

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0066

Reversed & Remanded

PROCEDURAL HISTORY: On November 16, 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 August 20, 2023 (decision # 135538). Claimant filed a timely request for hearing. On December 27, 2023, ALJ Chiller conducted a hearing at which the employer failed to appear, and on December 29, 2023 issued Order No. 23-UI-244424, affirming decision # 135538. On January 10, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Primeflight Aviation Services, Inc. employed claimant as a scanner from December 15, 2022 until August 23, 2023.

(2) In August 2023, claimant asked her supervisor, in person, for time off to attend events relating to a funeral for a family member. She originally made the request using the employer's app, however the app did not inform employees whether their leave requests were approved. Claimant's supervisor told her that the request was denied "because they were too short on people working." Transcript at 8.

(3) On the next day claimant was scheduled to work following the denial of her request for time off, and for "almost" two weeks thereafter, claimant did not report for her scheduled shifts. Transcript at 10. Claimant used the app to request paid time off on or before each subsequent shift. Claimant did not contact the employer to learn whether these subsequent leave requests had been granted. The days on which claimant missed shifts included August 15, 16, 20, 21, and 22, 2023.

(4) On August 22, 2023, claimant learned from a coworker that she was scheduled to work the next day.

(5) On August 23, 2023, claimant reported for work but was unable to clock in. Claimant spoke with her manager and supervisor who both told her that she had been discharged "for not calling in" for the shifts she missed. Transcript at 7. Claimant was "shocked" to learn that she had been discharged. Transcript at 7. She left and did not work for the employer thereafter.

CONCLUSIONS AND REASONS: Order No. 23-UI-244424 is set aside and the matter remanded for further proceedings.

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). A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C).

ORS 659A.156 provides, in relevant part:

(1) All employees of a covered employer are eligible to take leave for one of the purposes specified in ORS 659A.159 (1)(b) to (e) except:

(a) An employee who was employed by the covered employer for fewer than 180 days immediately before the date on which the family leave would commence.

(b) An employee who worked an average of fewer than 25 hours per week for the covered employer during the 180 days immediately preceding the date on which the family leave would commence.

* * *

ORS 659A.153 provides, regarding what constitutes a “covered employer”:

(1) The requirements of ORS 659A.150 to 659A.186 apply only to employers who employ 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which the leave is to be taken or in the year immediately preceding the year in which the leave is to be taken.

(2) The requirements of ORS 659A.150 to 659A.186 do not apply to any employer who offers to an eligible employee a nondiscriminatory cafeteria plan, as defined by section 125 of the Internal Revenue Code of 1986, providing, as one of its options, employee leave at least as generous as the leave required by ORS 659A.150 to 659A.186.

ORS 659A.159 provides, in relevant part:

(1) Family leave under ORS 659A.150 to 659A.186 may be taken by an eligible employee for any of the following purposes:

* * *

(e) To deal with the death of a family member by:

(A) Attending the funeral or alternative to a funeral of the family member;

(B) Making arrangements necessitated by the death of the family member; or

(C) Grieving the death of the family member.

* * *

ORS 659A.162(2) provides, in relevant part:

(a) Except as provided by paragraph (b) of this subsection, an eligible employee is entitled to a total of two weeks of family leave for the purposes described in ORS 659A.159 (1)(e).

(b) An eligible employee is entitled to the period of leave described in paragraph (a) of this subsection upon the death of each family member of the employee within any one-year period, except that leave taken as provided by this subsection may not exceed the total period of family leave authorized by subsection (1) of this section.

The order under review concluded that claimant's unapproved absences from work during the two weeks preceding her discharge constituted a willful or wantonly negligent violation of a standard of behavior which an employer has the right to expect of an employee, and therefore constituted misconduct. Order No. 23-UI-244424 at 3. The record as presently developed does not support this conclusion. Further development of the record is therefore needed.

Claimant was discharged because she was absent from work without approval for at least five shifts during the two weeks preceding August 23, 2023. The employer expected that their employees would work their shifts as scheduled unless granted leave. Claimant testified she understood this expectation, including that she must report for work if a request for time off was denied. Transcript at 12. Generally, this is a standard of behavior which an employer has the right to expect of an employee. However, if the employer unreasonably denied leave requests, the employer's expectations regarding attendance may have exceeded what the employer has the right to expect of an employee. The record, as currently developed, is insufficient to conclude whether the employer's attendance policy was reasonable and, if so, whether claimant willfully or with wanton negligence violated that policy.

The record suggests that the employer's procedure for requesting leave required an employee to make the request in an app, then contact their supervisor or manager to determine whether the request was granted because that information was not available in the app. *See* Transcript at 11. Claimant testified that on August 23, 2023, her supervisor "was showing me the dates where I didn't call in" over the

previous two weeks when explaining to her why she had been discharged. Transcript at 6. However, claimant affirmed at hearing that she had “[called] in for each of those days.” Transcript at 17. It can be inferred that claimant meant by this that she requested leave via the app each day but did not check with her supervisor or manager to see if her requests were granted, as claimant testified she did not communicate with the employer during the two weeks she was absent aside from making app requests for leave. Transcript at 16-17. This suggests that the employer denied each of those leave requests, even if the denials were not explicitly communicated to claimant as they occurred. The employer then considered claimant to have violated their attendance policy by not working the shifts and not notifying the employer that she would be absent despite having been denied leave.

Claimant was willfully absent from her shifts and knew that the employer had not granted her requests for leave. She knew that, at least for the first missed shift, her leave request had explicitly been denied. That claimant did not check to see if the subsequent leave requests were approved suggests that claimant may have been indifferent to whether they were approved and, in turn, to the consequences of missing work without having been granted leave. This suggests that claimant may have violated the employer’s attendance policy with at least wanton negligence.

However, such a violation may not have constituted misconduct if the employer’s denial of claimant’s leave requests rendered their attendance policy unreasonable. At hearing, claimant asserted that all the absences “related to” the funeral of a family member. Transcript at 14. She elaborated, “[T]he first date we have like family meetings, and in our culture we have to be like – we have to show up to the meetings. . . It was just part of our culture, like if you’re close related to the person that has passed away you have to show up for the meeting.” Transcript at 14-15. For example, if claimant had significant religious obligations for which she had to miss work, the employer’s denial of her leave requests may have been unreasonable. Further development of the record regarding claimant’s need for the leave she requested is warranted to determine whether the employer’s denials of the requests were unreasonable on that basis.

Moreover, the record suggests that claimant may have qualified for protected bereavement leave of up to two weeks under ORS 657A.156. While the dates of claimant’s employment suggest she worked for the employer for more than 180 days prior to the first absence, it is unclear whether she worked an average of at least 25 hours per week in the 180 days preceding that absence, whether the employer was a “covered employer” within the meaning of ORS 659A.153, and whether the deceased was a “family member” within the definition of ORS 659A.157. Further development of the record is needed to determine whether claimant’s requests for leave were protected under Oregon law and that the employer’s denials of the requests were therefore unreasonable.

On remand, inquiry as to whether claimant was entitled to the bereavement leave she requested under state law should include whether the employer was a “covered employer” under ORS 659A.153; whether claimant worked for the employer at least 180 days prior to the first funeral-related absence; whether she averaged at least 25 hours of work per week for the employer in the 180 days preceding that first absence; whether claimant was a family member of the deceased; and any other factors affecting claimant’s eligibility for protected leave.

Additional inquiry should be made regarding claimant’s cultural need for the leave requested, even if she did not qualify for protected leave, including what claimant meant by her “culture” compelling her

attendance at funeral activities and whether it was cultural or religious practices that were implicated; whether such beliefs compelled claimant's attendance at some or all of the activities and, if so, the details of those beliefs as they relate to claimant's attendance, including which specific activities claimant was compelled to attend on this basis and which activities were optional or subject to exceptions, whether claimant could be excused from some or all of the events for reasons such as preserving their employment, and what consequences, if any, would be imposed on claimant for failing to attend; whether funeral-related activities took place on each day claimant missed work; and, whether the timing of those activities conflicted with claimant's entire shift each day and, if not, why claimant did not attend work for at least part of the day. Inquiry should also be made into any other reasons why claimant requested leave for the shifts she missed, and whether claimant communicated those reasons and their importance to the employer in making the initial request.

Once the record is fully developed, the ALJ should determine whether the employer's denials of claimant's leave requests, and therefore the employer's expectations regarding her attendance, were unreasonable. If they were not unreasonable, the ALJ should determine whether claimant's violation of those expectations constituted misconduct.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct, Order No. 23-UI-244424 is reversed, and this matter is remanded.

DECISION: Order No. 23-UI-244424 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: February 14, 2024

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-244424 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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 desisyong ito.

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

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.