EO: 700
BYE: 202319

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1146

Affirmed
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 18, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 100224). The employer filed a timely request for hearing. On March 15, 2023, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for March 28, 2023. On March 28, 2023, the employer failed to appear at the hearing. On March 29, 2023, ALJ Zeitner issued Order No. 23-UI-220347, dismissing the employer's request for hearing due to their failure to appear. On March 31, 2023, the employer filed a timely request to reopen the hearing record. On September 18, 2023, ALJ Micheletti conducted a hearing, and on September 26, 2023, issued Order No. 23-UI-236738, allowing the employer's request to reopen the hearing and affirming decision # 100224 on the merits. On October 11, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019) as necessary to complete the record. The additional evidence consists of the employer's statement enclosed with their request for hearing and a text message exchange between claimant and the employer.[1] Both of these documents were offered prior to the hearing and were apparently considered or relied upon by the ALJ, although they were not admitted as exhibits. This evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

[1] The employer's request for hearing also enclosed additional documents, consisting primarily of their employee handbook. EAB did not consider this additional information when reaching this decision because the hearing testimony is adequate to establish the relevant portion of its contents.

WRITTEN ARGUMENT: The employer filed written arguments on October 11, 2023 and October 25, 2023. EAB did not consider the employer's October 11, 2023 argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). Both arguments also contained information that was not part of the hearing record.

In their October 25, 2023 argument, the employer asserted that the additional information they submitted with the argument should be considered because ". . . the manager whose hearsay testimony was questioned [by the order under review] was unavailable the day of the proceeding . . . so could not provide direct testimony." Employer's October 25, 2023 Written Argument at 5. The employer submitted "text message screenshots" from this manager, as well as "statements of other pertinent employees who were also unable to attend" the hearing to corroborate the employer's testimony. Employer's October 25, 2023 Written Argument at 5. The employer also offered "timecard evidence" with the written argument, asserting that they were "unaware at the time of the proceeding" that this evidence was available. Employer's October 25, 2023 Written Argument at 5.

Under ORS 657.275(2) and OAR 471-041-0090, for EAB to consider additional information not contained within the hearing record, the party offering the information must show that factors or circumstances beyond their reasonable control prevented them from offering the information during the hearing. The explanations that the employer provided suggest that the employer did not accurately anticipate the evidence they would need to submit into the hearing record. These does not constitute factors or circumstances beyond the employer's reasonable control which prevented them from offering that information into the hearing record. Therefore, except for the information contained in EAB Exhibit 1, EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's October 25, 2023 argument to the extent it was based on the record.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's request to reopen the hearing is **adopted.** The remainder of this decision addresses whether claimant is disqualified from benefits based on the work separation.

FINDINGS OF FACT: (1) Alpine Veterinary employed claimant from the summer of 2022 until December 21, 2022. Claimant performed administrative and reception duties for the employer's veterinary clinic.

(2) The employer's attendance policy required employees to report to work on time, to work all scheduled hours, and to inform the employer if they planned to be absent or tardy. Claimant understood these requirements.

(3) Claimant typically worked 8 a.m. to 5 p.m., Monday through Friday. However, this schedule was somewhat flexible, as the employer did not permit employees to work overtime, and claimant was sometimes required to stay late or fill in for other employees. As such, claimant sometimes modified her work schedule to arrive later and avoid accruing overtime.

(4) In August 2022, claimant was on vacation, was approved to take time off through August 17, 2022, and was scheduled to return to work on August 18, 2022. On August 16, 2022, claimant texted the

owner of the clinic to inform him that she would not be home from her vacation until around 2 a.m. on August 17, 2022, but that she would "try to make the managers meeting" scheduled for 8 a.m. that day. EAB Exhibit 1 at 3. Claimant ultimately did not get home from her vacation until about 3 a.m. on August 17, 2023. As a result, she "slept through all [her] alarms" that morning and missed the meeting. EAB Exhibit 1 at 3. Claimant explained this to the owner a few hours after the meeting, who warned claimant to be "careful not to commit to those things or make other arrangements to be back in time in the future." EAB Exhibit 1 at 3.

(5) On September 29, 2022, claimant missed another scheduled meeting. Claimant was initially aware of the meeting, but the meeting had been canceled before she left work the previous day. The meeting was subsequently reinstated at its previous time. However, the notice advising claimant of the meeting was sent to her via the employer's scheduling app after she left work on September 28, 2022, and claimant had turned off the app's notifications after she left work around 5 p.m. that day. The September 29, 2022 meeting was scheduled for 7 a.m., which was prior to claimant's regular start time. Claimant learned of the meeting when she arrived to work on September 29, 2022, as she turned the scheduling app's notifications back on when she arrived. The employer issued claimant a written warning for missing the meeting.

(6) On or around December 21, 2022, a supervisory employee notified the owner that claimant had been late for work "multiple times" during that week, including on December 19, 2022. Transcript at 14. Based on this information, on December 21, 2022, the owner discharged claimant for allegedly violating their attendance policy.

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 are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to

> act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant due to her having allegedly violated their attendance policy. As a preliminary matter, while the employer alleged other violations of their attendance policy, because December 19, 2022 was the last date on which the employer alleged that claimant had been late for work,[2] that alleged incident is considered to be the final incident which led the employer to discharge claimant and is therefore the focus of the misconduct analysis. *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 parties disagreed on whether claimant was late for work on December 19, 2022. While the employer's witness asserted that he had received a report that she was late that day, claimant testified that she "believed" she had reported to work on time because she did not recall being late, and "would remember" if she had been late. Transcript at 14, 24, 26. The employer's testimony is hearsay, because the information was conveyed to him by another employee who was not present at the hearing. Claimant's testimony is speculative. As such, the evidence as to whether claimant was late on December 19, 2022 is, at best, equally balanced. Because the employer bears the burden of proof in a discharge case, the preponderance of the evidence shows that claimant more likely than not was not late that day.

However, even if claimant *was* late that day, the incident would have been, at worst, an isolated instance of poor judgment. The employer offered two prior instances of claimant's having allegedly violated their attendance policy: claimant's absence from a meeting on August 17, 2022, and her absence from another meeting on September 29, 2022. The employer has not met their burden to show that either of these incidents constituted willful or wantonly negligent disregards of their standards of behavior.

As to the August 17, 2022 meeting, claimant was scheduled off on that day, told the owner that she would nevertheless attempt to attend the meeting, and ultimately failed to do so because she overslept due to a late return from her vacation. Here, while claimant told the owner that she would *try* to attend

[2] The employer's witness testified at hearing that he had received a report that claimant was late "multiple times" during the week in which she was discharged. Transcript at 14. However, claimant was discharged on December 21, 2022. Other than Monday, December 19, 2022, the employer did not offer any other specific dates during that week in which claimant was allegedly late. Therefore, December 19, 2022 is presumed to be the final date on which claimant was late for work.

the meeting, she nevertheless was not scheduled to work that day. The employer did not offer evidence to show that they required employees to attend meetings that were scheduled on days or during times at which the employees were not scheduled to work. Therefore, claimant's failure to attend the meeting that day, the owner's consternation notwithstanding, was not actually a violation of the employer's attendance policy.

Regarding the September 29, 2022 meeting, that meeting was scheduled for 7 a.m., an hour before claimant was scheduled to work that day. Even if the employer's policy required employees to attend meetings scheduled outside of their normal work hours, claimant did not have sufficient notice that the meeting was scheduled at that date and time. The record shows that such notices were issued via the employer's scheduling app, that the notice in this instance was not issued until after claimant left work the prior day, and that claimant did not see the notice until she arrived for work on September 29, 2022. Thus, claimant appears to have missed the meeting because notice of its addition to the calendar was not sent until after she left work the day before the meeting, and she therefore did not see the notice in time. The record does not show that the employer's policy required employees to keep scheduling app notifications enabled during non-work hours. As such, claimant's failure to attend the meeting on September 29, 2022 was the result of the employer's having failed to give her adequate notice that it was scheduled, rather than any willful or wantonly negligent behavior on claimant's part.

Because neither of the prior instances were willful or wantonly negligent violations of the employer's standards of behavior, claimant's late arrival on December 19, 2022, if it occurred at all, was isolated. The record does not show why claimant was allegedly late for work that day. Even assuming that such lateness was the result of willful or wantonly negligent behavior, though, the record does not show that being tardy that day violated the law, was tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. Therefore, to the extent that claimant was late on December 19, 2022, the incident amounted to no more than an isolated instance of poor judgment, which is not misconduct.

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

DECISION: Order No. 23-UI-236738 is affirmed.

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

DATE of Service: <u>November 22, 2023</u>

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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