

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0689

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 23, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144827). Claimant filed a timely request for hearing. On June 27, 2019, ALJ Frank conducted a hearing, and on July 5, 2019 issued Order No. 19-UI-132825, reversing the Department's decision. On July 25, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the employer'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) Stonemor GP LLC employed claimant from February 29, 2016 until April 26, 2019, last as a sales manager.

(2) As sales manager, the employer authorized claimant to access the work email account of a subordinate employee who had separated from the employment only after the employer's IT department notified claimant that she had access. Claimant was aware of this expectation. The employer also expected claimant not to access or copy programs, data, or documents that did not belong to her without the permission of the account holder, which included a separated employee's personal emails or personal email account. Claimant understood that expectation as a matter of common sense.

(3) Sometime before April 19, 2019, an employee who was subordinate to claimant notified the employer that she was quitting. When the former employee gave her notice, the employer instructed claimant to let her go immediately and to not allow her to work during her notice period. Claimant did so.

(4) On April 19, 2019, claimant opened a work laptop that had been assigned to the former employee. At that time, the employer's IT department had not notified claimant that she had permission to access the

former employee's work email account. When claimant powered up the laptop, the former employee's personal email account was open, as was a personal email to the former employee. Both the former employee's personal email account and the employer's work email accounts, including the former employee's work email, used the Google Gmail platform. However, personal email accounts and work email accounts in Gmail were different in appearance.

(5) Claimant saw that the open email to the former employee was from one of the employer's competitors and indicated that the former employee had accepted a job with the competitor to begin after she left work with the employer. Claimant forwarded that email as well as two other emails from prospective employers that were in the former employee's personal email inbox to her own work email account. Claimant forwarded the emails to herself because she wanted the employer to be able to show that the former employee had a new job at the time she had quit work in the event that the former employee pursued a claim against the employer for not allowing her to work out her notice period. Claimant also wanted the employer to have evidence of the new job in case the former employee pursued an unemployment insurance claim.

(6) On April 23, 2019, the former employee contacted the employer stating that her personal email account had been accessed, and some emails in it had been forwarded to claimant's work email account.

(7) After the former employee contacted the employer, the employer spoke to claimant. Claimant stated she had accessed an email account of the former employee, but had not known or suspected that it was the former's employee's personal email account.

(8) On April 26, 2019, the employer discharged claimant for accessing the personal email account of the former employee and reading and forwarding personal emails.

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). Isolated instances of poor judgment and good faith errors are not misconduct. 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).

Claimant agreed that she did not have authorization from the IT department when she accessed the former employee's personal email account and personal emails on April 19, 2019. Transcript at 17. Claimant also contended that she was not aware that she had accessed the former employee's personal email account and thought she had accessed the former employee's work email account on April 19, 2019. Transcript at 20. Although claimant maintained that Gmail personal email accounts and Gmail

work email accounts were not as distinctly different in appearance as the employer's witness testified, it is assumed for purposes of this decision that they were. Transcript at 12, 13, 20, 21. It is also assumed that, based on this difference in appearance, claimant knew or should have known on April 19, 2019 that she had accessed the former employee's personal email before forwarding the emails from the personal account to her work account. By doing so, claimant violated the employer's standards with at least wanton negligence.

However, claimant's wantonly negligent behavior is not misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

To be excused as an isolated instance of poor judgment, the issue in this case is whether claimant's behavior on April 19, 2019 meets the requirements set out in subparts (A) and (D), above. With respect to subpart (A), the evidence did not show that claimant had ever before April 19, 2019 failed to comply with the employer's standards of behavior. While claimant violated two expectations of the employer on April 19, 2019 – accessing the former employee's account before having authorization from IT and accessing the former employee's personal email account and personal emails without the former employee's permission – she did so simultaneously and as part of the same episode. Those violations are properly considered a single occurrence for purposes of the isolated instance of poor judgment exclusion. Accordingly, claimant's behavior on April 19, 2019 was a single or infrequent occurrence. It meets the first requirement to qualify as an isolated instance of poor judgment.

However, claimant's behavior on April 19, 2019 may not be excused as an isolated instance of poor judgment if it exceeded mere poor judgment as set out in subpart (D). At hearing, claimant did not deny that she accessed the former employee's personal email account and did so before she received notice of access from the IT department. In mitigation, however, it appears that claimant accessed the former employee's personal email account and read and forwarded the emails in quick succession in an attempt to protect the employer's interest, both as to unemployment insurance claims that the former employee might bring as well as to claims for lost wages. It also appears that claimant did not plan in advance to violate the employer's expectations, but did so impulsively due to the happenstance of powering up the laptop and observing that a personal email and personal email account had been left open.

Based on the state of mind that accompanied claimant's behavior in violation of the employer's standards, an employer would not objectively conclude that it could not trust claimant in the future to comply with its standards of behavior, that claimant's behavior on April 19, 2019 had caused an irreparable breach of trust in the employment relationship. Nor does the record show that claimant's behavior otherwise made a continued employment relationship impossible. Having met the second requirement, claimant's behavior on April 19, 2019 is excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant, but not for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 19-UI-132825 is affirmed.

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

DATE of Service: August 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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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

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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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