

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1114

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84534). Claimant filed a timely request for hearing. On November 27, 2018, ALJ M. Davis conducted a hearing, and on November 28, 2018 issued Order No. 18-UI-120408, affirming the Department's decision. On December 4, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Comfort Inn & Suites Boardwalk employed claimant as assistant general manager from February 6, 2018 until September 15, 2018.

(2) The employer expected that, while on duty, claimant would spend the work time completing assigned tasks or pursuing education applicable to his position and would not, among other things, devote work time to personal endeavors or personal entertainment. Claimant understood the employer's expectations.

(3) On September 9, 2018, while on duty, claimant watched football games or videos throughout the workday on computers in the back room and in the general manager's office. At least one subordinate employee interrupted claimant on a work-related matter while he was watching football and had to wait before claimant addressed the matter since he was engrossed in the football he was watching. A few hours later, the same subordinate again had to interrupt claimant on another work-related matter while claimant continued to watch football. At least one other subordinate employee also observed claimant watching football during the workday. The subordinates reported their observations to the general manager on approximately September 11, 2018. Sometime on or after September 11, the general manager reviewed the internet history from September 9 for the computer in the backroom, and it showed that between 9:12 a.m. and 2:00 p.m., claimant accessed numerous websites devoted to football for long periods, including livefootball.com, watchnfl.com, foxsports.com, livestreamz.net, nfl.com/kickoff and an NFL game streaming site. The computer history of the football websites that claimant accessed during work hours on September 9 was three pages in length.

(4) On September 15, 2018, the general manager accompanied by the regional manager met with claimant to discuss his computer activities on September 9. At the meeting, the general manager told claimant that he was discharged for watching football videos and visiting football-related websites during the workday on September 9. Claimant did not deny that he had watched the videos or visited the football websites or assert that he had done so because a guest had asked him to look up the start times for football games on September 9.

CONCLUSIONS AND REASONS: 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 connected with work. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While claimant testified that he understood the employer's prohibition against using the employer's computers for personal entertainment purposes during a work day, he contended that he had accessed football websites on September 9 to satisfy the request of a guest who wanted to know the starting times of football games scheduled for that day. Audio at ~22:44. However, claimant did not explain why the computer history of one of the computers he used that day showed that he had accessed numerous football-related websites when, if he was merely checking start times, he would have been expected to have accessed far fewer sites and for a significantly shorter period of time than over approximately six hours. In addition, claimant testified that he did not explain to the general and regional managers at the meeting in which he was discharged that he did not access the football-related websites on September 9 for personal entertainment purposes, but to fulfill a guest's request. Audio at ~23:40. Had claimant actually visited those websites for a business-related purpose like a guest's request, he likely would have informed the managers that the information on which he was being discharged was inaccurate. The employer's witnesses at hearing had in their possession the September 9 history from one of the computers that claimant used on that day, and claimant did not dispute the accuracy or reliability of that history with respect to his computer usage. It appears likely that claimant used the computer as shown in the history and that he visited several football-related websites over a lengthy period of time that day for personal entertainment purposes. By doing so, claimant willfully violated the employer's expectations.

Although claimant may have willfully violated the employer's expectations on September 9, his violation may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior may be excused if, among other things, it did not exceed mere poor judgment by causing an irreparable breach of trust in the employment relationship or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer's witness testified that the employer discharged claimant because, as result of the nature of his violation, the employer thought "there was an overall failure [by claimant] to provide a good manager-level presence" for the staff subordinate to him, and that he was no longer be able lead by example in obtaining staff compliance with the employer's policies. Audio at ~19:39. Here, claimant's

disregard of the employer's standards on September 9 was flagrant, took place over several hours in a workday and he apparently did not try to hide from subordinate staff what he was doing, or that he considered himself to be exempt from the employer's policies. On this record, a reasonable employer would conclude that by his behavior on September 9, claimant was no longer able to effectively and credibly act as a role model for subordinates, or to otherwise to compel the respect of the subordinates for the employer's standards. As such, a reasonable employer would objectively conclude that claimant's behavior on September 9 caused an irreparable breach of trust in the employment relationship, and that a continued employment relationship with claimant was impossible.

Claimant's willful violation of the employer's standards on September 9 also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend or suggest that he misunderstood the employer's prohibition against engaging in personal entertainment activities during work hours or that such a misunderstanding led him to watch the football videos that he did for an extensive period of time on September 9. As such, the record fails to show that claimant's behavior on September 9 was due to a good faith error.

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

DECISION: Order No. 18-UI-120408 is affirmed.

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

DATE of Service: January 4, 2019

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 محكمة 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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