EO: 200
BYE: 202107

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0435

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144417). The employer filed a timely request for hearing. On May 11, 2020, ALJ Murray-Roberts conducted a hearing, and on May 13, 2020 issued Order No. 20-UI-149673, affirming the Department's decision. On June 2, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider the employer'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) Stonemor GP LLC, which owned and operated Keizer Funeral Chapel, employed claimant as a field director at its Keizer funeral home from June 25, 2019 to February 27, 2020.

(2) At hire, claimant notified the employer that although she had prior experience working for funeral homes, she had not removed the body of a decedent from any location for six years. The employer did not provide claimant with any training about how to load a decedent onto a cot, or a decedent on a cot into an employer vehicle for transport to the employer's funeral home.

(3) The employer's practice was to send one person to a morgue for a standard "removal" of a decedent. Transcript at 5. However, if the decedent was heavy, the employer typically sent two individuals to perform the removal. The employer sometimes contracted with a third-party removal service to perform decedent removals. Claimant's husband was an employee of a third-party removal service used by the employer, and was qualified and certified to perform decedent removals. Occasionally, claimant had contacted the third-party removal service on behalf of the employer to perform decedent removals. The employer did not have a written policy regarding the use of the third-party removal service and had never told claimant that she was not allowed to contact the third-party service for assistance if necessary.

(4) In January 2020, claimant's supervisor gave her a written warning for failing to timely place obituaries or arrange for funeral services, which the employer believed was due to claimant's lack of "experience and . . . organization." Transcript at 11. Claimant disagreed with the warning and contacted the employer's human resources department about the warning. A human resources representative told claimant that it had never received the warning, and that claimant had a "clean slate." Transcript at 15.

(5) On February 24, 2020, claimant's supervisor directed her to perform a removal of a decedent from a hospital morgue. The call from the hospital morgue listed the decedent as weighing 250 pounds. Earlier that day, the supervisor had sent two other employees to perform a team removal of a decedent that weighed only 100 pounds. Claimant's supervisor told her that if she needed help with the removal, to call him, and he would help her. However, he also told her several times that morning that he was "very busy," that "there were lots of things going on," and that "he might not have time" to help her. Transcript at 17.

(6) When claimant arrived at the hospital morgue, rather than call her supervisor whom she thought would be "too busy" to help based on his comments that morning, she called her husband to come to the morgue and assist her with the removal. Transcript at 17. When he arrived, they both went into the morgue and loaded the decedent onto a removal cot. When they exited the hospital, claimant's husband, whom hospital personnel knew from prior removals, signed for the release of the decedent to Keizer Funeral Chapel. When claimant and her husband arrived at the employer's van, they both loaded the decedent, who weighed more than 250 pounds, into the van. Claimant's husband left, and claimant transported the decedent to the funeral home and completed the removal. The employer was not billed for the husband's services, and claimant's husband was not paid for assisting claimant.

(7) After February 24, 2020, the employer's human resources department questioned claimant about the removal. When asked if she had "completed the removal," claimant responded that she had because she believed that she had completed the removal by transporting the decedent from the hospital to the funeral home. Transcript at 19. When asked why her husband had signed for the decedent at the hospital, claimant responded that she had called him to assist her because of the weight of the decedent. Claimant admitted that she had made a "mistake" by asking her husband to help her with the removal that day rather than check with the supervisor whom she thought was too busy to assist her. Transcript at 17-18.

(8) On February 27, 2020, the employer discharged claimant because it believed her "mistake" on February 24, 2020 was a terminable offense because claimant used "poor judgment" in calling a non-employee rather than her supervisor to assist her with the removal of the decedent and then tried to conceal her conduct by stating that she had "completed" the removal. Transcript at 12, 19.

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

The employer had the right to expect claimant to follow her supervisor's instructions on February 24, 2020 to contact him to request help to remove the decedent from the hospital if she determined she was unable to complete the removal herself. Transcript at 17. Claimant acknowledged that she violated that expectation when she responded to the human resources department that she had made a "mistake" by asking her husband to help her with the removal that day instead of her supervisor. Claimant was conscious of her conduct when she asked her husband to assist her, and knew or should have known that her conduct would likely violate her supervisor's expectation that she call him if she needed assistance. In this regard, claimant's February 24 conduct was a wantonly negligent violation of her supervisor's expectation.

However, the employer's assertion that claimant attempted to conceal her conduct by responding to the human resources representative who questioned her that she had "completed" the removal is not supported by the record. Claimant explained that the question she was asked was whether she had "completed the removal," to which she responded "yes" because she believed she had "completed" the removal by driving the decedent from the hospital morgue to the employer's funeral home. Transcript at 19. She also explained that when she was questioned about why her husband had signed the decedent out of the hospital, she openly responded that he had assisted her with the removal that day due to the weight of the decedent, and signed for the decedent without any issue because the hospital staff was aware of who they both were. Transcript at 19-20. The employer did not dispute claimant's testimony on these issues, and so the evidence was no more than evenly balanced. Where the evidence is evenly balanced, the party with the burden of proof, here the employer, has failed to meet its burden. Accordingly, the employer failed to establish that claimant attempted to conceal her conduct on February 24 by the manner in which she answered the human resource representative's questions.

The remaining issue is whether claimant's wantonly negligent failure to contact her supervisor to request assistance instead of asking her husband to help her was an isolated instance of poor judgment.

Isolated instances of poor judgment are not misconduct. 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 employer presented hearsay evidence that in January 2020, claimant's supervisor gave claimant a written warning for conduct which the employer attributed to claimant's lack of "experience and . . . organization," the employer did not dispute firsthand evidence that after that incident, a human resource representative told claimant it had never received a warning, and that claimant had a "clean slate." Moreover, because mere inefficiency resulting from lack of job skills or experience is not misconduct, the record does not show that the prior incident was misconduct. OAR 471-030-0038(3)(b). More likely than not, claimant's February 24, 2020 conduct was no more than an isolated instance of wantonly negligent conduct.

The record fails to show that claimant's February 24 conduct exceeded mere poor judgment by violating a law, being tantamount to a law violation, creating an irreparable breach of trust in the employment relationship, or otherwise making a continued employment relationship impossible. There was no dispute that claimant's husband was qualified and certified to remove or assist in the removal of the decedent from the hospital morgue, and the record does not show that claimant violated the law by having her husband help with the removal. Claimant also asserted that although she should have asked the employer for assistance, she asked her husband to help, in part, to avoid exposing the employer to liability by requesting assistance from a hospital employee. Transcript at 14. Although the employer viewed claimant's conduct that day as a terminable offense, viewed objectively, claimant's conduct was not so egregious that it made a continuing employment relationship impossible. Therefore, claimant's conduct on February 24, 2020 did not exceed mere poor judgment.

The employer therefore discharged claimant for an isolated instance of poor judgment, and not misconduct. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 20-UI-149673 is affirmed.

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

DATE of Service: <u>July 8, 2020</u>

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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