EO: Intrastate
BYE: 14-Dec-2024

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

729
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0711

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 27, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 111947). The employer filed a timely request for hearing. On August 27, 2024, and continued to September 12, 2024, ALJ Lucas conducted a hearing, and on September 18, 2024, issued Order No. 24-UI-266584, affirming decision # 111947. On October 8, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: With their application for review, the employer filed a request that the documents they offered as exhibits, and which the ALJ excluded because the documents were not served on claimant, be admitted into the record. The request is denied.

At hearing on August 27, 2024, the ALJ explained that the employer had submitted documents to the Office of Administrative Hearings (OAH), and the employer's representative confirmed that the employer was offering the documents into evidence. August 27, 2024, Audio Record at 9:35. However, when the ALJ asked if the representative had served the documents on claimant, the representative acknowledged that she had no evidence that they had been served on claimant. August 27, 2024, Audio Record at 11:11. The employer's witness stated that the employer had sought to serve the documents by emailing them a few days prior to the hearing to the email account the employer had on file for claimant when she was an employee, which was a Gmail account. August 27, 2024, Audio Record at 14:55. Claimant stated that she had gotten a new phone and did not have access to the Gmail account. August 27, 2024, Audio Record at 15:07.

The ALJ suggested that the employer's representative serve the documents by email on claimant at that time, during the preliminary portion of the hearing. August 27, 2024, Audio Record at 11:35. Claimant read a different email address, a Yahoo account, to the representative. August 27, 2024, Audio Record at 11:57. The representative tried to send an email to the Yahoo account to serve the documents, but

struggled typing it correctly and concluded that she could not send the email. August 27, 2024, Audio Record at 14:41. The employer's witness then asked claimant to repeat the yahoo account, which claimant did, and the witness advised that she would send an email serving the documents. August 27, 2024, Audio Record at 15:24 to 16:12. Over the next several minutes, claimant stated that she was refreshing but nothing had come into her inbox. August 27, 2024, Audio Record at 17:40, 18:25, 21:16. Eventually, the ALJ announced that he was inclined to go forward without the admitting the documents into evidence but offered the employer an opportunity to request a postponement. August 27, 2024, Audio Record at 21:32. The employer's representative and witness discussed the matter, with the representative stating that it was up to the witness to decide. August 27, 2024, Audio Record at 21:45 to 22:26. The employer's witness advised to "just go forward." August 27, 2024, Audio Record at 22:27. The ALJ did so and ruled that he was not admitting the proposed exhibits into evidence because they were not served on claimant. August 27, 2024, Audio Record at 23:22.

The ALJ's insistence that the employer serve the documents on claimant for them to be admitted into evidence was appropriate. The administrative rule governing admission of documents requires parties to serve copies of any documentary evidence they wish to offer into evidence *before* the hearing begins. *See* OAR 471-040-0023(4) (August 1, 2004) ("Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record."). The ALJ gave substantial latitude to the employer by allowing them the option to serve via email while the parties were on the line after the hearing had begun. The employer's efforts to serve via email at that time were unsuccessful. However, the statements of the hearing participants suggest the failure to successfully transmit a service email to claimant's yahoo account was at least partly due to the employer representative's inability to type the email address correctly. *See* August 27, 2024, Audio Record at 14:41, 17:49. Moreover, it is not evident that anything had prevented the employer from using a different method to effectuate service prior to the hearing, such as sending the documents via U.S. mail with a return receipt requested. In any event, the ALJ ultimately presented the employer with an opportunity to postpone the hearing to enable the employer to serve the documents, but the employer declined and chose to "just go forward." August 27, 2024, Audio Record at 22:27.

The ALJ's ruling was also authorized under OAR 471-040-0025(5) (August 1, 2004), which provides, in pertinent part, that "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party." As discussed in the Conclusions and Reasons section below, the final incident in this case was claimant's failure to give notice per the employer's call-out policy before failing to report to her shift on December 16, 2024. *See* August 27, 2024, Transcript at 6, 11-12. This incident is the focus of the discharge analysis. Review of the documents offered by the employer reveal either they are immaterial, because they relate to other disciplinary matters leading up to the final incident, or that the documents are unduly repetitious because they relate to the final incident but repeat evidence that was established by testimony.

The documents the employer sought to admit at hearing, which they re-attached (with frequent duplications) to the submission they filed with their application for review, omitting fax and email transmittal pages and a cover page, consisted of the documents described below:

- The first page of the notice of hearing of the August 27, 2024, hearing session in this case. Employer's Submission at 6.
- The certificate of mailing of the notice of hearing of the August 27, 2024, hearing session in this case. Employer's Submission at 7, 10.
- A December 18, 2023, corrective action form memorializing claimant's December 18, 2023 discharge. Employer's Submission at 8, 11-13, 16.
- A December 18, 2023, email from an employee containing a list of concerns a resident had conveyed to the employee regarding claimant allegedly crossing professional boundaries, speaking negatively about coworkers, raising her voice to the resident, and limiting the areas of the house the resident could be in. Employer's Submission at 14, 17-18.
- An April 22, 2023, email thread from an employee to claimant, including claimant's reply email, memorializing a discussion the employee had with claimant that day about the proper procedures to follow when claimant called out from a shift. Employer's Submission at 19.
- Excerpts of the collective bargaining agreement governing claimant's employment, including the rules relating to corrective action, termination, and grievances. Employer's Submission at 20-21, 23-25, 30.
- A list of instances in which claimant had called out from shifts between February 2023 and August 2023, including information as to whether claimant had given notice of the call-outs within the required timeframe prior to the shift. Employer's Submission at 26-27, 29-32, 41-44.
- A list of instances in which claimant had called out from shifts between August 2023 and December 2023, including information as to whether claimant had given notice of the call-outs within the required timeframe prior to the shift. Employer's Submission at 33-36, 45-48.

The first page and the certificate of mailing of the notice of hearing are irrelevant. The December 18, 2023, corrective action form memorializing claimant's December 18, 2023, discharge is immaterial to the extent it relates to other disciplinary matters leading up to the final incident, because the final incident in this case, claimant's failure to give notice before failing to report to her shift on December 16, 2024, is the focus of the discharge analysis. To the extent the December 18, 2023, corrective action form relates to the final incident, it is repetitious of testimony in the record. The December 18, 2023, email from an employee containing a list of concerns a resident had conveyed about claimant is immaterial because it relates to matters other than the final incident in this case. The April 22, 2023, email memorializing a discussion with claimant about the proper procedures for calling out is not material because claimant conceded at hearing that she understood she was to give notice before calling out from a shift. August 27, 2024, Transcript at 28. Excerpts from the collective bargaining agreement are not material because whether claimant's discharge was for misconduct within the meaning of ORS 657.176(2) is governed by unemployment insurance law (ORS Chapter 657 and related administrative rules), not the collective bargaining agreement. The list of instances in which claimant called out from shifts between February 2023 and December 2023 is immaterial to the extent it relates to other disciplinary matters leading up to the final incident. To the extent the list includes the final incident, claimant's failure to give notice before failing to report to her shift on December 16, 2024, it is repetitious of testimonial evidence.

Finally, even if some aspects of the documents discussed above constituted evidence that was material and not unduly repetitious, the employer did not assert or show that excluding the documents resulted in substantial prejudice to the employer. Therefore, per OAR 471-040-0025(5), even if the ALJ erred in excluding some portions of some of the documents, any such erroneous ruling did not prohibit the ALJ

from entering his decision in this case. For these reasons, the employer's request to admit the excluded documents is denied.

FINDINGS OF FACT: (1) Alvord Taylor, Inc. employed claimant as a direct support professional at a residential facility for individuals with intellectual and developmental disabilities from January 17, 2023, until December 18, 2023.

(2) The employer expected their employees to notify the employer before failing to report to a scheduled shift. When an employee was scheduled for a day shift, the employer expected to receive notice of the absence four hours before the beginning of the shift. Employees were to provide the employer notice of an absence by calling into an on-call number. If an employee failed to report to a scheduled shift without any notice, the employee was subject to being discharged upon the second such instance of failing to report without notice. Claimant was broadly aware of these expectations, although she believed that providing notice of an absence to the on-call number within two hours of a day shift complied with the employer's policy.

(3) On numerous occasions between February 2023 and December 2023, claimant failed to notify the employer of absences within the required timeframe before the start of a shift, including on three instances, failing to report for her shifts without any notice. On August 25, 2023, the employer placed claimant on a performance improvement plan because of her issues relating to attendance and failing to notify the employer of absences in advance of shifts. As of the beginning of December 2023, claimant was on the final corrective action step short of being discharged. In addition to attendance and improper call-out issues, the employer had other concerns about claimant's workplace conduct relating to claimant allegedly clocking out improperly, gossiping, and speaking negatively about supervisors and peers, among other things.

(4) In December 2023, claimant was suffering from severe depression and anxiety. On December 10, 2023, claimant met with the employer's human resources (H.R.) manager and explained that she felt overworked and as though she was having a mental breakdown. Claimant cried during the meeting and appeared to the H.R. manager to be overwhelmed. Later that day, claimant approached the employer's director and informed the director of her mental and emotional distress. The director told claimant to "[l]ook for some coverage for your shifts" and "take some time for you." August 27, 2024, Transcript at 31.

(5) Claimant was scheduled to work from 8:00 a.m. until 8:00 p.m. on December 15, 2023, and from 8:00 a.m. until 10:00 p.m. on December 16, 2023. Claimant arranged for two coworkers to cover her shifts on those two days. One coworker agreed to work from 8:00 a.m. until noon each day, and the other coworker agreed to work from noon until the conclusion of the shift each day.

(6) On December 13, 2023, claimant met with the director, informed her that she had found coverage for the December 15 and 16 shifts, and stated that she planned to "take some time for me and check my mental health because I am not okay." August 27, 2024, Transcript at 31. The director responded, "I think that's great advice." August 27, 2024, Transcript at 31.

(7) On December 15 and December 16, 2023, claimant failed to report to her scheduled shifts without calling the on-call number or providing any notice, other than what she had told the director on

December 13, 2023. The coworkers claimant arranged to cover those shifts did not work the shifts as claimant had expected.

(8) Claimant was absent from work on December 15 and December 16, 2023, because of her depression and anxiety. Claimant's mental health difficulties were severe and included suicidal thoughts. During those dates, claimant was placed in an in-patient facility for 72 hours without access to a phone to assess her mental health. Later in December 2023, claimant was diagnosed with depression and anxiety.

(9) The employer regarded claimant as having failed to report to her scheduled shifts without any notice on December 15 and December 16, 2023. The employer considered the December 16, 2023, incident to be the "final straw" that justified discharging claimant. August 27, 2024, Transcript at 6.

(10) On December 18, 2023, claimant and her union representative met with the employer's H.R. manager. The H.R. manager told claimant that she had failed to report to her scheduled shifts without notice on December 15 and December 16, 2023, and the employer was discharging her. August 27, 2024, Transcript at 43. Claimant had a doctor's note that might have excused the failures to report without notice on December 15 and December 16, 2023, but had forgotten to bring the note to the meeting. In the meeting, claimant mentioned the doctor's note. The H.R. manager stated that the employer would have accepted the note, if claimant had it to present. Claimant accepted the employer's decision to discharge her and did not subsequently present the H.R. manager with the doctor's note or otherwise seek re-employment with the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

At hearing, the employer's witness testified that claimant's failure to give notice of her absence from her shift on December 16, 2024, was the "final straw" that caused the employer to discharge claimant. August 27, 2024, Transcript at 6. Furthermore, the witness acknowledged that had claimant given proper notice per the employer's call-out policy prior to her absence on December 16, 2024, the employer "probably would have continued to work with her" and not have discharged claimant, despite claimant's other, unrelated disciplinary issues. August 27, 2024, Transcript at 11-12.

Accordingly, the record shows that the incident that caused the discharge to occur when it did was claimant's failure to give notice per the employer's call-out policy before failing to report to her shift on December 16, 2024. That incident is therefore the proximate cause of claimant's discharge and the focus

of the discharge analysis. *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).

The employer did not meet their burden to show that claimant's failure to give notice per the employer's call-out policy prior to her absence on December 16, 2023, was a willful or wantonly negligent violation of the employer's expectations. Claimant did not willfully violate the employer's policy on that day. The record shows that claimant received permission from the employer's director to arrange for other employees to cover her December 15 and December 16, 2023, shifts. Claimant then found two coworkers who agreed to cover the shifts, and informed the director of the alternative coverage as well as that she planned to take time to focus on her mental health. The director gave apparent approval of this course of action, responding, "I think that's great advice." August 27, 2024, Transcript at 31. Although the coworkers did not work the shifts as claimant had expected, claimant did not willfully breach the employer's expectation because she arranged for coverage of the shifts and believed no additional notice was required before her absence, beyond what she had told the director on December 13, 2023, because the shifts were to be covered.

Claimant also did not violate the employer's policy with wanton negligence. To amount to a wantonly negligent violation of employer's call-out policy on December 16, 2023, claimant must have been acting with indifference to the consequences of her actions. It is undisputed that when claimant failed to report to work that day, she did not call the on-call number. Nevertheless, the record does not show that claimant acted with indifference to the consequences of her actions. On both December 15 and December 16, 2024, claimant was suffering from depression and anxiety, which she described at hearing as, "an epic episode that [she] couldn't pull [her]self out of." August 27, 2024, Transcript at 38. Claimant's mental health difficulties were severe and included suicidal thoughts. *See* August 27, 2024, Transcript at 34; September 12, 2024, Transcript at 7. During December 15 and December 16, 2024, claimant was in an in-patient facility undergoing a 72-hour mental health assessment. Claimant testified at hearing that while in this "72-hour psych hold" she had "no access to a phone." August 27, 2024, Transcript at 42. Given the severity of claimant's mental health difficulties and her limited ability to communicate while in the in-patient facility, the record does not show that claimant acted with indifference to the consequences of her actions when she failed to give notice via the employer's on-call number prior to her absence on December 16, 2023. Accordingly, claimant did not violate the employer's policy on that date with wanton negligence.

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

DECISION: Order No. 24-UI-266584 is affirmed.

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

DATE of Service: <u>October 31, 2024</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.

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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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