

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0591

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 21, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant but not for misconduct and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 151029). The employer filed a timely request for hearing. On July 14, 2021, ALJ Micheletti conducted a hearing, and on July 21, 2021 issued Order No. 21-UI-170787, affirming decision # 151029. On July 23, 2021, the employer filed an application for review with the Employment Appeals Board (EAB). On August 4, 2021, ALJ Micheletti issued Amended Order No. 21-UI-171859, vacating and replacing Order No. 21-UI-170787 to clarify an evidentiary ruling but otherwise leaving the substance of Order No. 21-UI-170787 undisturbed. This matter comes before EAB based on the employer's July 23, 2021 application for review, which EAB construes to apply to Amended Order No. 21-UI-171859.

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant as an operating room nurse from May 6, 2002 to March 3, 2021.

(2) At the time of her hire, the employer provided claimant a caregiver handbook that included the employer's professionalism policy that prohibited "embarrassing, discourteous, unprofessional, or disrespectful" behavior towards coworkers, patients, and visitors. Exhibit 1 at 1; transcript at 5-6. Claimant was aware of and understood the employer's policy.

(3) On September 13, 2019 and April 24, 2020, the employer counseled claimant for violating the professionalism policy. At the time the employer counseled claimant on April 24, 2020, the employer advised claimant that further violations of the policy might lead to additional corrective action including termination.

(4) On January 20, 2021, claimant was training a coworker, J.M. and serving as "circulator of the [operating] room" tasked with "making sure that everybody's doing their job within the room." Transcript at 11. At one point, claimant became concerned for the sterility of the operating room when

she observed another coworker, N.M., with her hands under her armpits. Claimant instructed N.M. to remove her hands from her armpits. Later, the operating room patient kicked a table and claimant responded by holding down the patient's legs and directing N.M. to move the table.

(5) On January 27, 2021, claimant was working with N.M. and noticed her improperly placing a sterile drape over a microscope. Claimant instructed N.M. how to place the drape over the microscope in the proper manner.

(6) On January 28, 2021, the employer received a complaint from N.M. stating that claimant had "yelled [at], demeaned, and embarrassed" N.M. on January 20, 2021 and "yell[ed]" at and "belittled" N.M. on January 27, 2021. Transcript at 7, 17.

(7) On February 15, 2021, the employer placed claimant on administrative leave to investigate whether the January 20, 2021 and January 27, 2021 incidents violated the employer's professionalism policy. The employer interviewed J.M. as part of the investigation and J.M. told the employer that she felt "belittled" when claimant "picked at . . . everything that she did" on January 20, 2021. Transcript at 15.

(8) On March 3, 2021, the employer discharged claimant for violating their professionalism policy after determining that the investigation had substantiated her coworkers' complaints.

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 record demonstrates that the employer had a professionalism policy that prohibited, among other things, disrespectful and discourteous behavior towards coworkers. Claimant was aware of the policy. Inasmuch as the employer's policy contributed to a healthy work environment and the safety of patients and visitors in the hospital, the policy was reasonable and the employer had a right to expect that claimant would comply with their requirements.

The employer believed that claimant violated the professionalism policy and, hence, committed misconduct justifying discharge, based on claimant's actions on January 20, 2020 and January 27, 2020. However, the preponderance of the evidence fails to support the conclusion that claimant violated the professionalism policy willfully or with wanton negligence.

The record shows that claimant's role in the operating room on both days was not only to train J.M., but also to make sure that everyone in the operating room was "doing their job." This responsibility coupled with the serious nature of an operating room environment dictated that claimant might have to be direct in her approach to a subordinate when she observed a safety risk or violation. The record suggests that claimant reacted in a direct manner towards both N.M. and J.M. on January 20, 2021 when she observed safety risks including N.M. placing her hands "outside a sterile field" and when the operating room patient reflexively kicked a table requiring claimant to quickly hold down the patient's legs and direct N.M. to move the table. Transcript at 8. Likewise, claimant was direct toward N.M. on January 27, 2021 due to the safety hazard potentially associated with draping a microscope incorrectly. The employer failed to establish that claimant knew or should have known that her conduct amounted to embarrassing, discourteous, unprofessional, or disrespectful behavior such as would violate the employer's professionalism policy. Claimant's first-hand testimony indicating that she never yelled at her subordinates and suggesting that she acted at all times in a professional manner is credible and entitled to more weight than the hearsay evidence relied upon by the employer to support claimant's discharge. Transcript at 24, 27. As such, the preponderance of the evidence shows that claimant was not indifferent to the consequences of her actions, but instead took them seriously and that she had no reason to know, nor should she have known that her actions might violate the employer's professionalism policy. Because the employer discharged claimant but not for misconduct, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-170787 is affirmed.

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

DATE of Service: August 26, 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.

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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 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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