

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0524

Reversed
Disqualification

PROCEDURAL HISTORY: On April 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132740). Claimant filed a timely request for hearing. On May 30, 2019, ALJ Seideman conducted a hearing, and on May 30, 2019, issued Order No. 19-UI-130828, concluding the employer discharged claimant, but not for misconduct. On June 7, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision. EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Business Telephone Exchange dba Answernet Inc. employed claimant from August 21, 2017 until October 25, 2017 as a customer service representative.

(2) The employer provided telephone customer service for a variety of clients and their customers. The employer could lose clients if the employer's customer service representatives disconnected calls from the clients' customers before completing the calls. The employer expected its customer service representatives to refrain from disconnecting calls from customers before the calls were completed. The employer also expected customer service representatives to report immediately to the supervisor on duty any problems with the telephone system. Claimant understood the employer's expectations.

(3) On October 17, 2017, the employer gave claimant a corrective action for having her cellular telephone on the floor next to her at her workstation. Claimant had no other corrective actions before October 17.

(4) On October 24, 2017, claimant deliberately picked up and then hung up at least five calls from customers before the calls were completed. The workplace was not experiencing any systemic problems

with its telephones on October 24, and claimant did not report to the employer that she was having any problems with her telephone on October 24. The supervisor on duty observed claimant picking up calls and disconnecting calls from callers without giving the answer phrase for the business associated with the calls. The supervisor looked at claimant's call record and it showed more than five "very, very short" calls. Audio Record at 13:32 to 13:35. Claimant's managers listened to the recordings and did not hear claimant state anything when she picked up the calls.

(5) On October 25, 2017, claimant's manager and assistant manager met with claimant and asked her if she was "hanging up on people," on October 24. Audio Record at 13:36 to 13:48. Claimant said that she was, and provided no explanation for her actions.

(6) On October 25, 2017, the employer discharged claimant for disconnecting calls from multiple customers on October 24, 2017 before the calls were completed.

CONCLUSION 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. "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) (December 23, 2018). "[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). *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence). Isolated instances of poor judgment, good faith errors, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The order under review reasoned that claimant's conduct on October 24, 2017 was a wantonly negligent disregard of the employer's expectation that she not hang up on callers, but concluded that it was an isolated instance of poor judgment, and therefore not misconduct.¹ The order reasons that the final incident was an isolated instance, and does not address if claimant's conduct exceeded mere poor judgment.² However, the record shows that claimant's conduct in the final incident did exceed mere poor judgment.

The employer reasonably expected claimant to refrain from disconnecting calls from customers before the calls were completed. Claimant understood that expectation. Claimant asserted at hearing that a call was disconnected on October 24, 2017 because she was "having issues with her phone." Audio Record at 18:11 to 18:14. Claimant's assertion is outweighed by the evidence showing claimant disconnected more than one call intentionally. Claimant did not report to the supervisor on duty that she was having problems with her telephone. Claimant asserted that she did not tell the supervisor on duty on October

¹ Order No. 19-UI-130828 at 3.

² Order No. 19-UI-130828 at 3.

24 that she was having issues with her telephone because they “were so busy that there wasn’t time for [her] to ask.” Audio Record at 21:05 to 21:20. However, even one day later, claimant not only failed to tell the managers that she disconnected calls due to problems with her telephone, but also admitted that she deliberately disconnected the calls. Even faced with discharge, claimant did not tell the employer that the disconnected calls were due to telephone issues, asserting at hearing that she did not explain her telephone malfunctioned because she was “embarrassed and ashamed.” Audio Record at 29:02 to 29:19.

Claimant’s explanations at hearing attempting to explain why she did not tell the employer on October 24 or October 25, and why she admitted to deliberately disconnecting the calls, are not plausible in light of the weight of the more plausible evidence that claimant intentionally disconnected the calls and admitted to doing so because she had, in fact, deliberately disconnected the calls. It is implausible that claimant was too “embarrassed and ashamed” to tell the employer that a technical problem, rather than her willful acts, caused the disconnected calls when she knew the employer was going to discharge her for failing to complete the calls. Claimant therefore willfully violated the employer’s reasonable expectations on October 24.

Claimant’s October 24 conduct is not excusable under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. Conduct that creates an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible exceeds mere poor judgment and may not be excused as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(D). Here, claimant deliberately disconnected calls with customers and offered the employer no reason for her conduct, thus giving the employer no information it could use to remedy the situation other than to discharge claimant. Claimant’s primary duty was to complete customer service calls. Based on her admission without explanation that she had deliberately disconnected calls, viewed objectively, an employer could not trust that claimant would not engage in the same conduct again, thus making a continued employment relationship impossible. As such, claimant’s October 24 conduct was not excusable as an isolated instance of poor judgment.

Claimant’s conduct cannot be excused as a good faith error because claimant did not sincerely believe, and have a rational basis for believing, her conduct complied with the employer’s expectations. Nor does the record show that claimant’s intentional act was a result of mere inefficiency resulting from lack of job skills or experience.

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

DECISION: Order No. 19-UI-130828 is set aside, as outlined above.

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

DATE of Service: July 15, 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.

Spanishs

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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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