

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0790

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 20, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant was disqualified from receiving unemployment insurance benefits effective April 19, 2020 (decision # 64535). Claimant filed a timely request for hearing. On December 3, 2020, ALJ Frank conducted a hearing, and on December 9, 2020 issued Order No. 20-UI-157439, affirming the Department's decision. On December 17, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments from claimant and the employer in reaching this decision.

FINDINGS OF FACT: (1) Columbia Memorial Hospital employed claimant as a staff pharmacist from October 7, 2008 until April 22, 2020.

(2) The employer expected employees to avoid causing unjustifiable risk to patients and to "provide excellence, quality and care in every interaction." Exhibit 1 at 3, Transcript at 5.

(3) Claimant and another pharmacist alternated every three to four days working as the on-duty chemotherapy pharmacist for the same patients. During her shift on March 27, 2020, claimant was the chemotherapy pharmacist on duty and was unable to find some patients' charts. The particular type of charts contained information about managing the patients' chemotherapy. Claimant and the other pharmacist used the charts to make clinical decisions about patient care. Although the employer used electronic medical records, the employer kept some of the patients' chemotherapy management information only in the patients' paper charts. Claimant complained to her supervisor, the director of pharmacy and oncology services, that she could not find the charts she needed to complete her duties

because she believed the other pharmacist had taken them home while she worked at home. The director told claimant he would address the matter and impose the appropriate discipline.

(4) The director contacted the other pharmacist, who admitted she had taken patient charts home because she mistakenly believed she had permission to do so. Upon the director's instructions, the other pharmacist brought the charts back to the hospital. The employer disciplined the other pharmacist for her conduct. Claimant did not know what discipline the director imposed on the other pharmacist, but was dissatisfied with the director's response. Claimant was not the other pharmacist's supervisor.

(5) On April 10, 2020, claimant was again working as the oral chemotherapy pharmacist on duty. Claimant took several patient charts from the other pharmacist's file cabinet to use to determine patient care. However, when claimant finished work, she filed one of the charts in the main pharmacy cabinet, and did not return it to the other pharmacist's file cabinet, because the chart had a notation that the other pharmacist had made while working from home, and claimant wanted to "preserve" the chart as evidence that the other pharmacist had taken the chart home. Transcript at 31.

(6) After claimant's shift on April 10, 2020, the other pharmacist was not able to find the chart claimant had not returned to her file cabinet. On April 14, 2020, the other pharmacist asked claimant if she knew where the missing patient chart was located. Claimant responded to the other pharmacist that she did not have the chart.

(7) On April 15, 2020, claimant removed the patient chart from the cabinet where she had put it on April 10, 2020, and placed it on top of a tall file cabinet where the other pharmacist was unlikely to find the chart.

(8) On April 17, 2020, in an effort to find the missing chart, the other pharmacist completed a thorough search of the pharmacy. The other pharmacist stood on a chair to look on top of the tall file cabinet, and found the missing chart.

(9) The pharmacist who found the file reported where she had found the chart, and what claimant stated when she asked claimant about the chart on April 14, 2020.

(10) On April 21, 2020, the director and human resources manager met with claimant. At that time, claimant told them that she told the other pharmacist she did not have the chart on April 14, 2020, and that she intentionally put the chart on the high file cabinet where the other pharmacist was unlikely to find it. Exhibit 1 at 3.

(11) On April 22, 2020, the employer discharged claimant for lying to the other pharmacist about where to find a patient chart, and in doing so, preventing the other pharmacist from accessing the charted information and creating an unjustifiable risk to a patient.

CONCLUSIONS AND REASONS: 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) (September 22, 2020). 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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

* * *

(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).

The employer discharged claimant for lying to the other chemotherapy pharmacist about the location of a patient chart, causing the file's whereabouts to be unknown to the other pharmacist for at least six days, including days when that pharmacist was treating the patient. Claimant's conduct was a willful violation of the employer's expectation that she refrain from engaging in conduct that risked patient care. That claimant intentionally concealed the chart location is not in dispute. On April 14, 2020, claimant knew where the chart was located, but lied to the other pharmacist and stated that she did not know where the chart was located.

The record shows that claimant knew or should have known that hiding the chart would violate the employer's reasonable expectations. Claimant's explanation for her conduct was that she was “preserving” the chart as evidence of the other pharmacist's wrongdoing so that claimant could report the matter to management, or management outside of her department. Transcript at 30. Claimant asserted that she “didn't have full confidence that the right thing was going to be done” after she reported the other pharmacist to the director on March 27, 2020. Transcript at 29. Claimant testified that she feared the chart “might be destroyed” by the other pharmacist. Transcript at 29. However, the record does not show that claimant had a reasonable basis for this concern. The other pharmacist had already admitted that she took charts home. Even if claimant did not know that the other pharmacist admitted to taking charts home, claimant could have reported the matter to higher levels of management without hiding a patient chart and potentially affecting a patient's care. Nor did claimant's apprehension justify her conduct in light of the potential risk it posed to a patient. Claimant also asserted that hiding the chart did not affect patient care because the same information that was in the paper chart was in the electronic records. Transcript at 35-36. This argument is equally unpersuasive. The record shows that the pharmacists used both the paper charts and the electronic records for patients' chemotherapy management because there was information contained in the papers charts that was not available in the electronic charts. Even if, in the final instance, the information in the paper chart and electronic chart was the same, claimant's conduct risked patient care because the treating pharmacist was unable to confirm the patient's course of treatment from an accurate and *complete* set of chart notes. In sum, the preponderance of the evidence shows that claimant's conduct in concealing the patient chart by lying about its location and concealing it on top of a high cabinet was a willful violation of the standards of behavior that the employer had the right to expect of an employee.

The next issue is to determine if claimant's conduct was an isolated instance of poor judgment, and not misconduct. Claimant's conduct cannot be excused as an isolated instance of poor judgment because it exceeded mere poor judgment. The record is insufficient to determine if claimant's conduct violated the law or was tantamount to unlawful conduct. However, viewed objectively, claimant's conduct of lying to the other pharmacist about the location of a patient chart and concealing it on top of a high cabinet was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Because claimant intentionally caused an unjustifiable risk to a patient's care, the employer could no longer trust claimant to care for patients. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3)(b).

Claimant's decision to hide a patient's chart from the other pharmacist who was treating that patient was not the result of a good faith error. Claimant understood the employer would not condone hiding a patient chart from the other treating pharmacist. The record contains no evidence to show that claimant could have reasonably believed the employer would permit her to hide a patient's chart from the other pharmacist while that pharmacist was treating that patient.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits effective April 19, 2020.

DECISION: Order No. 20-UI-157439 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: January 20, 2021

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.

This decision denies payment of your Unemployment Insurance (UI) benefits.

However, you may be eligible for Pandemic Unemployment Assistance (PUA) benefits for the period you are not eligible for other benefits as long as you are unable to work, unavailable for work, or unemployed due to the COVID-19 public health emergency. PUA is a new unemployment benefits program available through the Oregon Employment Department in response to the COVID-19 pandemic.

Visit <https://unemployment.oregon.gov> for more information, to apply for PUA, or to contact the Oregon Employment Department using the "Contact Us" form. You can also apply for PUA by calling 1-833-410-1004, but please be aware that the PUA staff cannot answer questions about this decision that denies payment of regular Unemployment Insurance (UI) benefits.

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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