

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0486

Modified
Requests to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On January 2, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, and claimant was disqualified from receiving benefits effective December 8, 2019 (decision # 152319). Claimant filed a timely request for hearing. On January 23, 2020, the Office of Administrative Hearings (OAH) mailed notice of a telephone hearing scheduled for February 4, 2020. On February 4, 2020, claimant failed to appear at the hearing, and on February 5, 2020 ALJ Griffin issued Order No. 20-UI-143891 dismissing claimant's request for hearing for failure to appear, leaving decision # 152319 undisturbed.

On March 12, 2020, claimant filed a request to reopen the February 4, 2020 hearing. On April 8, 2020, OAH served, by mail, notice of a telephone hearing scheduled for April 22, 2020 to consider claimant's request to reopen, and if granted, the merits of decision # 152319. On April 22, 2020, claimant failed to appear at the hearing, and on April 23, 2020 ALJ Schmidt issued Order No. 20-UI-148607, dismissing claimant's request to reopen for failure to appear, leaving Order No. 20-UI-143891 undisturbed.

On April 29, 2020, claimant filed a request to reopen the April 22, 2020 hearing. On May 18, 2020, OAH served, by mail, notice of a telephone hearing scheduled for May 27, 2020 to consider claimant's request to reopen the April 22, 2020 hearing and, if granted, claimant's request to reopen the February 4, 2020 hearing and, if granted, the merits of decision # 152319. On May 27, 2020, ALJ Schmidt conducted a hearing at which the employer failed to appear, and on June 4, 2020 issued Order No. 20-UI-150637, allowing claimant's requests to reopen the April 22, 2020 and February 4, 2020 hearings,

and affirming decision # 152319. On June 24, 2020, claimant filed an application for review of Order No. 20-UI-150637 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).

REQUESTS TO REOPEN: Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portions of the order under review allowing claimant's requests to reopen the April 22, 2020 and February 4, 2020 hearings are **adopted**.

FINDINGS OF FACT: (1) Legacy Mount Hood Medical Center employed claimant as lead nuclear medicine technologist from January 21, 2002 to December 11, 2019.

(2) The employer expected its nuclear medicine technologists to follow all regulations and policies for radiation safety and timely alert their managers whenever radiation equipment was not working properly. The employer expected its employees to communicate respectfully and professionally with coworkers. The employer expected its employees to refrain from photographing medical records containing protected health information with their personal cellphones. Claimant was aware of the employer's expectations.

(3) In July 2018, the employer reduced the allowable radiation that could be administered to patients for certain procedures.

(4) In December 2018, claimant learned that one of her coworkers was continuing to administer to patients' radiation amounts above the allowed doses under the July 2018 standards.

(5) On January 2, 2019, claimant reported the excess radiation doses to the employer's manager of imaging services, who indicated the matter would be investigated. However, claimant became concerned when the manager did not report the matter to the State of Oregon as required by law.

(6) Also on January 2, 2019, claimant confronted the coworker about her schedule flexing and spoke to her in a loud tone and in close proximity. The coworker reported the confrontation the employer's human resources department and alleged that claimant had acted in a threatening manner toward her. On January 21, 2019, the employer gave claimant a corrective action about the verbal confrontation and warned claimant that unless improvement was noted, she would be subject to further corrective action including possible termination of her employment.

(7) In April 2019, claimant confronted a coworker about how she handled the flow of patients and spoke to her in a loud manner. Also in April 2019, claimant attended a radiation safety committee meeting and aggressively inquired about the status of her January report of the administration of excessive radiation doses. At the meeting, it was implied that claimant herself may have incorrectly entered the overdoses reported in January. Sometime thereafter, at her manager's request, claimant emailed her manager a personal cellphone photograph of an entry the coworker had made in a patient record that proved her coworker had administered an excessive radiation dose to a patient. The manager was not convinced that the overdoses had occurred.

(8) On May 8, 2019, the employer gave claimant a corrective action about the April 2019 verbal confrontation and claimant's committee meeting behavior, and again warned claimant that unless she improved her manner of communication, she would be subject to further corrective action, including possible termination of her employment.

(9) In approximately July 2019, claimant went to the workplace on several weekends and photographed medical records on her personal cellphone that showed that her coworker had been administering radiation above the July 2018 limits. Approximately half of the photographs contained protected health information. Thereafter, claimant met with her manager and the human resources representative and showed them the photographs that indicated excessive radiation had been administered to patients by the coworker.

(10) On August 1, 2019, while at work, claimant found that some radiation equipment was not working properly and did not promptly report the issue to her manager or the radiation officer as required. Claimant's manager met with claimant alone on August 6, 2019 and again on August 21, 2019 with a human resources officer to discuss the issue. On August 22, 2019, the employer gave claimant a corrective action that confirmed that she was to "follow all regulations and policies for radiation safety," and that if immediate improvement was not noted, she would be subject to further corrective action up to the termination of her employment.

(11) On September 9, 2019, claimant responded to the employer's January 21, 2019 corrective action by disputing it. The employer's human resources representative responded that it would be placed in claimant's file.

(12) On December 11, 2019, the employer discharged claimant.

CONCLUSIONS AND REASONS: The record fails to show that the employer discharged claimant 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The order under review concluded that the employer discharged claimant for misconduct, reasoning:

The employer discharged claimant for violating its policy against taking pictures of protected health information with her personal cellphone. At hearing claimant admitted to knowingly violating this policy...Inasmuch as claimant's broader concerns about excessive

radiation were meant to protect patient safety, the evidence is persuasive that claimant had other routes she could have chosen to this end that did not involve a violation of the employer's policy...

Order No. 20-UI-150637 at 8. However, the record fails to support the order's conclusion regarding the reason for claimant's discharge.

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 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).

The record of this case does not contain any evidence from the employer concerning the reason or reasons for claimant's discharge on December 11, 2019. The employer did not appear at the hearing on May 27, 2020, and prior to that hearing, offered no documentary evidence concerning claimant's discharge. Although claimant testified that she was told she was being discharged for taking the cellphone photographs in question, the record shows that the employer was aware that she had taken such photographs containing protected information well before December 11, 2019, without even presenting her with a warning. Transcript at 17-18. Exhibit 1 shows that claimant emailed a photograph to her manager, apparently at the manager's request, sometime in April or May of 2019, and claimant met with the manager and human resources representative in August of 2019 to show them other such photographs. Moreover, the employer presented claimant with several corrective actions in 2019, each of which claimant disputed and each of which threatened claimant with termination unless immediate improvement was shown, the last occurring on August 22, 2019. Accordingly, the record fails to show by a preponderance of evidence the final incident on which the employer based its discharge decision. For that reason, the record fails to show whether the employer discharged claimant for willfully, or with wanton negligence, violating a standard of behavior the employer had the right to expect of her.

The record therefore fails to establish that the employer discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on her work separation from the employer.

DECISION: Order No. 20-UI-150637 is modified, as outlined above.

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

DATE of Service: July 31, 2020

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.surveymoz.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 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.

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