

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0948

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 5, 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 # 111626). The employer filed a timely request for hearing. On August 3, 2023, ALJ Toth conducted a hearing, and on August 7, 2023, issued Order No. 23-UI-232499, reversing decision # 111626 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective May 21, 2023. On August 23, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath Falls City Schools employed claimant as a paraprofessional from December 7, 2021, until May 24, 2023.

(2) The employer maintained an attendance policy which included, in relevant part, that more than three unplanned absences in a row would require a doctor's note in order to excuse the absences. Claimant signed an acknowledgment that he received the handbook which contained this policy.

(3) Starting in or around late 2022, claimant missed a significant amount of work due to chronic migraines. The employer approved claimant for 12 weeks of Family Medical Leave Act (FMLA) leave for this condition. Claimant exhausted his FMLA leave balance, as well as his sick leave balance, due to this condition.

(4) In or around April 2023, due to claimant's continued frequent absences, the employer offered to allow claimant to take a leave of absence for the rest of the school year. Claimant declined this offer because he wished to continue working. The employer was concerned about claimant's frequent absences because they were required by law to maintain a particular ratio of staff to students, and claimant's absences put them at risk of noncompliance.

(5) Claimant last performed work for the employer on May 5, 2023.

(6) On May 8, 9, and 10, 2023, claimant called out from work due to an illness. On or around May 10, 2023, the employer instructed claimant to provide them with a doctor's note to excuse the absence. Claimant obtained a note from his doctor, but presumed that he would be able to present it to the employer in person when he returned to work, and therefore did not send the employer the note.

(7) Claimant was absent from work on May 11, 12, 15, 16, 17, 18, and 19, 2023, due to a combination of either his own illness or his children's illnesses. On May 19, 2023, the employer sent claimant a pre-termination notice, advising him that a pre-termination meeting had been scheduled for May 23, 2023. On May 23, 2023, claimant was absent from work due to a doctor's appointment. As such, the employer rescheduled the pre-termination meeting to the following day.

(8) On May 24, 2023, the employer conducted a telephone pre-termination meeting, which claimant attended. At the meeting, the employer felt that claimant "provided no additional information to consider" regarding his absences. Exhibit 1 at 2. Following the meeting, the employer discharged claimant.

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).

Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant following, and in relation to, a significant period of regular absences from work. The order under review found that the employer "terminated claimant for his repeated conduct of failing to provide a doctor's note to explain his absences," and subsequently concluded that this constituted misconduct. Order No. 23-UI-232499 at 2, 4. The record does not support this conclusion or the finding upon which it was based.

At hearing, the employer's witness testified that they discharged claimant because he had "multiple days of [leave] without pay... and called in sick... with a code... and was told he needed to provide a notice, and did not." Transcript at 6. Based on this testimony, it is reasonable to conclude that both claimant's absences themselves and his failure to provide the employer with a doctor's note contributed to the

employer's decision to discharge him. However, the record shows that the proximate cause of the employer's decision to discharge claimant was, more likely than not, the absences themselves.¹

Of note, the employer testified that claimant's frequent absences put the employer at risk of noncompliance with legal standards regarding staff to student ratio. Transcript at 11–12. Furthermore, prior to initiating discharge proceedings, the employer offered to allow claimant to take a leave of absence for the remainder of the school year. While the employer did not explain how a wholesale leave of absence would have remedied this problem, it is reasonable to infer that having claimant step aside for the remainder of the school year would have allowed the employer to appoint a long-term substitute while he was on leave. When viewed as a whole, these considerations show that the employer was primarily concerned with claimant's absences because of the hardship they imposed on the school's operations. By contrast, it cannot be reasonably inferred that the employer's operational concerns would have improved if claimant had submitted the doctor's note as directed. Therefore, it is reasonable to conclude that, more likely than not, the proximate cause of claimant's discharge was his absences from work.

The employer did not explain the specific procedure surrounding the pre-termination meeting. However, given the employer's statement in their termination letter that claimant "provided no additional information to consider" at the meeting,² it can be inferred that the employer had already decided to discharge claimant when the meeting was set, unless claimant provided information that would affect their decision. The meeting itself was set on May 19, 2023, when the employer sent claimant a pre-termination letter, following his absence from work that day. Therefore, it is reasonable to infer that the employer made its initial decision to discharge claimant on May 19, 2023, following his absence that day. As such, claimant's absence on May 19, 2023, was the final incident which led the employer to discharge him.³

The record shows that claimant was absent on May 19, 2023, due to his or his children's illness. As such, the final incident which led the employer to discharge claimant was an absence due to illness, which is not misconduct under OAR 471-030-0038(3)(b). Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-232499 is set aside, as outlined above.

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

DATE of Service: October 11, 2023

¹ 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).

² Exhibit 1 at 2.

³ 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).

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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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