

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0150

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 144319). The employer filed a timely request for hearing. On January 29, 2020, ALJ M. Davis conducted a hearing, and on January 30, 2020, issued Order No. 20-UI-143595, affirming the Department's decision. On February 19, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bay Area Hospital employed claimant from July 17, 2018 until November 15, 2019 as a physical therapist.

(2) The employer had a code of conduct for its staff requiring staff to raise compliance concerns and report suspected compliance violations to the employer. The employer generally only canceled services for a patient if a provider was not available, there was an issue with a patient's insurance, or the patient declined services. The employer expected staff providers to keep their patients' charts updated or ask the employer for assistance if they were unable to complete charts in a timely manner. The employer expected claimant to complete each patient's discharge summary within thirty days of their last service.

(3) Claimant occasionally canceled patients' appointments if he was out ill. He did not request permission from the employer to do so.

(4) Claimant had multiple patient files older than thirty days for which he needed to complete discharge letters to close the files and add treatment records. Claimant's supervisor knew he was tardy in completing some of his patients' discharge letters. Claimant had been busy helping the employer increase business for the employer's outpatient clinic. Claimant had not received training on the type of filing system the employer used, and planned to complete the files incrementally as time permitted.

(5) Prior to October 29, 2019, claimant had not received any disciplinary warnings.

(6) On October 28, 2019, claimant became concerned that the employer was not billing properly for outpatient physical therapy services and contacted the American Physical Therapy Association, the Oregon Physical Therapy Licensing Board, and the Centers for Medicare and Medicaid Services for information regarding proper billing practices. Based on the information he received, claimant believed the employer was not billing properly. He canceled appointments to provide services for four patients on October 29, 2019 because he was “concerned about liability and committing billing issues.” Transcript at 30. Claimant planned to discuss his concerns with his manager, the rehabilitation department manager, before providing services to his patients with appointments scheduled on October 30, 2019.

(7) Later on October 29, 2019, another therapist told the rehabilitation department manager about claimant’s cancelations. The manager told claimant she thought the billing was correct, and then spoke with the employer’s human resources department, which put claimant on administrative leave pending an investigation into claimant’s act of canceling appointments.

(8) Had claimant reported his billing concerns to the employer, it would have provided services to patients, but researched the concerns before billing. After the incident on October 29, the employer withheld its billing, researched its billing procedures, and decided that its billing practices were correct.

(9) In early November 2019, while claimant was on administrative leave, the employer asked claimant for his key to open his desk, which contained patients’ files, to review the files to continue treating the patients in claimant’s absence. Claimant expressed concerns about providing the key, and did not provide it, because he was uncertain if the person who would be accessing the files had the right to view the files under HIPPA. The employer did not ask claimant again about access to his desk.

(10) The employer opened claimant’s desk without claimant’s key and found 46 patient charts from April 2019 and later stored in his desk that were missing documentation. All the charts were missing discharge letters to the patients’ respective physicians. Six charts were missing treatment documentation. Some were missing documentation necessary to bill the patients. The employer hired a private contractor to determine the patients’ needs. Some patients required additional treatment, and the contractor wrote discharge letters for the patients who did not need additional treatment.

(11) On November 15, 2019, the employer discharged claimant for canceling four patients’ services scheduled for October 29, 2019 without asking the employer, for failing to complete multiple patient charts in a timely manner, and for refusing to provide the key to his desk so the employer could access claimant’s patient files for continuation of care.

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 are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant for failing to immediately provide a key to access his desk, and to complete his patient charts in a timely manner, the employer did not establish that claimant’s conduct was misconduct. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (in a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence). The record shows claimant initially refused to provide a key to his desk, but shows that it was due at least in part to concern about who was accessing the patient charts and the patients’ HIPPA rights. The record does not show that the employer reassured claimant about those concerns or that claimant continued to refuse access to his desk after receiving assurances that the files would be handled properly. Therefore, claimant’s conduct in refusing to provide the key was not a willful or wantonly negligent disregard of the employer’s expectations. Similarly, the record shows that claimant’s tardiness in completing his files was not due to a willful or wantonly negligent disregard of the employer’s interests, but, rather, to claimant’s lack of training in completing non-electronic files and his overwhelming workload while he assisted the employer in “trying to grow the outpatient clinic.” Transcript at 33.

The employer also discharged claimant, in part, for canceling patient services on October 29 without notifying his supervisor or asking permission from the employer. The employer had a right to expect claimant to refrain from such conduct. Claimant implied that he believed he had permission to cancel appointments without asking his supervisor, but the record shows he knew or should have known the employer’s expectation. He asserted that he had canceled patient appointments without permission in the past. Transcript at 30. However, claimant canceled those appointments due to illness, and he was not ill or absent on October 29. Moreover, the record shows that claimant told his supervisor that he did not tell ask her about canceling the appointments first because he “did not trust the [employer].” Transcript at 13. More likely than not, claimant’s failure to notify his supervisor before canceling the October 29 appointments was a conscious act. His conduct therefore was wantonly negligent.

Although claimant’s conduct in canceling the patient appointments without permission was wantonly negligent, the record shows it was an isolated instance of poor judgment, and not misconduct under 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). Although the record shows that claimant had violated the employer's expectations in failing to provide the key to his desk immediately and failing to complete all his patient files in a timely manner, because those incidents were not willful or wantonly negligent misconduct, they do not constitute a pattern of willful or wantonly negligent conduct. Nor had the employer disciplined claimant before the final incidents or otherwise shown prior acts of misconduct before October 29. Thus, for claimant's act of poor judgment in the final incident to be disqualifying, it must have exceeded "mere poor judgment" by creating an irreparable breach of trust in the employment relationship or otherwise making a continued relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant was apparently concerned about liability from the employer's billing practices, and his testimony shows that he planned to discuss the matter with his supervisor, and not cancel additional appointments, before October 30. Transcript at 31. Viewed objectively, claimant's conduct was not the type of conduct that created an irreparable breach of trust in the employment relationship or otherwise make a continued relationship impossible. The employer therefore discharged claimant for an isolated instance of poor judgment, which is not misconduct.

Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation from the employer.

DECISION: Order No. 20-UI-143595 is affirmed.

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

DATE of Service: March 27, 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.

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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 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.

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