EO: 200
BYE: 202110

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

804
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0406

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 9, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 100645). The employer filed a timely request for hearing. On May 13, 2020, ALJ Messecar conducted a hearing, and on May 15, 2020 issued Order No. 20-UI-149815, concluding the employer discharged claimant for misconduct. On May 20, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant'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) Tanasbourne Pediatrics, LLC, employed claimant in their nursing department from January 3, 2020 through March 18, 2020. As part of her employment, claimant was provided a company email address and was required to review and sign the employer's "Social Media and Cell Phone Use Policy" (the policy), which claimant did on January 22, 2020.

(2) The employer considered "emails part of social media" and interpreted the policy as requiring that emails sent from company email addresses "are for work purposes only… [and an employee is] not supposed to send any personal email, or personal messages with work email," nor should any employee ever send an email from their company email address that "contains obscene language." Transcript at 6-7. At all relevant times, the employer had authorized claimant to use her work email to address to pay her bills. Although claimant never received express permission from the employer to email her mother, claimant occasionally needed to email with her mother about her bills. Claimant thought "as long as I wasn't abusing it and if I was just using it for things that needed to be done… I thought if there was no patients around" it would be fine. Transcript at 27.

(3) The employer also interpreted the policy as prohibiting employees from using their personal cell phones during working hours for purposes other than emergencies, and requiring employees to make any non-emergency personal phone calls from the breakroom. Throughout the course of claimant's

employment, the employer documented two instances where they believed that claimant had violated the cell phone provisions of the policy and warned her verbally on both occasions.

(4) In the early afternoon hours of Wednesday, March 18, 2020, and due to the impact of COVID-19, the office manager sent claimant several text messages informing her that she would not need to come into work for the remainder of that day, nor would she be needed for work on Thursday or Friday of that week. The text message also indicated that the employer would re-evaluate on Friday, March 20th the days they would need claimant to work the following week. The office manager advised claimant that they would understand if she wanted to look for work elsewhere. Claimant responded by asking the office manager if she was being fired. The office manager said "no" and told claimant "we just can't give you hours right now" and that they would see about next week. Exhibit 2, March 18, 2020 text thread (3:09 p.m.).

(5) Later, during the same text exchange, claimant texted the office manager that she would have to apply for unemployment benefits because she had not foreseen the employer's reduction in hours and she was concerned about losing her apartment. The office manager responded that "[t]his seems inappropriate as [y]ou haven't been fired or laid off… are you quitting?" Exhibit 2, March 18, 2020 text thread (3:13 p.m.). Claimant responded that she was not quitting but that she received no other financial help from anyone and she had no savings.

(6) The office manager later texted claimant again, this time asking for her company email password. The office manager wanted claimant's password because she "was wondering why [claimant] was pushing so hard [in the text conversation], so [the office manager] was curious to see if there was anything in her email that might address that, like if she was looking for a different job, or if she was – something was going on." Transcript at 20. Claimant provided her email password to the office manager. The office manager logged into claimant's company email and found several emails between claimant and claimant's mother, including one email, dated March 18, 2020, where claimant stated, "They aren't telling me anything so I have no idea if I'm going home early today or if we're doing half days or what, but I'm super fucking anxious." Exhibit 1, March 18, 2020 email (11:14 a.m.). After reviewing the emails, the office manager texted back to claimant:

> You've been using your work email for personal use. That is inappropriate and against company policy and the social media policy that you signed. You can pick up your items tomorrow. Please leave your fob. This was your last day.

Exhibit 2, March 18, 2020 text thread (4:45 to 4:46 p.m.).

(7) The employer discharged claimant because it viewed the emails between claimant and her mother as a violation of the policy prohibitions against using a company email address to send personal emails and because one of the emails contained "obscene language". Transcript at 6. But for the employer's March 18, 2020 discovery of claimant's emails to her mother from her company email address, the employer "probably [would] not" have fired claimant. Transcript at 7.

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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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 was discharged for misconduct "because she had violated the media policy multiple times within a three month period." Order No. 20-UI-149815 at 4. Specifically, the order pointed to claimant's two purportedly improper uses of her personal cell phone on February 14, 2020 and March 16, 2020, as well the emails claimant sent to her mother using her work email address that the employer discovered on March 18, 2020. The order also concluded that by "repeatedly using her phone and email and not following the employer's policy," claimant's actions could not be excused as an isolated instance of poor judgment. Order No. 20-UI-149815 at 4. Likewise, the order concluded that claimant's actions could not be excused as good faith error because the record "established that claimant did not honestly believe that the employer would approve or condone her conduct." Order No. 20-UI-149815 at 4. The preponderance of the evidence fails to support the order's conclusions.

In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). During the hearing, the employer's office manager testified that but for her discovery of the March 18, 2020 emails, claimant would "probably not" have been fired. Transcript at 7. Therefore, the March 18, 2020 emails were the proximate cause of claimant's discharge and the proper focus of the misconduct analysis.[1]

[1] Although the employer indicated that it "probably" would not have fired claimant but for the discovery of the emails, and although the term "probably" can be viewed as something less than a certainty, the record also demonstrates that the employer discharged claimant via a March 18, 2020 text message that was sent at 4:46 p.m., and that the discharge text had occurred within the context of a text message thread where, at 3:13 p.m., the employer texted claimant that she had not been "fired or laid off". Exhibit 2, March 18, 2020 text thread (3:13 p.m. to 4:46 p.m.). Between 3:13 p.m. and 4: 46 p.m., the employer discovered the disputed emails, and it was that discovery which resulted in claimant's discharge. As such, the emails were the proximate cause of claimant's discharge.

Claimant was discharged but not for misconduct. Here, the record reflects that although the employer viewed the policy as prohibiting employees from sending personal emails from a work email address, the employer blurred the lines of this policy with respect to claimant by authorizing her to use her work email to pay her bills and to address "things that needed to be done." While the employer qualified this personal email privilege by requiring that personal emails not be sent in the presence of patients, and that the privilege not be abused, the record is devoid of evidence establishing that the employer ever set forth any guidelines regarding what would constitute an abuse of the privilege. Nor does the record establish that at any point preceding the moment of her termination did the employer warn claimant that she had been abusing the privilege. The preponderance of the evidence suggests that claimant limited the number of personal emails she sent, and that she only sent personal emails to her mother, which generally related to claimant's bills and family matters. In light of the employer's broad grant of permission to claimant to send personal emails without any clarifying guidance regarding what would constitute an abuse of the privilege, and given claimant's generally restrained utilization of her personal email privilege, the preponderance of the evidence fails to support the conclusion that claimant knew or should have known that she had violated the employer's work email policy by sending emails to her mother.

Although the record reflects that on March 18, 2020, claimant used her work email account to email her mother that she was "super fucking anxious" about her employment situation, the record fails to support the conclusion that claimant knew or should have known that the foul language she used in her email to her mother violated any obscenity provisions of the policy or the reasonable expectations of the employer. To the extent that the employer's policy addresses obscene language, it does so by prohibiting employees who "contribute to social media sites" from "engag[ing] in … obscene … behavior directed at or implicating [the employer], its clients, business partners, service providers and vendors." Exhibit 1, media policy at 3 (paragraph 6). Claimant's March 18, 2020 email to her mother was not a contribution to a social media site, and the foul language within that email was not directed to the employer or its clients, business partners, service providers, or vendors. Likewise, there is no record evidence suggesting that the employer otherwise placed claimant on notice that the inclusion of foul language in a personal email, which was unrelated to her work for the employer or the employer's interests, would nevertheless constitute a violation of the employer's expectations for employee behavior. Under these circumstances, where claimant's use of foul language in a personal email was not directed towards the employer, and did not otherwise violate a policy of which claimant previously had notice, the record fails to establish that claimant knew or should have known that she had violated the standards of behavior the employer had a reason to expect by using foul language in an email to her mother.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 20-UI-149815 is set aside, as outlined above.

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

DATE of Service: <u>June 18, 2020</u>

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need 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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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