

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0052

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 7, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective September 27, 2020 (decision # 90444). Claimant filed a timely request for hearing. On January 20, 2021, ALJ Monroe conducted a hearing, and on January 22, 2021 issued Order No. 20-UI-159669, affirming decision # 90444. On January 25, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Teamsters Council 37 FCU employed claimant as a credit union teller from December 15, 2016 until October 1, 2020.

(2) The employer maintained a policy that prohibited employees from using the employer's computer systems for personal purposes. On an annual basis, the employer provided a copy of this policy to claimant for her to review.

(3) For a period of about three months prior to October 1, 2020, claimant used her work computer on several occasions for personal business such as shopping and paying bills. Claimant generally understood that the employer's policy prohibited her from doing so, but "didn't think it was as big of a deal as [she] later found it out to be." Transcript at 23. Claimant's belief was based at least in part on her knowledge that other employees, including supervisors, engaged in similar conduct.

(4) On or around September 22, 2020, the employer discovered that claimant had been using their computer systems for personal purposes. On September 23, 2020, claimant's manager confronted

claimant about the matter and asked claimant if she had ever used Google Drive or any other programs on the employer's computer for personal purposes. Claimant denied having used Google Drive, but admitted that she had used other programs. Shortly afterwards, claimant remembered that she had used Google Drive at work once, and admitted this to her manager.

(5) The manager also directed claimant not to delete any files from her work computer while the matter was under investigation. Despite this directive, claimant deleted one file—a résumé that she had created to apply for an internal job posting—because claimant was concerned that a coworker may obtain claimant's personal information from the résumé, and believed that deleting her own personal information would be permissible. Prior to being told not to delete files from her computer, claimant had cleared her browsing history, which she did regularly.

(6) On or around September 23, 2020, the employer suspended claimant from work while they investigated her alleged policy violations. On October 1, 2020, the employer discharged claimant for violating its computer-use policy, dishonesty during the investigation, and insubordination after being told not to delete files from her computer.

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). "[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). 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) (September 22, 2020).

The employer discharged claimant due to repeated violations of its computer-use policy, as well as alleged dishonesty and insubordination during the employer's investigation of claimant's policy violations. The employer's board chairman testified at hearing that claimant's insubordination after being told not to delete any files from her computer was the "most important" of these three reasons for discharge. Transcript at 8. Further, the record shows that this insubordination occurred last in time. 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). Therefore, claimant's deletion of a file from her computer after the employer directed her not to do so is the proper focus of the misconduct analysis.

Claimant testified that her manager “instructed [her] not to remove any files” from her work computer, but that she deleted her résumé because she was “afraid another coworker would access it [whom she] ‘had issues with,’” and, because it was claimant’s “private property,” she “honestly did not know” that the résumé was included in the manager’s instructions. Transcript at 30. Even assuming that claimant genuinely believed that her manager’s instructions excluded the résumé, the record does not support the conclusion that she held that belief in good faith. *See Goin v. Employment Dept.*, 203 Or App 758, 126 P.3d 734 (2006) (a claimant’s sincere but mistaken belief that their employer would excuse, condone or overlook a violation of their policy, when the claimant had at least some factual basis for believing so, suggests that the claimant acted in good faith). Here, the record does not show that claimant had any factual basis for believing that, in directing claimant not to delete any files, the employer had excepted from that directive any files that claimant considered “private property.” For that reason, claimant’s conduct was not a good-faith error. Instead, in assuming without evidence that the employer’s instructions contained an exception, and then acting in accordance with that assumption, claimant’s failure to follow the employer’s instructions was a wantonly-negligent disregard for the employer’s standards of behavior.

Similarly, the record does not support the conclusion that claimant’s conduct was an isolated instance of poor judgment. In order to meet the definition of an isolated instance of poor judgment, an act, in relevant part, “. . . 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.” OAR 471-030-0038(3)(b)(A). Here, the record shows that, in addition to deleting the résumé from her computer, claimant had regularly violated the employer’s computer-use policy. Claimant testified that she was aware that the employer maintained such a policy, but “did not remember it within detail.” Transcript at 22. Claimant testified that she did so because some of her coworkers acted similarly, and she therefore believed that “it was [not] as big of a deal as [she] later found it out to be.” Transcript at 23. In short, the evidence in the record shows that, more likely than not, claimant acted without regard for the consequences of her actions, in the belief that the employer was unlikely to stringently enforce the policy. Claimant’s previous policy violations were therefore wantonly negligent. As a result, claimant’s deletion of the file from her computer was not isolated, and therefore not an isolated instance of poor judgment.

For these reasons, claimant was discharged for misconduct connected with work and is disqualified from receiving unemployment insurance benefits effective September 27, 2020.

DECISION: Order No. 21-UI-159669 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: March 3, 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.

NOTE: 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.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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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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