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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1023

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 17, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective February 14, 2021 (decision # 141645). Claimant filed a timely request for hearing. On November 17, 2021, ALJ Toth conducted a hearing, and on November 24, 2021 issued Order No. 21-UI-180480, affirming decision # 141645. On November 29, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At hearing, the ALJ admitted documents submitted by claimant as Exhibit 2 into evidence, but failed to mark Exhibit 2. Transcript at 71. As a clerical matter, EAB identified the exhibit based on the ALJ's description of it, and marked it as Exhibit 2.

FINDINGS OF FACT: (1) Oregon Supported Living Program employed claimant as a direct support professional (DSP) from September 12, 2011 to February 17, 2021. Claimant's job responsibilities included providing living support to the employer's "very vulnerable" clients, which included making sure clients took prescribed medication and had no expired food in their refrigerators, and providing personal care assistance such as trimming fingernails and toenails. Transcript at 10.

(2) The employer provided databases, including medication administration records (MAR) and T-logs, for DSPs to use to properly track the care they provided to clients. The employer expected each DSP to complete the documentation in these databases accurately each time a DSP supported a client because the employer "depended" on accurate reporting to ensure their clients were receiving necessary care. Transcript at 10. In those instances when a client refused care, the employer expected their DSPs to notify their supervisor and to document the refusal in the MAR and/or the T-logs. Claimant was aware of the employer's documentation and notification expectations. Claimant had weekly check-ins with her supervisor to address client issues.

(3) On September 22, 2020, claimant documented in the MAR that she had trimmed the fingernails and toenails of a client. Claimant did this by placing her initials in the MAR next to a field labeled "Fingernails/Toenails." Transcript at 54. Although claimant had trimmed the client's fingernails, she had not trimmed the client's toenails because the client had refused to have their toenails trimmed. Claimant did not notify the employer, verbally or through database documentation, that she had not trimmed the client's toenails.

(4) On October 23, 2020, the same client allowed claimant to trim their fingernails, but refused to allow her to trim their toenails. Claimant did not know how to document the client's refusal in the MAR given that trimming "Fingernails/Toenails" was the only option to mark in the MAR, and the client had allowed the former, but not the latter. Claimant documented the client's refusal in the daily T-log that accompanied the MAR.

(5) On November 24, 2020, December 31, 2020, and January 20, 2021, claimant documented in the MAR that she had trimmed the fingernails and toenails of the same client by placing her initials in the MAR next to the "Fingernails/Toenails" field on each occasion. Claimant had not trimmed the client's toenails on any of these occasions because the client refused toenail service. Claimant did not inform her supervisor that the client had refused to have their toenails trimmed on any of these occasions, nor did she document the client's refusals in the T-logs for these occasions.

(6) On January 30, 2021, claimant's supervisor visited with the same client and became concerned when she discovered their toenails were "extremely overgrown," and when the client expressed that their toenails were causing them "discomfort." Transcript at 20. The supervisor took the client to a podiatrist who treated the client's overgrown toenails, and who concluded that the client's toenails had not been trimmed in four or five months.

(7) From February 2, 2021 to February 17, 2021, the employer suspended claimant and conducted an investigation to determine the circumstances surrounding what the supervisor had discovered on January 30, 2021. The investigation revealed claimant's documentation discrepancies regarding the client's toenail care from September 2020 through January 2021.

(8) On February 17, 2021, the employer discharged claimant based on her failure to properly document the client's lack of toenail care (including any refusal of care) over the preceding months, or to otherwise inform her supervisor of any refusal of care such that the employer would be on notice of the situation. The employer believed that claimant's failures created a "severe" situation for the client, and that they "couldn't take [the] risk, to allow [claimant] to continue working" for the employer. Transcript at 14-15.

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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

> (A) The act 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.
>
> (B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).
>
> (C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.
>
> (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 record shows that the employer expected claimant to keep the employer notified, through properly documented entries in the MAR and/or the T-log, of the daily care tasks she completed with her clients. The employer was particularly concerned that claimant document those instances where a client refused care and that she inform her supervisor of any such refusal because the employer's knowledge of such a refusal was critical to the employer's ability to ensure a client received proper care. Claimant was aware of the employer's expectations and the employer's expectations were a matter of common sense.

The employer discharged claimant on February 17, 2021 after discovering that claimant had entered inaccurate and misleading information in the MAR on September 22, 2020, November 24, 2020, December 31, 2020, and January 20, 2021, indicating that she had trimmed her client's fingernails and toenails, when the client had, in fact, refused to allow claimant to trim their toenails. Claimant did not document her client's refusal in the T-log entry corresponding to the MAR or otherwise notify her supervisor of her client's refusal on any of these occasions. Because of claimant's failures, the employer was unaware that the client's toenails had not been trimmed for a period of months and had instead become "extremely overgrown" and painful. The employer did not learn of this fact until January 30,

2021. The record shows that claimant was conscious of her conduct and knew or should have known that by repeatedly documenting in the MAR that she had trimmed the client's toenails when the client had actually refused to have their toenails trimmed, and then by not informing her supervisor of the clients refusals or documenting those refusals in corresponding T-logs, she would not only be placing the client at risk for a medical emergency, but would also be violating the employer's reasonable expectations.

The record shows that the MAR database combined fingernail and toenail care as a single field in the MAR database and that this created a documenting challenge for claimant when the client allowed her to trim their fingernails, but not their toenails. Although it can be inferred from the record that claimant never addressed this documenting challenge with her supervisor during any of their weekly meetings, claimant was nevertheless able to overcome this challenge, and meet the employer's documentation expectations in the process, when on October 23, 2021 she documented the client's refusal of toenail care in the daily T-log accompanying her MAR entry for that day. As such, the record demonstrates that claimant understood the need to properly document any refusal of toenail care, that the T-log database allowed her to do so, and that a failure to document a similar refusal of toenail care in the T-log for September 22, 2020, November 24, 2020, December 31, 2020, and January 20, 2021 constituted a wantonly negligent disregard of the employer's reasonable expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. The record shows that in addition to her misleading MAR entry on January 20, 2021, claimant had made the same misleading MAR entry, under the same circumstances, on September 22, 2020, November 24, 2020, and December 31, 2020. Finally, the record shows that claimant's database documentation errors otherwise exceeded mere poor judgment because they placed her client at risk for a medical emergency and created doubt in the employer that claimant could be counted on to accurately report the completion of other required duties such as the administration of medication. As such, claimant irreparably breached the trust relationship between herself and the employer, making a continued employment relationship impossible.

Claimant's conduct is also not excusable as a good faith error. The record shows that claimant knew of the importance of properly documenting any refusal of care either in the MAR, the daily T-log, or both. Claimant complied with the employer's reasonable expectation on October 23, 2020 when she documented her client's refusal of toenail care in the daily T-log that corresponded with her MAR entry. Because claimant knew the significance of accurately documenting any refusal of care for the employer, and because the record shows that claimant had previously done so on at least one occasion, her failure to properly document her client's refusals of care on November 24, 2020, December 31, 2020, and January 20, 2021 was not a good faith error in any of these instances.

For the above reasons, the preponderance of the evidence shows that the employer discharged claimant for misconduct, and claimant is therefore disqualified from receiving unemployment insurance benefits effective February 14, 2021.

DECISION: Order No. 21-UI-180480 is affirmed.

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

DATE of Service: January 6, 2022

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.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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
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