

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0750

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 5, 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 benefits based on the work separation (decision # L0004441044). The employer filed a timely request for hearing. On October 17, 2024, ALJ Buckley conducted a hearing at which claimant failed to appear, and on October 17, 2024, issued Order No. 24-UI-269870, affirming decision # L0004441044. On October 25, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lowe's Home Centers LLC employed claimant as a customer service associate in their lawn and garden department from 2022 until April 21, 2024.

(2) Under the employer's attendance policy, employees were allowed seven unexcused absences from scheduled shifts in a twelve-month period. Upon a seventh unexcused absence in twelve months, an employee received an initial warning. If an employee had an initial warning, their next unexcused absence resulted in a written warning. If an employee had a written warning, their next unexcused absence resulted in a final warning. If an employee had an unexcused absence after receiving a final warning, they were subject to being discharged. Under the policy, an employee could use sick leave time to excuse an absence if they had accrued sick leave time equal to at least half the length of the shift. For example, if a shift was eight hours long, an employee needed four hours of sick leave time to excuse being absent from the shift. The attendance policy was contained in the employer's policies and procedures manual, and claimant was advised of the policy upon hire.

(3) Prior to April 15, 2024, claimant had accumulated enough unexcused absences in a twelve-month period to be on his final warning. As of April 15, 2024, claimant had only one hour of accrued sick leave.

(4) On April 15, 2024, claimant was ill and was scheduled to work an eight-hour shift. Claimant contacted the employer and advised that he was ill. Claimant requested to use his sick leave to excuse

the absence. The employer denied his request because claimant had only one hour of accrued sick leave, and needed at least four hours to excuse an absence from the eight-hour shift.

(5) Claimant was absent from his shift on April 15, 2024, due to illness. Because the absence was unexcused and claimant was on his final warning, claimant became subject to discharge under the employer's attendance policy.

(6) On April 21, 2024, the employer discharged claimant for being absent from his shift on April 15, 2024.

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). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant on April 21, 2024, for violation of their attendance policy on April 15, 2024. Under the policy, an employee on their final warning for attendance, as claimant was, was subject to being discharged upon their next unexcused absence. Claimant was absent from his shift on April 15, 2024. The absence was unexcused because claimant did not have enough accrued sick leave to excuse the absence. Therefore, claimant was subject to being discharged under the policy, and the record shows that the employer's decision to discharge claimant for the April 15, 2024, absence was authorized under their attendance policy.

Nevertheless, claimant's discharge was not for misconduct because under OAR 471-030-0038(3)(b), absences due to illness are not misconduct. The record shows that claimant was absent from his April 15, 2024, shift due to illness. The employer discharged claimant for this absence, and therefore discharged claimant for an absence due to illness.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-269870 is affirmed.

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

DATE of Service: November 21, 2024

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 stated above**. *See* ORS 657.282. For forms and information, visit <https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx> and choose the appropriate form under “File a Petition for Judicial Review.” You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់រដ្ឋទេ បើសិនជាលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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.

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