

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0540

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 23, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114210). Claimant filed a timely request for hearing. On May 17, 2019, ALJ Snyder conducted a hearing, and on May 24, 2019, issued Order No. 19-UI-130591, affirming the Department's decision. On June 6, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included a statement that he referred to and summarized during his hearing testimony. Transcript at 26-37. Because EAB's disposition of this matter is in claimant's favor, EAB need not and does not consider whether that statement should be admitted into the record as new information under OAR 471-041-0090 (May 13, 2019).

Exhibits 1 and 2 were admitted into evidence during the hearing, but were not marked as exhibits. EAB corrected this clerical oversight and marked Exhibits 1 and 2.

FINDINGS OF FACT: (1) Department of Corrections employed claimant from March 1, 2004 until March 28, 2019, last as a facilities maintenance specialist.

(2) The Department of Corrections facility at which claimant worked housed female inmates. As one of his duties, claimant trained a small group of inmates assigned to work in the facilities maintenance department.

(3) The employer expected that claimant would maintain professional boundaries with inmates, and that he would not become emotionally, romantically, or sexually involved with inmates. Claimant understood the employer's expectations.

(4) In 2012, a female inmate accused claimant of having a sexual relationship with her. On March 21, 2012, based on the inmate's allegations, police interrogated and then arrested claimant for second degree

custodial sexual misconduct and first degree official misconduct. The police held claimant in jail for a short period. Around that time, the employer placed claimant on leave and he stayed at home. No accusatory instrument was ever issued against claimant due to lack of evidence. Subsequently, claimant obtained a court order setting aside his arrest record. Claimant returned to work in April 2015.

(5) While claimant was on leave and at home between 2012 and 2015, he experienced dissociative episodes. Claimant had recurrent flashbacks when exposed to stimuli that evoked the trauma of the 2012 false accusations, interrogation, and arrest. Claimant experienced anxiety, panic attacks and had intrusive dreams. Claimant developed a generalized fear of being in public.

(6) Claimant's symptoms continued after he returned to work in 2015. Because he was working in the same correctional setting as he had in 2012, the work caused him to re-experience the trauma of 2012 and gave rise to the same symptoms. Claimant often felt unsafe at work. The symptoms that claimant experienced affected his judgment at work and his ability to appreciate the professional consequences of his actions. Claimant tried to ease his symptoms by using alcohol. When claimant quit using alcohol in July 2018, his feelings of dissociation and anxiety increased.

(7) Beginning before or around October 2018, claimant thought that a particular inmate wanted him to communicate with her on a personal basis and help her. The inmate told claimant her problems. The inmate expressed to claimant that he was valuable as a person and that she appreciated him. Claimant felt safe and protected against false accusations when he was in the inmate's company or by communicating with her.

(8) Sometime after October 2018, it came to the employer's attention that claimant's relationship with the female inmate might be inappropriate. On December 13, 2018, the employer placed claimant on home duty with pay while it investigated claimant's relationship with the inmate. The employer discovered that claimant had sent letters to the inmate using an alias instead of identifying himself by his true name. The letters expressed claimant's love for the inmate. The employer also discovered that claimant had opened an online messaging account using an alias that would allow claimant to communicate with the inmate when he was not at work. The employer further discovered that claimant had deposited \$300 in the inmate's account using the name of someone other than himself as the source of the funds. On one occasion, claimant briefly touched or brushed the inmate's hand, which the employer interpreted as holding the inmate's hand.

(9) On January 10, 2019, the employer interviewed claimant about his relationship with the inmate. On March 18, 2019, the employer met with claimant to give him an opportunity to refute the employer's allegations about having had an inappropriate relationship with the inmate or to raise mitigating circumstances. Claimant did not deny that he had engaged in the behaviors that the employer alleged. At the meeting, claimant attributed the behaviors that gave rise to the employer's allegations to undiagnosed Post-Traumatic Stress Disorder (PTSD). Claimant told the employer that PTSD had caused him to dissociate and disconnect from reality, to pursue contacts that make him feel safe, to engage in reckless behaviors, and to fail to appreciate the consequences of his behavior.

(10) On March 28, 2019, the employer discharged claimant for engaging in an emotional relationship with a female inmate in violation of its policies.

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. “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). 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).

Order No. 19-UI-130591 concluded that the employer discharged claimant for misconduct. While the order noted that claimant presented “compelling evidence” that he was not fully conscious of his behavior because of PTSD, it reasoned that “claimant knew or should have known that his conduct would probably result in a violation of the Employer’s expectations,” and that, consequently, claimant violated the employer’s standards with wanton negligence. Order No. 19-UI-130591 at 3. The order is not supported by the record.

At the outset, claimant did not dispute that he engaged in the behaviors that the employer alleged. The employer did not dispute that claimant has had PTSD since 2012, that the behaviors that led to claimant’s discharge might have arisen due to PTSD, or that PTSD might have impaired claimant’s professional judgment and his ability to appreciate the consequences of his behaviors.

Claimant offered progress notes from the psychologist treating him for PTSD. Exhibit 1 at 29-31. Those notes corroborate claimant’s PTSD and the severity of claimant’s symptoms, including that they “appear to have impaired his judgment at work, causing him to trust one of the inmates with whom he eventually had an emotional affair, leading to his termination at work.” Exhibit 1 at 30. The psychologist’s professional opinion reasonably suggests that claimant’s behaviors in relation to the inmate may not have been voluntary, and may not have been undertaken with a conscious appreciation that they would probably result in a violation of the employer’s standards. In other words, the psychologist’s opinion gives rise to a colorable claim that claimant’s behaviors were not accompanied by the state of mind required to establish willful or wanton negligence. The evidence that the employer presented did not rule out, more likely than not, that claimant lacked the required mental state for a finding of misconduct. The employer did not therefore meet its burden to show claimant’s misconduct.

The employer discharged claimant, but it did not show that it was for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-130591 is set aside, as outlined above.

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

DATE of Service: July 12, 2019

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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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