

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0170

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 74645). The employer filed a timely request for hearing. On December 3, 2018 and January 3, 2019, ALJ S. Lee conducted a hearing, and on January 30, 2019 issued Order No. 19-UI-123682, affirming the Department's decision. On February 19, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments to the extent they were based upon the hearing record.

FINDINGS OF FACT: (1) Oswego Cove Apartments employed claimant as an assistant office manager from March 8, 2017 to August 18, 2018.

(2) The employer had a policy prohibiting harassment and sexual harassment. The policy stated, "In all instances, the complaint and investigation will be handled promptly and in as confidential manner as possible given the need for investigation, and no employee will be retaliated against in any way for notifying the company in good faith of possible harassment." Exhibit 1. The employer had a confidentiality policy. That policy required employees to "keep confidential all personal information furnished to us [the employer] by rental applicants and residents . . ." Exhibit 1. The employer's policy also prohibited "[w]illful, deliberate violation of safety rules." Exhibit 1. Claimant received and initialed or signed for receipt of those policies and, on March 8, 2017, affirmed that she read the policies.

(3) Over time, the employer became concerned that claimant was not adhering to its policies and procedures with respect to allowing RV parking on the employer's premises, ensuring apartments were clean prior to a new tenant's move-in, timely depositing checks, and complying with the manager's

instruction to deposit checks, among other things. The employer issued verbal and written warnings to claimant for various conduct.

(4) On August 5, 2018, an unknown man called the employer's office and spoke to claimant. He asked claimant questions about her appearance and attire and made sexual noises that suggested to claimant that he was masturbating during the call. Claimant hung up on the man and reported the call to a manager. The manager instructed claimant to obtain the man's phone number if he called again. The man called several more times but claimant could not obtain the number. Claimant reported the man to police, who took note of her report but did not send an officer or otherwise investigate the caller.

(5) By August 5, 2018, the manager had concluded that claimant "had been on and off not doing things for a while now and it was just like the last straw." Exhibit 1. The manager intended to either give claimant another written warning or talk with claimant about her performance the following Friday and "go from there." *Id.* On August 10, 2018, the manager gave claimant another warning.

(6) The unknown man continued to call the office when claimant was working. On August 11, 2018, claimant reported to the managers that she felt unsafe because of the man's calls. Claimant carried pepper spray at work for protection. Claimant asked the managers to activate the recording feature in the security camera. The managers instructed claimant to block the man's phone number on the land-line and transfer the calls to her cell phone to maintain a call log. The managers told claimant to contact police and file a report. Claimant had already done so.

(7) On August 12, 2018, claimant reported to the property manager that she still felt unsafe because of the man's calls. The property manager instructed claimant to go home if she felt unsafe, to lock the door when she was on premises if she felt unsafe, and to transfer the calls to someone else. Later that day, the community manager arrived at the office and found claimant inside with the door open and unlocked. Claimant told the community manager she felt safe with the door open at that time because a resident was in the clubhouse with her. On August 12, 2018, the community manager called police to report the man's calls.

(8) On August 14, 2018, claimant continued to exchange text messages with the community manager and property manager regarding the man's calls and the functionality of the employer's security cameras. Claimant included her ex-husband, Reed, in the messages. Claimant mistakenly believed the managers knew that Reed was an attorney based upon casual conversations that had occurred earlier in her employment. Claimant thought Reed could help them understand her concerns. The managers thought it was inappropriate for claimant to include Reed in the text messages and felt she was breaching confidentiality by including him in text messages about the employer's security protocols.

(9) The managers considered claimant's failure to keep the doors locked or go home on August 12th to have been an insubordinate act on claimant's part, since she had reported feeling unsafe and had been instructed to keep the doors locked or go home if she felt unsafe. The managers considered claimant's inclusion of Reed in the August 14th text messages to be a breach of confidentiality. On August 18, 2018, the employer discharged claimant for those reasons.

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. 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.

The proximate cause of the employer's decision to discharge claimant when it did occurred after the August 10th warning; claimant's specific conduct after that date included her failure to keep the door locked or go home from work on August 12th and her inclusion of Reed in text messages she exchanged with the employer and manager on August 14th. Those incidents are therefore the proper focus of the initial misconduct analysis.

The employer reasonably expected claimant to adhere to its safety rules, which include adhering to reasonable instructions given to claimant for the purpose of ensuring her safety at work. The record shows that the managers instructed claimant to keep the door locked or go home if she felt unsafe. The instruction was therefore conditional upon whether or not claimant felt unsafe at any given time. The community manager discovered claimant at the office with the door open on August 12th. Had claimant felt unsafe at the time of that incident, claimant's conduct in leaving the door open might be considered a violation of the employer's reasonable safety instructions. At the time of that incident, however, claimant felt safe in the office due to the presence of a tenant in the clubhouse. Because claimant left the door open at a time she did not feel unsafe, her conduct in leaving the door open was not a violation of the community manager's instructions or the employer's safety rules. The employer has not shown misconduct with respect to that incident.

The employer likewise had a reasonable expectation that claimant keep tenant or prospective tenant information confidential, in accordance with its policy. Claimant did not violate that policy by including Reed in the August 14th text messages, because the confidentiality policy only covered the personal information of tenants and prospective tenants, and the text messages claimant sent to Reed did not address or include any confidential tenant or prospective tenant information.

The record also did not show that it is more likely than not that claimant's inclusion of Reed in the August 14th text messages violated the employer's harassment policy. The portion of the employer's policy pertaining to harassment does not expressly require employees to keep their complaints of harassment confidential, it states that any complaint and investigation "will be handled promptly and in as confidential manner as possible." In other words, the employer's policy made it incumbent upon the employer to handle reports of complaints and investigations confidentially. On its face, it did not place the responsibility for confidentially "handling" harassment complaints upon the employee or require that employees refrain from disclosing their concerns to others. The record does not establish that the employer's policies required claimant to keep her concerns about her workplace safety or being harassed by the caller confidential, or that the policies made divulging concerns to a third party a violation of the employer's policies. The employer therefore did not establish by a preponderance of the evidence that

claimant violated the employer's harassment or confidentiality policies with respect to including Reed in the August 14th text messages.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits because of this work separation.

DECISION: Order No. 19-UI-123682 is affirmed.

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

DATE of Service: March 29, 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 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 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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