

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0041

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 24, 2021, 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 October 4, 2020 (decision # 84130). Claimant filed a timely request for hearing. On December 9 and 22, 2021, ALJ Meerdink conducted a hearing, and on December 22, 2021 issued Order No. 21-UI-182482, affirming decision # 84130. On December 30, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Children's Nursing Specialties employed claimant as a registered nurse from August 14, 2019 until October 7, 2020. The employer provided in-home nursing care to children and young adults.

(2) The employer expected claimant not to become friends with clients on her social media accounts. Claimant understood that expectation. The employer expected claimant not to call clients or their families when not on duty about her work schedule. Claimant understood that expectation. The employer expected claimant to be professional toward clients and their families and "maintain strong . . . boundaries" with clients and their families. Exhibit 1 at 23. Claimant understood those expectations.

(3) In September 2020, the employer assigned claimant to care for a new client, who was a young adult in his twenties. Claimant had several trainings with the client. During one of the trainings, claimant, who

had persistent back pain and fibromyalgia, experienced difficulty moving the client. Claimant's trainer asked if claimant had ever injured her back, and claimant responded that she had. The client overheard the conversation and asked claimant questions about her back pain. Claimant answered the client's questions about her back pain because she thought it would be rude not to do so.

(4) In another training with the client in September 2020, during a time when there were wildfires in the area, claimant mentioned to the client and his family that she was concerned about an earthquake hitting the region and being distant from her family if bridges collapsed. Claimant thought the comment was appropriate because the group had been discussing the wildfires and disaster relief.

(5) In late September 2020, while off-duty, claimant called the client's mother on her cell phone to advise that claimant had interacted with someone who had traveled on a full flight with improperly masked passengers, and, given the potential for COVID-19 exposure, asked whether the mother still wanted claimant to work an upcoming shift.

(6) On or about October 1, 2020, claimant became friends with the client on Facebook.

(7) On October 3, 2020, claimant was working in the client's home. That morning, at 8:00 a.m., claimant asked the client's mother to wake up and show claimant the process the mother used to get the client out of bed. The mother had previously offered to get up that morning and show claimant her process because she thought it would help claimant.

(8) Later on October 3, 2020, the client's mother called the employer and complained about aspects of claimant's behavior. The mother mentioned that claimant became Facebook friends with the client, called the mother to check about work scheduling, woke the mother up to have her show claimant her process for getting the client out of bed, complained about her back pain, and mentioned concern about earthquakes and distance from her family. On October 5, 2020, the mother sent the employer an email memorializing her complaints about claimant's behavior.

(9) On October 7, 2020, the employer discharged claimant in part for violating their expectations not to become friends with the client on her social media accounts and not to contact the client or his family when not on duty about her work schedule. The employer also discharged claimant for violating their expectation that claimant be professional toward clients and their families and not cross personal boundaries by waking up the mother to have her show claimant her process for getting the client out of bed, mentioning her back pain to the client, and mentioning her concern about earthquakes and distance from her family.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The order under review concluded that claimant violated the employer’s expectations with at least wanton negligence by being Facebook friends with the client and by calling the mother during off-duty hours to discuss scheduling. Order No. 21-UI-182482 at 3. The record supports that conclusion. However, the order further concluded that those violations were not isolated instances of poor judgment. Order No. 21-UI-182482 at 3. The record does not support that conclusion.

As an initial matter, the record shows that the employer discharged claimant, in part, for waking up the mother to have her show claimant her process for getting the client out of bed, mentioning her back pain to the client, and mentioning her concern about earthquakes and distance from her family. However, the record also shows that the mother had previously offered to get up the morning of October 3, 2020 and show claimant her process for getting the client out of bed because she thought it would help claimant. Further, claimant mentioned her back pain to the client because he asked her about it and she thought it would be rude not to answer his questions. Finally, while claimant mentioned to the client and his family her concern about an earthquake hitting the region and being distant from her family if bridges collapsed, she raised the topic in the context of discussing wildfires in the area and disaster relief. For these reasons, the employer did not meet their burden to show that claimant’s above-mentioned conduct constituted a willful or wantonly negligent violation of the employer’s expectation that claimant be professional toward clients and their families and not cross personal boundaries. This is because the record does not show that claimant intended to be unprofessional or cross personal boundaries with respect to any of the above-mentioned conduct, or that claimant knew or should have known that her conduct probably violated the employer’ expectations.

The record shows that the employer also discharged claimant for violating their expectations not to become friends with clients on social media and not to contact clients or their families when not on duty about her work schedule. The employer met their burden to show that claimant violated these expectations with at least wanton negligence. This is because claimant knew and understood that she was not to become Facebook friends with the client or call the client or his family when not on duty about her work schedule. Nevertheless, in late September 2020, claimant, while off-duty, called the client’s mother to ask whether the mother still wanted claimant to work an upcoming shift, and, on or about October 1, 2020, claimant became Facebook friends with the client. This evidence is sufficient to conclude that claimant consciously engaged in conduct she knew or should have known probably violated the employer’s expectations. As such, claimant’s conduct regarding calling the mother about scheduling and becoming Facebook friends with the client constituted wantonly negligent violations of the standards of behavior the employer had a right to expect.

However, under OAR 471-030-0038(3)(b), claimant’s wantonly negligent conduct regarding calling the mother about scheduling and becoming Facebook friends with the client did not constitute misconduct if the violations were isolated instances of poor judgment. 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).

Applying these standards, the record shows that claimant's conduct regarding becoming Facebook friends with the client and calling the mother about scheduling were isolated instances of poor judgment, and not misconduct. The record shows that becoming Facebook friends with the client and calling the mother about scheduling were single or infrequent occurrences rather than repeated acts. Further, the two acts were not sufficient to establish a pattern of willful or wantonly negligent behavior because the two incidents were unrelated and constituted violations of two distinct employer expectations. Because claimant's conduct regarding becoming Facebook friends with the client and calling the mother about scheduling were not repeated acts and did not amount to a pattern of other willful or wantonly negligent behavior, the acts were "isolated," as defined under OAR 471-030-0038(1)(d)(A).

Application of the remaining criteria supports that claimant's conduct regarding becoming Facebook friends with the client and calling the mother about scheduling were isolated instances of poor judgment. The acts were acts of poor judgment in that claimant's conduct consisted of conscious decisions that resulted in violations of the employer's standards of behavior. Claimant's conduct regarding becoming Facebook friends with the client and calling the mother about scheduling did not exceed mere poor judgment because it did not violate the law, was not tantamount to unlawful conduct, and, viewed objectively, did not create an irreparable breach of trust in the employment relationship or otherwise make a continued relationship impossible.

Accordingly, the employer discharged claimant for reasons that either did not constitute willful or wantonly negligent violations of the employer's expectations or were isolated instances of poor judgment. Claimant therefore was not discharged for misconduct, and is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 21-UI-182482 is set aside, as outlined above.

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

DATE of Service: February 9, 2022

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 desisyong ito.

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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www.Oregon.gov/Employ/eab

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