

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0752

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 27, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 80015). The employer filed a timely request for hearing. On June 27, 2023, ALJ Logan conducted a hearing, and on June 28, 2023 issued Order No. 23-UI-228995, reversing decision # 80015 by concluding that the employer discharged claimant for misconduct and that claimant was therefore disqualified from receiving benefits effective January 29, 2023. On July 6, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cazier Enterprises Inc. employed claimant, most recently as an assistant manager, at their Subway restaurant from May 2022 until February 1, 2023.

(2) The employer expected employees to work their scheduled shifts but permitted employees to be absent from scheduled shifts in the event of illness or an emergency. The employer required employees who had to be absent from a scheduled shift to call in at least two hours before the beginning of their shift. Claimant understood these expectations.

(3) Claimant's sister had longstanding anxiety problems. The anxiety caused the sister to experience convulsions and spend long periods of time in the shower, which was dangerous because the sister sometimes fell asleep while in the shower. The sister lived with claimant in claimant's home, with other members of claimant's family. Claimant and her brothers and mother shared the responsibility of looking after the sister.

(4) On January 30, 2023, claimant was scheduled to work at 3:30 p.m. That day, claimant's sister was having a "really, really bad day." Audio Record at 21:08. The sister was in the bathroom experiencing convulsions, and the other family members who sometimes looked after the sister were not available.

(5) At 2:15 p.m. that day, claimant sent a text to her manager advising that her sister was having a bad day and requesting the manager find someone to cover her shift. The manager was not able to find an

employee to cover claimant's shift and the two exchanged more texts in which claimant explained that her sister's anxiety was high and she did not want to leave her sister alone. Claimant then sent a text stating, "Well, I'm going to be late." Audio Record at 11:08. In response to this text, the manager called claimant. Claimant answered the telephone and told the manager that she would not leave her sister at home alone while she was having convulsions. Claimant then yelled at the manager that she was drunk and was not coming in to work, and she did not care if the manager gave her a write-up.

(6) Claimant told the manager that she was drunk because she did not want to leave her sister, did not know what else to tell the manager that the manager would accept as a reason for claimant to stay home, and "was just thinking of all kinds of thing just to get a write-up so [she] [could] stay home with [her] sister." Audio Record at 22:32. However, after the telephone conversation, the employer believed that the true reason claimant did not want to report for her shift was that she was intoxicated.

(7) Claimant did not report for her January 30, 2023 shift. Later that day, claimant's mother and brother returned home, and "everything all settled down." Audio Record at 23:15. Claimant worked her shift the next day, January 31, 2023.

(8) On February 1, 2023, the employer discharged claimant for violation of their attendance policies on January 30, 2023.

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 concluded that claimant was intoxicated on January 30, 2023, that claimant violated the employer's attendance expectations with wanton negligence that day, and that her wantonly negligent violation was misconduct because it was not an isolated instance of poor judgment. Order No. 23-UI-228995 at 3-4. The record does not support that claimant violated the employer's expectations with wanton negligence on January 30, 2023.

The employer did not meet their burden to establish that claimant violated their attendance expectations willfully or with wanton negligence on January 30, 2023. As an initial matter, the record does not show by a preponderance of evidence that claimant was intoxicated on January 30, 2023, and therefore does not show that claimant breached the employer's attendance policies that day as a result of intoxication. At hearing, the employer's witness, who was not present for the texts and telephone conversation between claimant and the manager, testified that she did not believe that claimant's sister was having

difficulties on January 30, 2023, and thought, based on claimant's statement during the conversation with the manager, that "it was the fact that [claimant] was drunk was why she was calling in." Audio Record at 15:52. Claimant conceded that she stated she was drunk during the telephone conversation with the manager, but explained that she did so because she did not want to leave her sister, and did not know what else to tell the manager that the manager would accept as a reason for claimant to stay home. Audio Record at 22:32. Given that the employer bears the burden of proof and claimant offered a firsthand account that plausibly explains why she stated to the manager that she was drunk, the employer did not show by a preponderance of evidence that claimant was intoxicated on January 30, 2023, and therefore did not show that claimant breached any attendance policies that day as a result of intoxication.

Although claimant was absent from her scheduled shift on January 30, 2023, her absence was permissible. The employer permitted employees to be absent from their shift in the event of an emergency. On that day, claimant was having an emergency related to her sister's condition. Claimant's sister, who had longstanding anxiety problems, was experiencing a serious medical episode, and the other family members who looked after the sister were away from home. It was necessary for claimant to stay home and look after her sister because there was no one else in claimant's family to do so. Therefore, claimant's absence on January 30, 2023 was not a willful or wantonly negligent violation of the employer's expectations.

Nor did claimant's failure to give notice that she would be absent two hours before her shift constitute a willful or wantonly negligent violation of the employer's expectations. The employer required employees who had to be absent from a scheduled shift to call in at least two hours before the beginning of their shift. The record shows that claimant first advised her manager of her sister's difficulties an hour and fifteen minutes before her shift. However, in light of the emergency situation presented by claimant's sister, the employer failed to establish that claimant's failure to give two hours' notice was a deliberate breach of policy on claimant's part, as would be necessary to prove a willful violation. The employer also did not establish that claimant's failure to give two hours' notice was wantonly negligent, because, in light of the emergency situation presented by claimant's sister, the record fails to show that claimant acted with indifference to the consequences of her actions.¹

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

DECISION: Order No. 23-UI-228995 is set aside, as outlined above.

¹ At hearing, the employer's witness presented evidence that claimant yelled during the January 30, 2023 telephone conversation with the manager and asserted that claimant's conduct during the conversation was insubordinate and "part of" the "final situation" that gave rise to claimant's discharge. Audio Record at 11:15, 16:59. The record fails to show that claimant's yelling, which came only after claimant had repeatedly conveyed to the manager her sister's condition, rose to the level of a willful or wantonly negligent breach of any policy against insubordination. Furthermore, at hearing, the employer's witness testified that a reason the employer opted to discharge claimant on February 1, 2023 was because of the potential liabilities presented when an employee is intoxicated at work and that the employer believed claimant had been intoxicated at work in the past. Audio Record at 14:31, 14:49. This testimony suggests that the proximate cause of claimant's discharge, that is, the factor without which the discharge would not have occurred when it did, was the employer's belief that claimant was intoxicated on January 30, 2023 and had breached their attendance policies as a result of intoxication, rather than the fact claimant yelled at the manager. *See e.g. 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).

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

DATE of Service: August 21, 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.

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