

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0028

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #151105). Claimant filed a timely request for hearing. On December 30, 2019 and January 3, 2020, ALJ Murdock conducted hearings, and on January 10, 2020 issued Order No. 20-UI-142468, affirming the Department's decision. On January 15, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) The Center for Developing Hope, LLC, an outpatient mental health clinic, employed claimant as Practice Manager from December 1, 2018 until October 31, 2019. At the time of her hire, the owner/president of the company (owner), who also served as a mental health nurse practitioner at the clinic, had been friends with claimant for four or five years, dating back to a prior working relationship between the two where claimant served in a supervisory role over the owner.

(2) Claimant worked Monday through Friday from 8:00 a.m. to 5:00 p.m. As Practice Manager, claimant was responsible for the internal workings of the business, which freed the three practitioners on staff to treat patients. Among claimant's responsibilities were reception work, scheduling appointments, checking in patients, returning patient's telephone calls, establishing patient/practitioner boundaries, managing medical records, sending secure medical faxes, obtaining prior authorizations for medications, and billing. On weekends, claimant would call and check voice messages left on the employer's phone lines to ensure that any patient emergencies were immediately referred to one of the providers. Claimant's responsibilities did not include direct patient care. Claimant worked from home on some occasions.

(3) On October 9, 2019, the owner and claimant had a regularly scheduled executive leadership meeting. During the meeting, claimant sat at the owner's desk, while the owner sat in a chair between the desk and the office door. Claimant felt uncomfortable with this seating arrangement. The discussion became heated when the owner and claimant discussed whether the business needed to hire a receptionist. In addition, the owner's raised voice, clenched jaw, and "intense body language" intimidated claimant. December 30, 2019 hearing, Transcript at 27. Claimant did not express her discomfort to the owner during this meeting. Conversely, the owner perceived that claimant acted disrespectfully towards him during the meeting by speaking to him with a raised voice and glaring at him. The owner expressed the perceptions to claimant during the meeting, which made her angry.

(4) On October 15, 2019, claimant sent the owner an email stating that she felt intimidated by the owner's actions during the October 9, 2019 meeting and provided examples of some of the owner's behaviors that led to her feeling. In addition, claimant requested that the owner not sit between her and the door during future meetings because it made her nervous.

(5) On October 18, 2019, claimant and the owner held another meeting. The owner sat behind his desk to ensure he was not sitting between claimant and the door. The meeting consisted of the owner reading a previously prepared letter to claimant. The letter began with a prayer then generally addressed the owner's concerns over claimant's work performance over the preceding two months, as well as the owner's concerns about claimant's well-being. The letter included references to nine patient complaints directed at claimant related to her depressed or disrespectful presentation. The letter also addressed the owner's concerns over missed billing deadlines. Conversely, however, the letter also noted that the meeting was "not about [claimant's] performance," that even when claimant was functioning at 75% of her best that it was "better than most peoples 100%," and that claimant was "foundational for this company and ... the face of this company." Exhibit 1 (letter from owner to claimant) at 1, 3. The owner also acknowledged that it was only after the October 9, 2019 meeting went "south" that he recognized he needed to have a conversation with claimant "about the changes [he had] seen in [her] as well as the complaints." Exhibit 1 (letter from owner to claimant) at 3. The letter concluded by telling claimant, "Please do what you need to do for the rest of the day. If you need to go home feel free to do so." Exhibit 1 (letter from owner to claimant) at 4. Claimant went home after the meeting.

(6) On October 21, 2019, claimant appeared for work. While at the office, claimant experienced shaking symptoms and vomited. She notified one of the other providers that she was going to go home and texted the owner to this effect later.

(7) From October 22 to October 30, 2019, claimant called out sick, notifying the employer each morning of her sickness. Claimant felt distraught, traumatized, and did not know what to do to handle the situation with the owner. She did not seek the assistance of a healthcare professional. During that time, claimant worked part-time from home "triaging" telephone calls to the business, returning client calls, scheduling appointments, and answering business-related questions emailed to her by the owner. December 30, 2019 hearing, Transcript at 20. During this period, claimant would not take any calls from the owner. She told him she was not feeling well enough to talk over the phone. The owner did not express any concerns to claimant about claimant working from home during this period.

(8) On October 30, 2019, the owner texted claimant asking when she would be returning to work. Claimant responded to the owner in an email that included an attached letter. In the letter claimant, expressed her feelings that she currently felt unsafe at the worksite based on her feeling that the owner often made inappropriate comments and was harassing her. Claimant's letter also defended her work performance and expressed her commitment to returning to the worksite once the owner took necessary steps to assure her safety, but stated that in the meantime, she would work from home.

(9) On October 31, 2019, the owner sent a letter to claimant, via email, terminating her employment. The owner discharged claimant based on multiple complaints from clients, missed billing deadlines, and claimant's absence from work from October 21, 2019 through October 31, 2019, and the resulting impact of that absence on the business. The owner decided to discharge prior to receiving claimant's October 30, 2019 letter.

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 demonstrate misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 20-UI-142468 concluded that claimant willfully violated the employer's reasonable standards of behavior and willfully disregarded the employer's business interests based on her pattern of negative behavior. Specifically, the order concluded that claimant "refus[ed] to return to work at the office for several days with no exigent circumstances to prevent it, refused to speak to the president about her workload on those days, irrationally and unfairly accus[ed] the [owner] of severe violations and mistreatment, refus[ed] to acknowledge any wrongdoing on her own part, and ma[de] vague and illogical demands of him." Order No. 20-UI-142468 at 4.

The record does not support the order's finding that claimant's absences from work from October 22, 2019 until October 30, 2019 were misconduct. First, the record reflects that claimant left work early on October 21, 2019 due to illness that manifested itself in the form of shaking symptoms and vomiting. Claimant notified her employer that she was leaving work early on the 21st due to her symptoms, and continued to notify her employer each day from October 22, 2019 until October 30, 2019 that she would not be reporting to work due to illness. The record is devoid of any evidence indicating that claimant was not actually sick during that period. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

Although the weight of the evidence suggests that claimant was sick from October 22, 2019 until October 30, 2019, the record also demonstrates that, notwithstanding her illness, claimant continued to

work part-time from home triaging telephone calls to the business, returning client calls, scheduling appointments, and answering business-related questions emailed to her by the owner. Order No. 20-UI-142468 concluded that claimant's pattern of negative behavior included her refusal to return to work during this period despite a lack of exigent circumstances. Again, however, the record supports a valid basis for claimant's absence from work, her illness. Furthermore, the fact that claimant continued to work during this period supports the conclusion that she did not consciously disregard the employer's interests or refuse to work. The order also concluded that claimant refused to speak to the employer during this period. Placing to the side the question of whether claimant was obligated to speak to her employer while on sick leave, the preponderance of the evidence supports the conclusion that claimant did communicate with her employer during this period through email. Finally, the order found that claimant irrationally and unfairly accused the owner of discriminatory behavior and mistreatment, while refusing to acknowledge her own wrongdoing, and while making vague and illogical demands of him. The record does not support this finding, which appears to be inferred from claimant's letter to the employer on October 30, 2019. However, given that the owner did not consider the contents of claimant's October 30, 2019 letter prior to making the decision to discharge claimant, it is more likely than not that any such accusations and demands did not factor into the owner's discharge decision.

The evidence is also insufficient to establish that claimant acted with a willful or wantonly negligent disregard for the employer's interests with respect to the patient complaints lodged against her in the two months leading up to her discharge. While claimant's emotional and/or depressed appearance towards certain of the employer's patients was not ideal for business purposes, the record does not suggest that claimant displayed emotional or depressed appearances to patients willfully or on purpose, nor does it suggest that such behavior reflects a conscious disregard for the employer's interests. Likewise, to the extent claimant might have been viewed as being disrespectful to some patients, the evidence in the record is insufficient to establish that any such disrespect was intentional or the result of a conscious disregard for the business interests of the employer.

Similarly, the preponderance of evidence in the record fails to demonstrate that any missed billing deadlines by claimant were intentional or the result of claimant's conscious disregard for the employer's business interests. Claimant struggled to keep up with her billing responsibilities due to the other demands of her job, which is why she asked the employer for reception support. To the extent claimant failed to meet the employer's expectations with respect to the billing requirements, the preponderance of the evidence fails to establish that claimant consciously disregarded those responsibilities as she actively sought to address any deficiency by suggesting the additional of additional staff. Furthermore, the employer addressed these billing deficiencies (for the first time) in the October 18, 2019 meeting. Given the language utilized by the employer in that letter reflecting a clear intention to move forward with the employment relationship, and given the lack of evidence in the record reflecting that claimant missed any billing deadlines after the meeting (but prior to her discharge), the employer has failed to meet its burden to demonstrate that any missed billing deadlines were the result of willful or wantonly negligent acts attributable to the claimant as misconduct.

For these reasons, the record shows that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 20-UI-142468 is set aside, as outlined above.¹

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

DATE of Service: February 14, 2020

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

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 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

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 الإستئناف 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.