regarding his duties during on-call shifts before, during, and after that outage is entitled to greater weight than the employer's second-hand account of that event and of claimant's training. More likely than not, claimant was never trained to react to the August 13, 2022 outage in the manner the employer expected, and he acted in accordance with what he believed were the employer's expectations from his experience during the July 2022 outage. The employer therefore failed to show claimant knew or should have known his inaction during the August 13, 2022 outage probably violated the employer's expectations. Absent such a showing, the employer failed to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 22-UI-205861 is set aside, as outlined above.

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

DATE of Service: January 12, 2023

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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