

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0483

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 17, 2023, 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 January 15, 2023 (decision # 152630). Claimant filed a timely request for hearing. On April 5, 2023, ALJ Logan conducted a hearing, and on April 7, 2023 issued Order No. 23-UI-221372, affirming decision # 152630. On April 24, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant submitted written arguments on April 24, 2023 and May 1, 2023. Claimant did not declare that he provided a copy of his arguments to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The arguments also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Rosboro Company, LLC employed claimant as a powerhouse operator from February 1, 2020 until January 20, 2023.

(2) The employer maintained attendance and call-in policies. These policies required that employees report to their assigned shifts at the time that they were scheduled and required employees to call in one hour before their shift if they were going to be late or absent. The employer policy did not permit employees to inform the employer of their tardiness or absence via text message. Claimant was aware of these policies.

(3) On July 25, 2022, claimant received a written warning as the result of multiple violations of the employer's attendance and call-in policies. When the employer issued this warning, they again discussed these policies with claimant.

(4) On December 20, 2022, claimant received a final written warning and 3-day suspension for repeated violations of the attendance and call-in policies. At this time, the employer again reviewed the attendance and call-in policies with claimant.

(5) On January 16, 2023, claimant was thirteen minutes late to work. Prior to the being late, claimant called the employer and informed them that he would be late because his car would not start.

(6) On January 18, 2023, claimant was 42 minutes late for work because of unknown reasons.

(7) On January 20, 2023, claimant overslept because he did not hear his alarm clock. Upon waking, he immediately called his supervisor and informed them that he would be arriving to work late. Claimant arrived at work 33 minutes late. After claimant arrived to work, the employer discharged him for violations of the employer's attendance policy.

CONCLUSION 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 employer discharged claimant for violations of their attendance policy. The order under review concluded that the "[claimant] was late on three occasions during his last week, the final two examples being wantonly negligent violations of employer's expectations for his attendance." Order No. 23-UI-221372 at 3. The record does not support this conclusion.

While the employer listed multiple violations of their attendance policy, the focus of the discharge analysis is the final attendance violation. *See generally* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge). The record shows that the final attendance policy violation occurred on January 20, 2023. Claimant's failure to arrive at work on time on January 20, 2023 was a violation of the employer's attendance policy. An employer has the right to expect that employees arrive to work when they are scheduled to do so. The record shows that claimant received a copy of this policy and understood this expectation, as the employer reviewed it with claimant on multiple occasions. However, the record does not show that claimant violated this policy willfully or with wanton negligence on that day.

Claimant testified that he reported to work late on January 20, 2023 because he did not hear his alarm clock. Transcript at 20. This violation of the attendance policy was caused by inadvertently sleeping

through his alarm and was not an intentional action on claimant's part. Therefore, this violation of the employer's attendance policy was not willful. Additionally, while claimant had numerous prior absences, including two earlier in the week, there is no evidence that any of the prior absences were the result of claimant failing to wake to his alarm clock. As such, there is nothing to suggest that claimant should have known that he needed to take additional precautions to ensure that he would wake up and not sleep through his alarm clock. Thus, failing to take these additional precautions does not reveal that claimant was indifferent to the consequences of failing to wake to his alarm. Further, claimant's immediate action upon waking was to call the employer and inform them that he would be late. Transcript at 20. This response suggests that claimant was attempting to mitigate the consequences and comply with the employer's policy by calling in, not that he was indifferent to them. Because there is no evidence that claimant was indifferent to the consequences of failing to wake to his alarm, his lateness on January 20, 2023 was, at worst, mere negligence. Therefore, claimant's violation of the attendance policy on January 20, 2023 was neither willful nor wantonly negligent.

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

DECISION: Order No. 23-UI-221372 is set aside, as outlined above.

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

DATE of Service: May 26, 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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