

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0460

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 31, 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 unemployment insurance benefits effective September 27, 2020 (decision # 95947). Claimant filed a timely request for hearing. On April 14 and 18, and May 10, 2021, ALJ S. Lee conducted a hearing, and on May 25, 2021, issued Order No. 21-UI-167477, reversing decision # 95947 and concluding claimant's discharge was not for misconduct and did not disqualify claimant from receiving benefits. On June 11, 2021, the employer filed an application for review of Order No. Order No. 21-UI-167477 with the Employment Appeals Board (EAB).

On June 16, 2021, ALJ S. Lee issued Amended Order No. 21-UI-168848, amending Order No. 21-UI-167477 only to correct an error in the evidentiary rulings contained therein. EAB has construed the employer's application for review of Order No. Order No. 21-UI-167477 as an application for review of Amended Order No. 21-UI-168848.

FINDINGS OF FACT: (1) Lower Umpqua Hospital employed claimant as a laboratory manager from September 16, 2019 until October 1, 2020.

(2) The employer had a written Workplace Harassment Policy stating that the employer expected its employees to be "respectful and professional . . . in the workplace," and refrain from conduct that included "harassment, bullying or intimidation" of coworkers. Exhibit 2, Workplace Harassment Policy. Claimant received the policy when hired and understood the employer's expectations.

(3) Shortly after claimant began work, she became concerned that the employer's laboratory testing and other procedures were not compliant with state quality assurance standards, which potentially put the hospital laboratory at risk with state authorities. Her concerns were based on her observations that unqualified personnel had been allowed to perform laboratory tests they had not been formally trained or certified to perform, that laboratory tests had not been correctly performed, and that tests which had

been performed were not correctly documented in medical logs. Claimant reported her concerns to the employer's chief executive officer (CEO) and their human resources director.

(4) When claimant began changing the way and by whom laboratory procedures were to be performed to comply with state standards, she met resistance from laboratory staff members who were unhappy with the changes and claimant's interactions with them about the changes. The employer received complaints from laboratory employees that claimant had yelled at them, given them "the silent treatment," or had slammed things when she was not happy with them. April 28, 2021 Transcript at 39.

(5) The employer also received several complaints from a phlebotomist that claimant prevented her from performing particular laboratory tests or reporting the results because she was not a certified laboratory technician, even though the phlebotomist insisted that she had been properly trained. On July 13, 2020, claimant filed a complaint with the employer that the CEO and human resources director were intimidating her to allow the phlebotomist to conduct laboratory tests for which she was uncertified.

(6) On July 14, 2020, employer conducted a laboratory staff meeting to address what it perceived as laboratory discord between claimant and laboratory employees. The human resources manager and a union representative attended the meeting. During the meeting, employees expressed their frustration with claimant's conduct in the laboratory and claimant expressed that she "wanted to have . . . a better team approach" in the laboratory, which the employer perceived as sincere. April 28, 2021 Transcript at 11.

(7) One of claimant's duties was to manage the work shifts of laboratory personnel. When the employer needed additions to the laboratory staff to meet staffing requirements, it often sought employees from a temporary staffing agency. When claimant interviewed the staffing candidates, she asked them particular questions about their experience with required state protocols and drawing blood, and rejected any whom she believed lacked the necessary qualifications. The staffing agency reported to the employer that claimant had been "aggressive" and "unprofessional" in interviews with candidates, which made the candidates uncomfortable, and told the employer that it might refuse to send over any more candidates. April 28, 2021 Transcript at 11-12, 36-37.

(8) On July 17, 2020, claimant met with the CEO and human resources director regarding the staffing agency complaint regarding claimant's conduct with staffing agency candidates during interviews. Thereafter, the employer required claimant to be accompanied during interviews. Following the next interview claimant conducted, which the human resources director attended, the employer concluded the interview "went well," and the staffing agency had no complaints regarding claimant's conduct. April 28, 2021 Transcript at 37.

(9) On July 30, 2020, the employer's compliance director responded to claimant's July 13, 2020 complaint against the CEO and human resources director regarding the phlebotomist. The compliance director did not find evidence that the CEO and human resources director had intimidated claimant, or proof that the employer had provided the required training to the phlebotomist. Exhibit 2. She concluded that the problem could be resolved by relying on state guidelines regarding laboratory roles and the laboratory procedures to be followed, and that the phlebotomist would be held to those standards going forward.

(10) On August 27, 2020, the United Food and Commercial Worker Union (UFCW) filed a grievance against the employer on behalf of several laboratory employees who claimed that they worked in a hostile work environment due to claimant's treatment of them.

(11) On August 28, 2020, the employer placed claimant on administrative leave with pay for the purpose of conducting an investigation of the allegations and information contained in the August 27, 2020 UFCW grievance. Shortly thereafter, the employer retained a law firm to conduct an investigation regarding the allegations in the grievance.

(12) During the investigation, employees made various allegations against claimant, including that claimant approached a doctor regarding Family Medical Leave Act (FMLA) information the doctor had provided for an employee, had told one employee another could not be trusted, gave the silent treatment or slammed things when she was not happy with staff, and behaved in unprofessional ways. April 28, 2021 Transcript at 32-33. The investigator submitted a report to the employer in which she found that the accusations against claimant were substantiated and that claimant's conduct included harassment, gossip, sharing confidential information, bullying and other unprofessional conduct.

(13) On October 1, 2020, "based on the findings of the investigation" contained in the law firm's report, the employer discharged claimant for having engaged in "inappropriate and unprofessional conduct" that "negatively affected the hospital's operations." Exhibit 1, October 1 termination letter.

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) (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).

The employer discharged claimant for alleged "inappropriate and unprofessional conduct" based on the findings of the investigator's report. The employer had the right to expect claimant to be "respectful and professional . . . in the workplace," and refrain from conduct that included "harassment, bullying or intimidation" of coworkers. Claimant understood the employer's expectations. However, the employer failed to meet its burden to show that claimant engaged in much of the conduct for which she was discharged.

The employer's evidence was based entirely on hearsay reports of claimant's conduct and the results of the investigation, which was not offered into evidence. Claimant denied engaging in most, if not all of the conduct in question, and none of the individuals who made the complaints testified at hearing. April 28, 2021 at 28-29, 30, 39. The employer's hearsay evidence was their primary source of evidence of

claimant's conduct towards her coworkers, and because the individuals who reportedly were the source of those reports did not testify, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness, or potential bias. On this record, the employer had the alternative of presenting live testimony from current employees to substantiate its allegations, and the facts the employer sought to prove that were central to its assertion of misconduct. Moreover, the hearsay evidence the employer offered at hearing to support its allegations of claimant's misconduct were generalized statements without supporting details and failed to show that claimant's actions were deliberate violations of the employer's expectations or demonstrated a conscious indifference to those expectations. Absent a reasonable basis for concluding that claimant was not a credible witness, claimant's first-hand denials of the employer's allegations were at least as credible as the employer's hearsay. The evidence as to whether claimant engaged in the conduct complained of in conscious violation of the employer's policies therefore was, at best, equally balanced.¹ Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden.

To the extent that claimant may have admitted that she told an employee that their coworker told her that the coworker "hated" the employee, and told the coworker that the employee told her that the employee did not "trust" the worker, the employer failed to establish misconduct. April 28, 2021 Transcript at 38-39. Claimant explained at hearing that the statements in question were "taken out of context" because she was trying to resolve a problematic scheduling conflict between the two coworkers for the employer. April 28, 2021 Transcript at 39. Accordingly, to the extent claimant may have made the statements in question, the preponderance of the evidence fails to show that they were made with a conscious indifference to the employer's expectations, and therefore fails to establish that they were willful or wantonly negligent violations of those expectations.

For these reasons, the employer failed to meet its burden to show that claimant willfully engaged in "inappropriate and unprofessional conduct" as alleged, or did so with wanton negligence. The employer therefore failed to establish that it discharged claimant for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Amended Order No. 21-UI-168848 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: July 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

¹ *See, Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

'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.

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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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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