

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0015

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # L0007218579). The employer filed a timely request for hearing. On December 27, 2024, ALJ Hall conducted a hearing, and on December 31, 2024 issued Order No. 24-UI-278496, affirming decision # L0007218579. On January 6, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jackson County employed claimant, most recently as a security supervisor at the county's airport, from July 9, 2018 through October 4, 2024.

(2) The employer's policies required security staff to be at their duty station at the time that their shift was scheduled to start. The employer's policies also forbid security staff from accepting free food or other gifts from businesses located at the airport. Claimant was aware of and understood these policies.

(3) In April 2023, the employer issued claimant a warning about being late for work.

(4) From August 16, 2024 to September 6, 2024, claimant was late for work a total of five times. Each time, claimant was between three and nine minutes late. Most of these instances were the result of claimant having slept poorly due to a medical condition.

(5) On September 12, 2024, claimant was approximately five minutes late for work due to unexpected road construction. Claimant could have taken a detour to avoid the construction, but taking a different route would have "add[ed] time to the trip." Transcript at 16.

(6) In or around mid-September 2024, the employer received a complaint from another employee, regarding claimant's conduct. The subject of the complaint was "predominantly" claimant's recent late

arrivals to work, but also included an allegation that claimant had received free food from the airport's restaurant on September 14, 2024. Transcript at 10–11.

(7) The employer investigated the complaints made against claimant. Regarding the allegation that claimant had accepted free food from the airport's restaurant on September 14, 2024, claimant told the investigator that he “did not remember” accepting free food on that date. Exhibit 1 at 7. The employer determined that there was “no record of [claimant] paying for that food” because they were unable to find a receipt for it. Exhibit 1 at 7, Transcript at 20.

(8) On October 4, 2024, the employer discharged claimant. The employer discharged claimant due to his having been late for work on September 12, 2024 and on previous occasions, having allegedly accepted free food on September 14, 2024 and one prior occasion, and alleged earlier violations of other policies.

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 employer discharged claimant due to his having been late for work on September 12, 2024 and on previous occasions, having allegedly accepted free food on September 14, 2024 and one prior occasion, and alleged earlier violations of other policies. At hearing, the employer's witness testified that claimant's late arrival on September 12, 2024 was the final incident which ultimately led the employer to discharge claimant, but also explained that “[i]t was just a culmination of all of [the prior alleged violations] combined being repeated and repeated and repeated.” Transcript at 6. Given the employer's testimony that claimant's late arrival on September 12, 2024 was the final incident which led to claimant's discharge, this incident appears to be the proper focus of the misconduct 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); *See also* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the last occurrence of an attendance policy violation is considered the reason for the discharge).

The employer has not met their burden to show that claimant's late arrival on September 12, 2024 constituted a willful or wantonly negligent violation of their standards of behavior. Claimant violated the employer's standards of behavior by arriving approximately five minutes late for work that day.

However, the record shows that claimant was late because of unforeseen road construction. Furthermore, the record suggests that rerouting around the road construction would have caused claimant to arrive to work even later. As such, even though claimant violated the employer's policy by arriving late for work on September 12, 2024, the record does not show that he did so because he acted with indifference to the consequences of his actions. Instead, it shows that he was slightly delayed in his commute, and late for work as a result, due to circumstances that were beyond his reasonable control. Therefore, claimant's late arrival on September 12, 2024 was not misconduct.

Additionally, given that the alleged instance of claimant having accepting free food occurred on September 14, 2024, just two days after claimant's final late arrival for work, this alleged conduct may also have been part of the proximate cause of the employer's decision to discharge claimant. The employer has not met their burden to show that this constituted misconduct, because the record does not show, by a preponderance of the evidence, that claimant actually accepted free food on that date.

At hearing, claimant admitted to having accepted free food from the airport's restaurant on a prior occasion, as an employee there had offered it to him unprompted and explained that they were otherwise going to throw it out. Transcript at 20. However, regarding the alleged incident on September 14, 2024, claimant testified only, "...they couldn't find the receipt for [that instance]. But every time I was up there to get food I always offered to pay." Transcript at 20. Additionally, in a "pre-disciplinary meeting letter" dated September 27, 2024, the employer documented that claimant had stated that he did not remember whether he had accepted free food that day, and that the employer had found that there was "no record of [claimant] paying for that food." Exhibit 1 at 7.

The employer's witness testified that the initial complaint about claimant's conduct, including the allegation about claimant accepting free food, was made by another employee. Transcript at 10. It can be reasonably inferred from this testimony that the witness, claimant's former supervisor, did not personally observe claimant accepting food without paying for it on September 14, 2024. Given that claimant did not admit to the allegation and that the employee who complained about claimant did not testify, the only direct evidence that claimant acted as alleged is hearsay. Further, although the record shows that the employer was not able to locate a record of payment for the food that claimant received, the hearing record lacks evidence regarding, for instance, the thoroughness of the employer's search for that information, or the likelihood that the information was retained long enough to show up in such a search. In sum, the employer's hearsay evidence that claimant accepted food without paying for it, combined with the circumstantial evidence that the employer was unable to find proof that claimant did pay for the food, is insufficient to show, by a preponderance of the evidence, that claimant acted as the employer alleged on September 14, 2024. Because the record does not show that the alleged behavior actually occurred, it cannot be considered misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-278496 is affirmed.

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

DATE of Service: January 31, 2025

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

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.

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