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BYE: 202347

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

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EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1235

Late Application for Review Allowed
Reversed
No Disqualification

PROCEDURAL HISTORY: On December 16, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 95418). The employer filed a timely request for hearing. On March 22, 2023, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for April 5, 2023. On April 5, 2023, the employer failed to appear at the hearing, and on April 6, 2023, ALJ Chiller issued Order No. 23-UI-221228, dismissing the employer's request for hearing due to their failure to appear and leaving decision # 95418 undisturbed. On April 13, 2023, the employer filed a timely request to reopen the hearing. On May 5 and 24, 2023, ALJ Chiller conducted a hearing, and on May 26, 2023, issued Order No. 23-UI-226271, allowing the employer's request to reopen and reversing decision # 95418 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective November 20, 2022. On June 5, 2023, claimant filed an application for review with the Employment Appeals Board (EAB). On July 17, 2023, EAB issued EAB Decision 2023-EAB-0643, allowing the employer's request to reopen and concluding that the final incident that led to claimant's discharge constituted a willful or wantonly negligent disregard of the employer's standards of behavior, but remanding the matter for further development of the record to determine whether claimant's conduct constituted an isolated instance of poor judgment.

On August 23 and September 21, 2023, ALJ Chiller conducted a hearing, and on September 29, 2023, issued Order No. 23-UI-237214, again reversing decision # 95418 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective November 20, 2022. On October 19, 2023, Order No. 23-UI-237214 became final without claimant having filed an application for review with EAB. On November 6, 2023, claimant filed a late application for review of Order No. 23-UI-237214 with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence the written statement claimant

included with her late application for review explaining why it was late, and 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(s) will remain in the record.

WRITTEN ARGUMENT: Claimant also submitted a written argument on the merits of Order No. 23-UI-237214 with her application for review. However, 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) Victoria's Secret Stores, LLC employed claimant as a sales associate from November 22, 2021, until November 22, 2022.

(2) The employer maintained a dress code that required employees to wear only solid black or white clothing, without any branded logos on tops, jackets, or pants, while on the sales floor when the store was open for business. Claimant was aware of this policy.

(3) On at least two occasions, claimant wore clothing to work which the employer believed violated their dress code. On one of these occasions, claimant wore to work a black velour track suit jacket "that had bling down the zippers," which the employer believed violated their dress code because it was "considered a sport outfit that did not fall under [the employer's] dress code[.]" August 23, 2023, Transcript at 36. One of claimant's supervisors warned claimant not to wear that jacket to work again. On another occasion, claimant wore a Nike-branded sweatshirt to the gym at approximately 4 a.m., prior to her shift. One of claimant's supervisors called her that day and asked her to come to work an early shift while the store was closed. Claimant did so, traveling directly from the gym to work, and still wearing the sweatshirt. When she arrived at work, the supervisor allowed claimant to continue working with the sweatshirt on but required claimant to cover the Nike logo with her headset, and instructed claimant not to wear that sweatshirt to work again. After the latter incident, claimant bought a new, plain black jacket to ensure that she complied with the dress code at work.

(4) On November 22, 2022, the employer discharged claimant in connection with an incident that had occurred the prior day.

(5) Order No. 23-UI-237214, mailed to claimant on September 29, 2023, stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date that this decision is mailed." Order No. 23-UI-237214 at 5. Order No. 23-UI-237214 also stated on its Certificate of Mailing, "Any appeal from this Order must be filed on or before October 19, 2023, to be timely."

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Claimant was discharged for an isolated instance of poor judgment, and not for misconduct.

Late application for review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 23-UI-237214 was due by October 19, 2023. Because claimant did not file her application for review until November 6, 2023, the application for review was late. In her statement enclosed with the application for review, claimant stated:

> I had already mailed copies of my written argument and request to reopen to paperwork to both the Employer… and [EAB] on 10/18/23 The day Prior to it being due. I called today to check and The very nice lady on the phone said the Employment appeals Board has still not received the mail containing the information.

EAB Exhibit 1 at 1. Claimant's statement suggests that she filed a timely application for review which, for unknown reasons, was not received by EAB. Her statement further suggests that until she called EAB on November 6, 2023, she was not aware of the fact that EAB had not received the application for review. The preponderance of the evidence therefore shows that while claimant attempted to file a timely application for review, she failed to do so due to, presumably, an issue with mail delivery, which constituted circumstances beyond her reasonable control. Those circumstances ceased on November 6, 2023, when claimant called EAB and learned that her original application for review had not been received. Because claimant filed her late application for review the same day, she filed it within a "reasonable time" per OAR 471-041-0070(2)(b). Claimant's late application for review therefore is allowed.

Discharge. 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 in connection with an incident which occurred on November 21, 2022. In EAB Decision 2023-EAB-0643, EAB adopted the conclusion of Order No. 23-UI-226271 that this final incident was a willful or wantonly negligent disregard of the employer's standards of behavior, and remanded the matter for further inquiry as to whether the final incident constituted an isolated instance of poor judgment. EAB Decision 2023-EAB-0643 at 2. Therefore, the analysis in this decision focuses solely on whether claimant's conduct on November 21, 2022, was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. The preponderance of the evidence shows that claimant's conduct was not a repeated act or pattern of willful or wantonly negligent behavior, and that claimant was therefore discharged for an isolated instance of poor judgment.

The order under review concluded otherwise, finding that "[o]n several occasions, claimant wore a jacket with a Nike logo on the front while on the sales floor and was told by managers that it was a violation of the dress code," and that "claimant acknowledged that she was instructed not to wear the branded jacket during her shifts but nevertheless continued to do so and had to repeatedly be told to take it off." Order No. 23-UI-237214 at 2, 4. On this basis, the order under review concluded that claimant "engaged in a pattern of other willful or wantonly negligent behavior," and that her conduct on November 21, 2022, therefore was not an isolated instance of poor judgment. Order No. 23-UI-237214 at 5. However, the record does not support this conclusion.

At hearing, one of claimant's supervisors testified that claimant was spoken to about the employer's dress code "upwards of like eight to ten times probably." August 23, 2023, Transcript at 21. Claimant testified that, "The only one reminder that I was given, um, was to take off my jacket, which I always complied as the managers testified." September 21, 2023, Transcript at 5. While this testimony suggests

that claimant may have knowingly violated the employer's dress code on prior occasions, it is too vague to be clear as to what actually happened during each of the alleged violations, whether claimant actually violated the dress code, and, if so, whether any such violation constituted willful or wantonly negligent behavior. The employer did not, for instance, describe when these alleged violations occurred or what happened during each instance, and did not provide any documentary evidence to corroborate their testimony. As such, the employer has not demonstrated that claimant violated their dress code "upwards of… eight to ten times."

The only two instances of alleged dress code violations that are described with detail in the record are the incident in which claimant wore a black velour jacket with "bling down the zippers" to work, and the incident in which she wore a Nike-branded sweatshirt to work. As to the former incident, one of the employer's witnesses testified that the garment violated their dress code because it was "considered a sport outfit that did not fall under [the employer's] dress code[.]" August 23, 2023, Transcript at 36. However, the record contains considerable ambiguity in regards to both what the employer's dress code required *and* to what extent those requirements were conveyed to claimant prior to her having worn whichever garment(s) allegedly violated the code. Even if the velour jacket that claimant wore that day did violate the employer's dress code, the employer has not met their burden to show that claimant knew or had reason to know that doing so would violate their standards of behavior.

As to the latter incident, the record suggests that claimant's having worn the Nike-branded sweatshirt to work was not actually a violation of the employer's policy. At hearing, one of claimant's supervisors read the relevant portion of the dress code into the record as follows: "Any statements, logo or language visibly displayed [that] are not company approved or provided are not permitted on the sales floor in our store during business hours." August 23, 2023, Transcript at 14–15. However, when claimant wore the Nike-branded sweatshirt to work, she was working at 6 a.m., prior to the store's business hours. Based on the language of the policy itself, it does not appear that claimant violated the dress code on that occasion. Even if she did, however, she did so because she had been wearing the garment prior to work and had been called in early in order to help a supervisor, and the supervisor permitted her to wear the sweatshirt that day so long as claimant covered the logo, which she did. Therefore, in regards to this incident as well, the employer has not met their burden to show that claimant's alleged violation of their dress code constituted a willful or wantonly negligent violation of their standards of behavior.

For the above reasons, the employer has not shown that claimant engaged in a pattern of willful or wantonly negligent behavior. Additionally, the record does not show that the final incident itself met any of the conditions under OAR 471-030-0038(1)(d)(D). Therefore, the record shows that the final incident on November 21, 2022, was an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-237214 is set aside, as outlined above.

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

DATE of Service: <u>December 28, 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.

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.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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