

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0668

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 14, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct, disqualifying claimant from receiving benefits effective January 15, 2023 (decision # 121414). Claimant filed a timely request for hearing. On May 19, 2023, ALJ Taylor conducted a hearing, and on May 26, 2023 issued Order No. 23-UI-226237, affirming decision # 121414. On June 14, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) WinCo Foods employed claimant from May 18, 2016 until January 21, 2023, most recently as a lead clerk,

(2) Beginning in 2021, the employer implemented an attendance policy whereby employees would accrue points for tardiness and absences, and the accumulation of excessive points on a rolling basis would subject the employee to progressive discipline, including discharge. The employer expected that their employees would not be tardy or absent with such frequency as to accumulate points in excess of what was permitted by the policy. Claimant was aware of the attendance policy through training, and from receiving warnings regarding violations of the policy.

(3) On April 9, 2022, May 15, 2022, and July 17, 2022, claimant received warnings for having accumulated points in excess of that allowed by the attendance policy. The policy allowed for a grievance procedure through which employees could challenge the assessment of points they believed were unwarranted under the policy. Though claimant disagreed with the assessment of many of the

points leading to these warnings, she did not challenge them through the grievance procedure. The July 17, 2022 warning stated that it was “the final disciplinary action before termination.” Exhibit 1 at 6.

(4) On January 10, 2023, claimant was scheduled to begin work at 11:00 p.m. At approximately 10:15 p.m., she received a call from her minor son, who was “in a panic and crying and saying like three people were harassing him and trying to get into his car and he was – felt like he was in danger.” Transcript at 12. Claimant instructed her son to call 911 and began driving to his location approximately a mile away. While driving to her son’s location, claimant called the employer to tell them that she would be late for work. After assisting her son, claimant arrived at work at approximately midnight.

(5) On January 21, 2023, the employer discharged claimant for having been tardy on January 10, 2023, since she received additional attendance points for that incident and her total points remained in excess of what was permitted.

CONCLUSIONS AND REASONS: Claimant was discharged, 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant “did willfully, or at least with wanton negligence, violate employer’s reasonable policy or expectation when she chose to be an hour late for work on January 10, 2023.” Order No. 23-UI-226237 at 3. The record does not support this conclusion.

The employer discharged claimant because claimant violated their points-based attendance policy by being late for her shift on January 10, 2023. While claimant was discharged based on the cumulative effect of numerous instances of tardiness or absence over the preceding twelve months, the discharge analysis focuses on the proximate cause of the discharge, which is the incident without which the discharge would not have occurred when it did. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012; *Appeals Board Decision 09-AB-1767*, June 29, 2009. In cases of discharge due to attendance policy violations, the last occurrence of an attendance policy violation is considered the reason for the discharge. *See generally* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division.

The employer believed that claimant was late for work on January 10, 2023 due to “a family emergency,” and was aware of the facts of that emergency. The employer nevertheless determined that claimant’s tardiness was not “protected” because it “didn’t qualify under any of the federal, state or

ADA requirements,” and therefore required the assessment of points under the policy and claimant’s resulting discharge. Transcript at 5-6. However, to the extent that the policy required the assessment of attendance points which would result in an employee’s discharge based on an instance of tardiness caused by a family emergency, the policy did not constitute a standard of behavior which an employer had the right to expect of an employee. This is true regardless of the number of accumulated points or instances of tardiness or absences claimant had in the preceding twelve months. Accordingly, the employer has not shown that claimant violated the standards of behavior which an employer has the right to expect of an employee in being late to work due to a family emergency on January 10, 2023.

The record also fails to establish that claimant violated the employer’s expectations willfully or with wanton negligence. Claimant’s tardiness was due to a family emergency. The record fails to show that claimant knew or should have known that the being one hour late for that reason probably violated the employer’s expectations, and was not the result of a good faith error in her understanding of those expectations. Nor does the record show that claimant was indifferent to the consequences of her actions, given that she notified the employer that she would be late and reported for work within a reasonable time.

In sum, the record therefore fails to establish that the employer discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 23-UI-226237 is set aside, as outlined above.

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

DATE of Service: July 25, 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 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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