

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0977

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 30, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the claimant was discharged for misconduct connected with work (decision # 63945). The claimant filed a timely request for hearing. On September 24, 2019, ALJ Seideman conducted a hearing, and on September 26, 2019 issued Order No. 19-UI-137154, affirming the Department's decision. On October 14, 2019, the claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant did not declare 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). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Society of St. Vincent DePaul employed claimant, last as a receptionist, from July 5, 1978 to August 12, 2019.

(2) The employer had various concerns about claimant's employment, and on April 20, 2019 entered into a "last chance agreement" with her. The agreement claimant signed on that date required that claimant "must meet all established standards of conduct and job performance" and "may be subject to discipline, including termination, for failure to meet SVdP's standards of conduct and job performance." Exhibit 5, Exhibit 6.

(3) The employer permitted employees to listen to the radio at their work stations, provided that the employees complied with its photo and music devices policy. The policy required employees to follow their supervisors' instructions regarding music player use, and that use of the music player must not interfere with the employees' or coworkers' abilities to do their jobs. Claimant understood the policy.

(4) Claimant listened to the radio at her reception desk in the lobby. The station claimant listened to regularly, played a show that included one-sided political commentary.

(5) During the weeks prior to August 5, 2019, two coworkers and a customer complained to claimant's supervisor that the radio station claimant played was offensive to them. On August 5, 2019, claimant's supervisor gave claimant a verbal warning that included an instruction to "change her radio station immediately to something else that is appropriate to all ears." Exhibit 3. The supervisor specifically told claimant that she could not listen to that station in the lobby.

(6) Claimant complied with the supervisor's instruction for a short time while the supervisor was at claimant's work location. The supervisor then worked away from claimant's work location. During the time the supervisor was away from claimant's work location, claimant resumed playing the same radio station at her reception desk, and played it "all week," loudly enough to be heard in the lobby. Exhibit 4.

(7) Prior to August 12, 2019, additional people had complained to the supervisor that claimant continued to play the offensive radio show at the reception desk. On August 12, 2019, the supervisor discharged claimant for violating her "very clear directive that that radio station absolutely could not be played down there." Audio recording at 27:30-28:00.

CONCLUSIONS 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). OAR 471-030-0038(3)(b) provides that some conduct, including isolated instances of poor judgment and good faith errors, is not considered misconduct.

The employer reasonably expected claimant to comply with its music devices policy by following her supervisor's instructions and ensuring that her use of the radio did not interfere with others. Claimant understood that policy. On August 5, 2019, claimant's supervisor gave her a specific instruction not to play a particular radio station at the reception desk because others found it offensive. Claimant understood that expectation and did not play that radio station when her supervisor was at her work location. When the supervisor worked elsewhere, however, claimant resumed playing that same radio station. By intentionally playing a radio station the supervisor had instructed her not to play, claimant willfully violated the employer's music devices policy and her supervisor's instruction.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined as "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior," that involves poor judgment. OAR 471-030-0038(1)(d)(A). A judgment is an evaluation resulting from discernment and

comparison, and every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment. OAR 471-030-0038(1)(d)(B). After receiving a verbal warning not to play that specific radio station again at the reception desk, claimant knowingly and intentionally continued to play the same station “all week.” Each time claimant decided to tune the radio to that particular station, or allowed that radio station to continue playing at the desk while she worked there, required claimant to form and execute a conscious decision to violate her supervisor’s instruction, and, consequently, the music devices policy which required her to comply with such an instruction. Claimant’s conduct therefore involved repeated instances of willful or wantonly negligent poor judgment, and cannot be considered “isolated” or excused as an isolated instance of poor judgment.

Claimant’s conduct also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant essentially alleged at the hearing that her conduct was a good faith error because, although the supervisor “probably did” tell her to change the radio station, “I knew that she didn’t personally care about this, that the object was to not have any – not have her hear any more complaints about anything that I was doing at the front desk, be it radio, performance, rudeness, whatever.” Audio recording at 32:15-32:40. Claimant testified that even though she continued to play the radio station, by playing it more quietly “I thought I was accomplishing the goal of the directive, which was not to have any complaints and not interfere with my own job, the clientele, or anyone else doing the job.” Audio recording at 32:45-33:00. At the time claimant played the radio station, however, she had specifically been told not to play that radio station, not merely not to have more complaints occurred, and knowingly violated the supervisor’s instruction to that effect. Even if claimant had only been instructed not to have more complaints lodged against her, claimant could not have sincerely believed that continuing to engage in the same conduct – playing that radio station which had resulted in many complaints over at least a two-week span of time – would achieve the goal of not having more complaints lodged against her. Claimant did not sincerely believe, or have any basis for believing, that the supervisor would either condone her continued engagement in conduct that had resulted in multiple complaints, nor that her continued playing of that particular radio station was not in violation of the supervisor’s August 5th instructions to her. Claimant’s conduct therefore was not the result of a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-137154 is affirmed.

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

DATE of Service: November 19, 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 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 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

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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