

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0061

Reversed
Disqualification

PROCEDURAL HISTORY: On November 15, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged but not for misconduct connected with work (decision # 74808). The employer filed a timely request for hearing. On January 10, 2020, ALJ Murdock conducted a hearing, and on January 17, 2020, issued Order No. 20-UI-142935, affirming decision # 74808. On January 27, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Umpqua Community Health Center Inc. employed claimant as a quality assurance specialist from June 10, 2019 until September 11, 2019.

(2) Upon being hired, claimant signed and acknowledged the employer's "Workplace Guidelines" and "Code of Conduct Attestation." The combined policies prohibited harassment and disrespect in the workplace and subjected violators to corrective action including suspension or discharge.

(3) Claimant had been divorced from the ex-wife for two years. The ex-wife also worked for the employer.

(4) In late August 2019, claimant approached the chief compliance officer (CCO) and informed him of the workplace distress he was encountering working in close proximity to the ex-wife. The CCO had been unaware that the ex-spouses worked together and suggested that claimant seek other employment.

(5) The ex-wife approached the CCO a few days after claimant met with the CCO. The ex-wife reported that she told claimant not to have any contact with her and claimant was not respecting her wishes. She explained that it bothered her that he came to her desk and petted her dog and that he had given her notes or letters. The notes or letters included the statement "Come home to me" three times, and one said, "You should unblock me and talk." See Exhibit 1. He called the ex-wife "slime" in another note and, in a letter where he talked about the two of them in conjunction with God, wrote that her soul was in danger and that she was dancing with the devil. Audio Recording at 22:02 to 22:08. The ex-wife explained that she was considering obtaining a restraining order against claimant. The CCO relayed to

the claimant that the ex-wife wanted privacy and no contact from him. The CCO instructed claimant not to have any contact with the ex-wife and not to walk by her cubicle.

(6) On September 10, 2019, claimant approached the CCO and expressed his concern with the CCO taking walks with the ex-wife during the workday. Claimant explained to the CCO that he considered their marriage to still be in effect in a “biblical sense” and that he was having a difficult time emotionally and mentally because he knew his ex-wife was flirting with other men and having affairs all over the place. Audio Recording at 21:39 to 21:47; 24:50 to 24:57.

(7) The CCO began to fear for the ex-wife’s safety and decided to relocate claimant to another area to minimize claimant’s contact with and visual exposure to the ex-wife. Even with the relocation of claimant’s workstation, the CCO determined that it would be impossible to keep them separated all of the time because there would be meetings that they would both be required to attend or other situations where they could have some level of contact with each other.

(8) On September 11, 2019, the ex-wife informed the CCO that claimant had not contacted her since the CCO told him not to, but he continued to walk past her desk and attempt to interact with her dog.

(9) On September 11, 2019, the employer discharged claimant. During claimant’s exit interview, claimant denied walking by the ex-wife’s desk after being instructed not to and stated that he had simply explained his “disease” and discomfort to the CCO about his recent divorce situation. *See Exhibit 1.*

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct connected to work.

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).

The order under review concluded that claimant’s discharge was not for misconduct because the employer’s evidence that claimant might pose a safety risk to the ex-wife if he continued to work for the employer was “too vague and uncertain” to establish that claimant violated the employer’s expectation that he avoid walking past or interacting with the ex-wife and her dog after being instructed not to do so. Order No. 20-UI-142935 at 3. The preponderance of the evidence in the record does not support this conclusion.

The employer’s harassment policy reasonably required claimant to not engage in harassing behavior at work. The ex-wife and the CCO both instructed claimant to refrain from contacting the ex-wife or her dog, or walking past them, which was perceived as harassing conduct. The CCO also decided to move

claimant away from the ex-wife's work area. Despite such efforts and instructions for claimant to refrain from contact with the ex-wife and her dog, claimant continued to try to walk by her desk and interact with the dog. Claimant's ongoing attempts to interact with the ex-wife's dog, which we infer occurred within a close proximity to the ex-wife's desk where the dog was likely to be while inside the office, amounted to at least a wantonly negligent violation of the employer's expectations.

Claimant's conduct is not excusable as a good faith error or isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant had been instructed not to contact or be near the ex-wife or her dog. He therefore had no basis upon which to sincerely believe that contacting her or her dog would not violate the employer's expectations, and no basis upon which to sincerely believe the employer would excuse or condone such actions.

For conduct to be excused as an isolated instance of poor judgment, claimant's conduct had to be isolated and cannot exceed mere poor judgment. *See* OAR 471-030-0038(1)(d). Although the CCO received more than one report that claimant was walking past the ex-wife's cubicle or interacting with her dog, it is unclear whether or how many times claimant violated the employer's expectations by contacting the ex-wife or her dog *after* the CCO told him not to do so. For purposes of this decision, claimant's conduct in violating the expectation might therefore have been an isolated wantonly negligent exercise of poor judgment. Even isolated conduct can exceed mere poor judgment, however, if it caused an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. *See* OAR 471-030-0038(1)(d)(D).

Claimant's conduct in this case caused an irreparable breach of trust or made a continued employment relationship impossible. Claimant repeatedly engaged in unwanted contact with the ex-wife and/or her dog, including after the employer had suggested he work elsewhere, after the CCO and the ex-wife asked him to refrain, and after the CCO prohibited him from such contact and decided to move his desk to another area away from the ex-wife's work location. Although he had been divorced for some time, claimant still considered himself married to the ex-wife and expressed concerns and jealousy around the ex-wife's platonic interactions with other males in the workplace. Claimant's inability to refrain from such behavior, his expressed concerns, his expressed statement that he and the ex-wife were still "biblically" married even though they had divorced suggested the employer had a significant and reasonable basis for believing that claimant's continued employment would result in him initiating ongoing contact with the ex-wife or her dog, and could even pose an ongoing safety risk for the office should claimant's behavior escalate further. Claimant's violation of the employer's prohibitions with respect to the ex-wife and her dog therefore caused a breach of trust in the employment relationship that was irreparable, and coupled with the potential safety risk, suggests that no reasonable employer under the circumstances would have continued to employ claimant. Claimant's conduct therefore exceeded mere poor judgment and cannot be excused.

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

DECISION: Order No. 20-UI-142935 is set aside, as outlined above.

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

DATE of Service: March 5, 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.



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 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.

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.