

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0420

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 20, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115103). Claimant filed a timely request for hearing. On March 29, 2019, ALJ Meerdink conducted a hearing, and on April 5, 2019 issued Order No. 19-UI-127701, affirming the Department's decision. On April 25, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Mental Health Association of Oregon (MHAO) employed claimant from August 2016 to January 16, 2019, last as a program manager.

(2) Two employees with whom claimant worked, (MC) and (JC), obtained required licensures or certifications to engage in their employment. To maintain those certifications, the employees were required to maintain their sobriety.

(3) Claimant had a close friend (KG) who began working for the employer in August 2017, in whom claimant regularly confided regarding her concerns about the employer's work culture. During the summer of 2018, while away from work, claimant discussed with KG statements made in jest by MC and another coworker about their prescription medications that, "maybe we will have to trade sometime." Exhibit 1. Claimant mentioned it in confidence to KG as an example of why she was frustrated with the employer's work culture. Claimant also told KG that she was concerned about JC because JC had told her in 2016 that she had been taking an opioid medication, and claimant believed

that during work sessions in 2018, JC was modeling symptoms “that might outwardly appear to be substance related” in front of others in early recovery, which did not look good for the organization.

(4) On November 13, 2018, MC had a conversation with KG in which KG reportedly told MC that in the past, claimant had told KG that MC “regularly drinks and trades pills,” and had made comments about JC, including, “[JC] ...whatever she is on all the time.” Exhibit 1.

(5) On November 24, 2018, the employer gave claimant a copy of its new handbook that included a new section, Section 6.1, which specifically prohibited “[m]aking maliciously false statements about co-workers,” and “[t]hreatening, intimidating, coercing and otherwise interfering with the job performance of fellow employees or visitors.” Claimant acknowledged receiving that handbook on November 24, 2018.

(6) On or about December 3, 2018, both MC and JC filed grievances against claimant for reportedly making “maliciously false” statements against them to KG. The employer began an investigation concerning the grievances in which it spoke to claimant, KG, MC and JC.

(7) On December 5, 2018, claimant spoke to a supervisor, DD, about general work plans and strategies. DD later disclosed to the employer that in that conversation, claimant shared with her that JC “hated” her and wished that DD “would get hit by a truck,” and that during DD’s absence from work receiving cancer treatment, the employer had been discussing ways to “effectively get rid of [DD]” without inviting a discrimination lawsuit. Exhibit 1. On December 18, 2018, DD shared that information with the employer in an email. Exhibit 1. During the investigation JC denied making the statements and the employer denied discussing ways to “effectively get rid of [DD]” without inviting a discrimination lawsuit. Exhibit 1.

(8) On January 16, 2019, after completing its investigation, the employer discharged claimant for making maliciously false statements about MC, JC and DD, and interfering with their job performance in violation of its Handbook Section 6.1.

CONCLUSIONS AND REASONS: The employer discharged claimant for an isolated instance of poor judgment, and not 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) (December 23, 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for making maliciously false statements about MC, JC and DD, and interfering with their job performance in violation of its Handbook Section 6.1. Exhibit 1. Order No. 19-UI-127701 concluded that the employer discharged claimant for misconduct, reasoning as follows:

The employer discharged claimant for malicious gossip. As a matter of common sense, it is expected not to speak about and to coworkers in such malevolent and undermining ways. Because claimant repeated this behavior, first with [JC] and subsequently with [DD], her repeated conduct was at least a wantonly negligent disregard for the employer's interests. The record is not persuasive that claimant genuinely believed her statements comported with the employer's expectations. The employer established that claimant committed misconduct.

Order No. 19-UI-127701 at 3.

We agree that claimant's statements to DD were, at best, wantonly negligent. Claimant did not dispute that she made the statements to DD, which occurred on December 5, 2018, after she received the employer's new handbook, which specifically prohibited "malicious gossip." Although claimant explained that she made the statements to warn DD to protect herself, she did so after the investigation into her prior statements to KG had started. Viewed objectively, even repeating comments to DD that a coworker "hated" her and hoped that she "would get hit by a truck" more likely than not was a malicious act of gossip which would likely interfere with DD's job performance in working with JC. Transcript at 35. Claimant knew or should have known that making such comments to DD probably violated the standards of behavior concerning gossip the employer had the right to expect of her, at least after November 24, 2018, when claimant received the employer's new handbook, which included the new standards. Claimant's conduct on December 5, 2018 was, therefore, at best, wantonly negligent.

However, we disagree that claimant's conduct concerning DD cannot be excused as an isolated instance of poor judgment. An instance of poor judgment is isolated if it is a single or infrequent occurrence rather than a repeated act or pattern of willfully or wantonly negligent behavior. OAR 471-030-0038(1)(d). Here, claimant disputed that she made the specific comments attributed to her in the grievances filed by MC and JC, which were based on hearsay evidence of a discussion KG apparently had with MC on November 13, 2018, prior to the effective date of the employer's gossip policy. Exhibit 1. Claimant also explained that she made the comments in confidence to KG, who was her friend, outside of work based on her frustration with the employer's work culture rather than based on some malevolent intent to gossip about MC or JC. Exhibit 1. Absent a reasonable basis for concluding that claimant was not credible in her explanation regarding the content and purpose of her statements to KG, we find that her first-hand testimony on that issue is not outweighed by the employer's hearsay evidence to the contrary. The evidence as to whether claimant willfully, or with wanton negligence, engaged in malicious or malevolent gossip about MC and JC therefore was, at best, equally balanced. Accordingly, the employer failed to meet its burden to prove that claimant's willful or wantonly negligent behavior on December 5, 2018 was a repeated act or part of a pattern of such behavior.

Under OAR 471-030-0038(1)(d)(D), an isolated act that violates law, is tantamount to unlawful conduct, creates irreparable breaches of trust in the employment relationship, or otherwise makes a continued employment relationship impossible exceeds mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). Here, claimant's statement to DD on December 5, 2018 was not unlawful, tantamount to unlawful conduct, and viewed objectively on its own, was not so

egregious that the employment relationship could not have been rehabilitated and claimant trusted after receiving a form of discipline short of termination to emphasize that she should not engage in similar conduct in the future.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Order No. 19-UI-127701 is set aside, as outlined above.¹

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

DATE of Service: May 31, 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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¹ This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.



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 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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