

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1040

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 17, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82834). Claimant filed a timely request for hearing. On October 10, 2018, ALJ Wyatt conducted a hearing, and on October 18, 2018 issued Order No. 18-UI-118371, affirming the Department's decision. On November 5, 2018, claimant filed a timely application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that included a written statement offered but not admitted at hearing, and other new information that was not part of the hearing record. At hearing, claimant read part of the written statement she offered as an exhibit, so that portion of the written statement is already part of the record. Because claimant did not provide the employer a copy of the written statement before the hearing, the ALJ did not err by excluding claimant's written statement at hearing, and we did not consider the portions of the written statement claimant did not read into the record at hearing in reaching this decision. ¹ Audio Record at 12:08 to 13:58. Claimant also failed to show that factors or circumstances beyond her reasonable control prevented her from offering at hearing the other new information included in her argument. Moreover, the new information that is a letter to the employer written after the hearing is not relevant for the purposes of our decision. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision. We considered claimant's argument only to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Columbia Gorge Family Medicine, a primary care clinic in Hood River, Oregon, employed claimant in its referrals and authorizations department until August 23, 2018.

(2) The employer has a policy that prohibits harassment of or offensive conduct toward the public or coworkers, and discriminating behavior toward the public or coworkers. The policy provided for

¹ Prior to commencement of an evidentiary hearing that is held by telephone, each party must provide to all other parties and the ALJ copies of documentary evidence that it will seek to introduce into the record. OAR 471-040-0023(4) (August 1, 2004).

immediate discharge for serious violations. At hire, claimant acknowledged receiving, reviewing and understanding the policy.

(3) Twenty-five percent of the employer's patients identify as Latino.

(4) Prior to August 22, 2018, the employer had not given claimant warnings or disciplined her for violating the employer's policy against harassment and discrimination.

(5) On August 22, 2018, while at home and not working, claimant posted a comment using her own electronic device on her personal Facebook page stating the following:

Here it is. Living across the street from Jackson Park in Hood River, Oregon has many disadvantages. This town cares only about making the immigrant community happy and taken care of. Who cares about us Americans who were born and raised here? The ones who pay for everything and get no help. We can't sleep because of the nonsense and noise going on in the park because of the second annual Latino festival in the park. Do we ever celebrate the good old United States citizens who work hard and pay their way? No. Something is wrong here. And, if you, as a Mexican, want to live in America, at least speak English. That's all I have. You deserve a great life, but not on our dollar. I'm sure I will not get good response from this post. I'm sorry. I care about everyone, but this is getting out of hand. Audio Record 17:33 to 18:32.

Claimant's Facebook page and personal profile were visible to the public when she posted the comment. Claimant's daughter helped claimant set up her Facebook page, and claimant did not discuss her Facebook settings with her daughter. Claimant knew that her Facebook profile identified her as being an employee of Columbia Gorge Family Medicine. Claimant had Facebook "friends" who were coworkers at Columbia Gorge Family Medicine.

(6) The same evening claimant posted the comment online, the employer's administrator received communications from claimant's coworkers about the post and the employer's medical director sent the administrator a screenshot of the post. The post upset them.

(7) On August 23, 2018, the administrator reported to work and asked the staff present at that time to tell claimant not to report to work until he spoke with her later that day because the staff members were upset about the Facebook post.

(8) The employer received more than 30 voicemails from patients who were upset by the Facebook post, expressing disappointment that the employer had a staff person working in its office who would post a comment like claimant's comment. The administrator called the patients and some expressed that they were concerned that they would not be treated fairly at the clinic if claimant were employed there. Patients called and canceled appointments stating that they were doing so because of the Facebook post, and other community members called and complained about the post.

(9) On August 23, 2018, the administrator discussed the Facebook incident with the employer's board of directors. The administrator then discussed the incident with the employer's physician owners, attorney, and human resources company. They decided to discharge claimant for violating the employer's policy

against harassment and discrimination. The administrator called claimant and notified her of the employer's decision.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because of claimant's post to Facebook on August 22, 2018 containing statements that were discriminatory on their face, based on race and national origin, directed in general toward Latinos and Mexicans. The employer had a right to expect employees to refrain from engaging in discriminatory conduct connected with work, including making discriminatory statements. We infer that claimant understood the employer's policy as a matter of common sense and because it was contained in its employee handbook, a copy of which claimant read and acknowledged that she understood at hire.

Claimant argued at hearing that she should not be disqualified from unemployment insurance benefits because her Facebook post "had nothing to do with the clinic." Audio Record at 45:10 to 45:15. It is undisputed that her conduct took place at home, outside of work hours, on her own device. When a claimant was discharged for off-duty conduct, it is necessary to determine whether the conduct was "connected with work," such that the employer had the right to expect her to refrain from such conduct. For off-duty conduct to be connected with work, it must affect, or have a reasonable likelihood of affecting, the workplace. *Levu v. Employment Department*, 149 Or App 29, 941 P2d 1056 (1997); *Erne v. Employment Div.*, 109 Or App 629, 633, 820 P2d 875 (1991).

In the present case, there is a connection between claimant's Facebook post and her position doing referrals and authorizations for the employer, a medical provider. Claimant was discharged because she made discriminatory statements about Latinos, Mexicans and immigrants on a Facebook page that identified claimant as an employee of Columbia Gorge Family Medicine, which provides medical care for many Latinos. Claimant had to know patients and potential patients would see or learn of her post and that many of the employer's patients were members of the groups she offended. She had daily contact with patients, and 25 percent of the employer's patients were Latino. Moreover, based on patients' reaction in calling and canceling appointments and their explanations to the administrator for doing so, the record shows that claimant's Facebook post affected the employer's workplace by jeopardizing patients' trust that the employer would ensure nondiscriminatory provision of health care

services by its clinic. It was also upsetting to claimant's coworkers. Therefore, claimant's conduct was connected with her work, claimant should have reasonably foreseen that connection, and the employer had a right to expect her to refrain from such conduct.

To be misconduct, the conduct must have been willful or a conscious act where claimant knew or should have known her conduct would probably violate the employer's policy. Claimant asserted that she was not "tech savvy" and thought only her friends and family could see her post. Audio Record at 32:29 to 33:36. Claimant testified that her daughter helped her set up her Facebook account, and claimant could have asked her daughter to limit her account to Facebook "friends." *Id.* Even had she limited her account, however, it is common knowledge that social media posts may be shared and thus become public even if published only to friends and family. Moreover, claimant knew some of her coworkers were Facebook "friends" who could see her post. Claimant also knew or should have known that the employer had patients who would be offended by her post. Claimant contended that she did not intend to "hurt anyone" and that her post was "misunderstood." Audio Record at 34:08 to 34:25. However, we find that testimony disingenuous because claimant testified that she was in a "frustrated" state of mind when she posted the statements, and stated in the post that she "[was] sure [she would] not get good response" from it, showing she knew the statements would be offensive to some of its recipients, but posted them on Facebook anyway. Audio Record at 38:09 to 38:44. We therefore conclude that claimant's conduct was a willful violation of the employer's policy.

Claimant's conduct cannot be excused as a good faith error. Claimant could not have reasonably believed that the employer would condone her conduct of posting discriminatory statements about Latinos on social media, especially given that it was foreseeable that such conduct would make her employer and patients question her ability to interact with and conduct referral and authorizations for Latino patients in an unbiased manner.

Claimant's Facebook post on August 22, 2018 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, behavior that does not exceed mere poor judgment by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, claimant deliberately made statements that she knew or should have known were offensive and unlikely to be interpreted as other than expressing derogatory views about the groups to which they referred. The employer understandably did not want to have those statements associated with it. A reasonable employer would objectively conclude that claimant's deliberate posting of offensive, discriminatory statements on August 22, 2018 exceeded mere poor judgment and caused an irreparable breach of trust in the employment relationship. For this reason, it is not excusable as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-118371 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: December 7, 2018

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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.

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