

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0499

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 27, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective December 24, 2023 (decision # L0003356114). Claimant filed a timely request for hearing. On May 23, 2024, ALJ Contreras conducted a hearing, and on May 31, 2024, issued Order No. 24-UI-255509, affirming decision # L0003356114. On June 11, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Point Blank Distribution employed claimant as a sales representative from March 22, 2022, until December 29, 2023.

(2) Absent an emergency, the employer expected employees who anticipated being absent from work to notify the employer of the absence one hour before the start of their shift. Exhibit 1 at 8. If an employee provided a doctor's note excusing the employee from work for a particular date range, the employee was not required to give the employer additional notice of an absence on any of those dates. Claimant understood these expectations.

(3) Prior to November 26, 2023, claimant fell and injured her back. On November 26, 2023, claimant began receiving care and treatment to address her back injury from an urgent care facility.

(4) On November 30, 2023, and December 15, 2023, claimant was absent from work due to her back injury. The employer considered claimant to have been absent from work on those dates without having given advance notice of each absence.

(5) On December 17, 2023, claimant emailed the employer's Human Resources (H.R.) manager that she would be absent from her shift scheduled for the next day, December 18, 2023. On December 18, 2023, the H.R. manager emailed claimant back that the employer considered claimant to have been absent from work on November 30, 2023, and December 15, 2023, without having given the employer advance notice of each absence. The employer advised in the email that "Any further no call no shows could result in disciplinary action, up to and including termination of employment." Exhibit 1 at 13.

(6) On December 18, 2023, claimant was absent from work. That day, claimant obtained a doctor's note excusing her from work through December 28, 2023. Claimant sent a copy of the doctor's note to the H.R. manager via email on December 18, 2023.

(7) On December 28, 2023, claimant obtained a doctor's note excusing her from work from December 29, 2023, through January 5, 2024. Claimant sent a copy of the doctor's note to the H.R. manager via email on December 28, 2023. The H.R. manager either did not receive this email or received it, but did not recognize it had been received.

(8) On December 29, 2023, claimant did not report for her scheduled shift because she had been excused from work by her doctor. Because the employer either did not receive claimant's December 28, 2023, email or they received it, but did not recognize it had been received, the employer believed claimant had failed to notify them in advance of the December 29, 2023, absence.

(9) On December 29, 2023, the employer discharged claimant for allegedly failing to give advance notice of her absence that day.

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 order under review concluded that the employer discharged claimant for misconduct. 24-UI-255509 at 4-5. The record does not support this conclusion.

The focus of the discharge analysis is the proximate cause of the discharge, that is, the incident without which the discharge would not have occurred when it did. *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). At hearing, the employer's witness testified that the employer discharged claimant because they believed that claimant did not give the employer advance notice of her absence on December 29, 2023. Transcript at 5, 9. Thus, the proximate cause of claimant's discharge was the alleged failure to give notice of the December 29, 2023, absence, because that was the incident without which the discharge would not have occurred when it did.

The employer did not establish they discharged claimant for misconduct because they did not meet their burden to prove that claimant failed to give advance notice of the December 29, 2023, absence. At hearing, the employer's witness, who was the employer's H.R. manager, testified that claimant did not send her a copy of the doctor's note excusing claimant from work for the date range including December 29, 2023, and that she did not receive any emails from claimant after December 18, 2023. Transcript at 10, 25. Claimant, in contrast, testified that she took a picture of the doctor's note excusing her from work for the date range including December 29, 2023, and emailed the picture to the H.R. manager on December 28, 2023. Transcript at 15-16. Given that these conflicting accounts are no more than equally balanced, and that the employer has the burden of proof in a discharge case, the employer has not met their burden to show that claimant violated the employer's expectations in the final incident that prompted the employer to discharge claimant.¹ Based on this record, it is equally probable that claimant emailed the employer her doctor's note on December 28, 2023, excusing her from work for a range of dates including December 29, 2023. Accordingly, the employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-255509 is set aside, as outlined above.

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

DATE of Service: July 17, 2024

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.

¹ Note that in assessing the accounts of the witnesses, the order under review reasoned that the H.R. manager was more credible than claimant. Order No. 24-UI-255509 at 4. The main support the order cited for this was the way claimant read her doctor's notes into the record during her testimony, which the order described as sounding "flustered," stopping mid-sentence, or featuring "slight differences in wording each time." Order No. 24-UI-255509 at 4. It is not atypical for a witness to communicate in an unpolished manner during an unemployment insurance hearing, nor is it unusual for doctor's notes to feature only slight differences in wording. Therefore, EAB views the credibility of the witnesses who testified in this case to be of equal stature and does not accept the adverse credibility determination the order made regarding claimant. *See* ORS 657.275(2) ("When there is evidence in the record both to make more probable and less probable the existence of any basic fact or inference, the board need not explain its decision to believe or rely on such evidence unless the administrative law judge has made an explicit credibility determination regarding the source of such facts or evidence.").

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.

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.