

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1045

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 11, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective June 4, 2023 (decision # 105402). Claimant filed a timely request for hearing. On September 5, 2023, ALJ Chiller conducted a hearing, and on September 7, 2023, issued Order No. 23-UI-235367, affirming decision # 105402. On September 16, 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 him 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) Pearl Buck Center, Inc. employed claimant as a teaching assistant from December 5, 2022, until June 9, 2023.

(2) The employer expected that their employees would begin working each day at their scheduled time unless excused. Claimant understood this expectation through being warned regarding attendance issues several times throughout his employment, and was ultimately placed on a period of probation where further violations could result in discharge.

(3) For most of claimant's employment, claimant's shifts were scheduled to begin at 7:30 a.m., Monday through Thursday, and 9:00 a.m. on Friday. On May 16, 2023, the employer changed claimant's start time to 8:00 a.m., Monday through Friday, and claimant signed an acknowledgement of this change. However, claimant misunderstood the change to have only applied to his Monday through Thursday shifts, and that his Friday shifts still were to start at 9:00 a.m.

(4) On each Friday following the schedule change, claimant began work at 9:00 a.m., believing it was still his scheduled starting time. Claimant was not warned, disciplined, or otherwise alerted to the fact that he was late to work on these occasions.

(5) On Friday, June 9, 2023, claimant awoke mistakenly believing that it was earlier in the week. He texted his supervisor at approximately 8:15 a.m. that he would be late for work because he had overslept. He then realized that it was Friday and, believing that his shift started at 9:00 a.m., texted his supervisor that he was mistaken about what day of the week it was and that he would not be late since he would be at work by 9:00 a.m. Claimant arrived at work at 8:45 a.m.

(6) Later on June 9, 2023, the employer discharged claimant for having been late to work that morning for his shift, which was scheduled to begin at 8:00 a.m., after having been warned against committing attendance violations.

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).

The employer discharged claimant for being late to work on multiple occasions, the last of which occurred June 9, 2023. The order under review concluded that this constituted misconduct because claimant “should have known that the failure to fully understand and comply with his established schedule would result in a violation of the employer’s expectations.” Order No. 23-UI-235367 at 4. The record does not support this conclusion.

The employer expected their employees to abide by their attendance policy, which included beginning work on time. Claimant was aware of this expectation because the employer previously warned claimant, prior to the May 16, 2023, schedule change, that other instances of unexcused tardiness would not be tolerated. In determining misconduct, 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. Accordingly, the employer discharged claimant for being late to work on June 9, 2023.

Claimant was late to work on June 9, 2023, because he mistakenly believed that he was scheduled to start work at 9:00 a.m. rather than 8:00 a.m. This belief was reinforced by his arrival at work each Friday at 9:00 a.m., even after the start time had changed to 8:00 a.m., without being corrected by the employer. The employer’s witness testified that they were in possession of a document which claimant

signed on May 16, 2023, when the schedule change was announced, and which listed claimant's start time going forward as 8:00 a.m. every weekday. Transcript at 38. Claimant testified he did not remember reading or signing the document, but suggested that he likely misread the document such as to understand that the start time change applied only to Monday through Thursday. Transcript at 40-41. Claimant explained that his job duties were different on Fridays than the rest of the week and he therefore would have had no reason to expect a change to the Friday start time even if the start time changed for the rest of the week. Transcript at 41.

The fact that claimant appeared at work by 9:00 a.m. on the Fridays following the schedule change demonstrated that claimant was not indifferent to the consequences of his actions with regard to punctuality, but rather that he genuinely, if mistakenly, believed he was starting work at the correct time. Thus, while claimant's misreading of the schedule change announcement as to the Friday starting time may have constituted ordinary negligence, the employer has failed to prove by a preponderance of evidence that claimant's actions constituted *wanton* negligence. Accordingly, claimant was not discharged for a willful or wantonly negligent violation of the employer's standards of behavior.

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

DECISION: Order No. 23-UI-235367 is set aside, as outlined above.

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

DATE of Service: October 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 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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