EO: 200
BYE: 202216

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0626

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective April 18, 2021 (decision # 95447). Claimant filed a timely request for hearing. On April 26, 2022, ALJ Ramey conducted a hearing, which was continued to May 2, 2022 and May 17, 2022.[1] On May 25, 2022, ALJ Ramey issued Order No. 22-UI-194625, concluding that claimant was discharged, but not for misconduct and was not disqualified from receiving benefits based on the work separation. On June 1, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer submitted written arguments received on June 27, 2022 and July 25, 2022. EAB considered the employer's June 27, 2022 written argument when reaching this decision. As to the employer's July 25, 2022 written argument, because it was not received by EAB within the time period allowed under OAR 471-041-0080(1) (May 13, 2019), the argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b). Claimant submitted a written argument on June 10, 2022. EAB did not consider claimant's written argument when reaching this decision because she did not include a statement declaring that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) The employer was a trust established to oversee the care of the trust beneficiary, H.S.O., who was an elderly woman. The employer employed claimant as an in-home caregiver for H.S.O. from September 2012 until April 23, 2021.

[1] Claimant failed to appear at the May 17, 2022 session of the hearing.

(2) The employer expected claimant not to be physically aggressive or to direct foul language toward H.S.O. Claimant knew and understood this expectation as a matter of common sense. The employer also expected claimant to submit time cards that accurately reflected the time claimant worked. This expectation was contained in the employee handbook the employer gave claimant and which claimant signed when she was hired in September 2012. However, claimant believed, based on oral discussions with the employer's trustee, that it was acceptable for H.S.O.'s caregiving team to work "extra time here or there" because H.S.O.'s "wellbeing was number one," and sometimes she needed longer care. May 2, 2022 Transcript at 35-36. Claimant further believed, based on a statement the employer's trustee made, that if she went to H.S.O.'s home to provide extra care she was supposed to put at least two hours down on her timecard for that work.

(3) Prior to April 2021, claimant sometimes brought her dog to H.S.O.'s home during her shifts. In February or March 2021, claimant stopped bringing her dog to H.S.O.'s home because the dog had grown older and more self-sufficient.

(4) On Saturday March 6, 2021, claimant was not scheduled to work but received a call from another caregiver, A.H., requesting claimant assist A.H. in giving H.S.O. a shower. Giving H.S.O. a shower required two caregivers. A.H. and either claimant or a specific other coworker typically were the pair of caregivers who showered H.S.O. Claimant agreed to help, went to H.S.O.'s home, and worked with A.H. to give H.S.O. a shower. Claimant worked less than two hours helping with the shower. However, when she filled out her timecard, she reported working two hours on March 6, 2021.

(5) On April 12, 2021, the employer's trustee sent an email to H.S.O.'s caregiving team, including claimant, stating that employees were not allowed to bring their pets to H.S.O.'s home without prior authorization.

(6) On April 18, 2021, the employer's trustee conducted an audit of claimant's March 2021 time cards. The trustee discovered that for March 6, 2021, the day claimant came in to help A.H. give H.S.O. a shower, claimant had reported working two hours that day, although she was not scheduled to work.

(7) On April 19, 2021, the trustee sent another email to the employer's employees, including claimant, again stating that employees were not allowed to bring their pets to H.S.O.'s home without prior authorization.

(8) On or about April 20, 2021, one of claimant's coworkers told the trustee that she observed claimant bring her dog to H.S.O.'s home after the trustee sent the April 12 and 19, 2021 emails. However, claimant had not brought her dogs to H.S.O.'s home after the trustee sent the emails establishing the no-pets policy.

(9) Also on or about April 20, 2021, a different coworker told the trustee that sometime in 2020, the coworker had observed claimant become frustrated while brushing H.S.O.'s hair, drop the hairbrush aggressively in H.S.O.'s lap, and tell H.S.O. to "brush [her] own damn teeth." May 2, 2022 Transcript at 8. However, claimant had not been physically aggressive with H.S.O. and had not directed foul language toward her.

(10) On April 23, 2021, the employer discharged claimant because claimant had reported working two hours on March 6, 2021, although she was not scheduled to work that day. The employer also discharged claimant based on the trustee's belief that claimant brought her dog to H.S.O.'s home after the trustee sent her April 12 and 19, 2021 emails, and based on the trustee's belief that claimant had been aggressive with H.S.O. and had directed foul language toward her.

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 did not meet their burden to show that claimant, willfully or with wanton negligence, breached the employer's expectation regarding submitting accurate time cards. At hearing, the employer asserted claimant violated their time card expectations by submitting a card with an entry for two hours of work on March 6, 2021, the occasion when claimant was not scheduled to work but came into work on her scheduled time off as requested to help A.H. give H.S.O. a shower, and listed two hours of work when she actually worked less than two hours.[2] April 26, 2022 Transcript at 12. The testimony of the employer's trustee and of claimant differed relating to claimant's understanding of the employer's time card expectations. The trustee testified that, per the employee handbook, claimant was required to submit time cards that accurately reflect the time claimant worked and that claimant could only depart from the planned work schedule "[w]ith email permission" from the trustee. April 26, 2022 Transcript at 15. Claimant, on the other hand, acknowledged she had received the employee handbook in 2012 but stated that she believed, based on oral discussions with the trustee, that it was acceptable for H.S.O.'s caregiving team to work "extra time here or there" because H.S.O.'s "wellbeing was number one," and sometimes she needed extra care. May 2, 2022 Transcript at 24, 35-36, 40. Claimant further testified that she believed, based on a statement the trustee made, that if she went to H.S.O.'s home to provide extra care she was supposed to put at least two hours down on her time card for that work. May 2, 2022 Transcript at 53.

The weight of the evidence favors claimant's account of what she understood the employer's expectations to be. This is because the employer had the burden of persuasion and the record shows it was plausible that the employer would depart from the policy as stated in the handbook. Nearly a decade had passed since claimant received the handbook and evidence suggested the employer was willing to deviate from it, given statements the trustee made in March 2021, which claimant read into the record, in

[2] The trustee also testified that there were a "few other[]" time card discrepancies but did not provide further detail or otherwise assert or show that the alleged discrepancies were willful or wantonly negligent violations of the employer's expectation. April 26, 2022 Transcript at 12.

which the trustee encouraged employees to "reschedul[e] yourself" and take "an extra hour or so" to facilitate a change in H.S.O.'s routine. May 2, 2022 Transcript at 34-35. Because the weight of the evidence favors claimant's account of what she understood the employer's expectations to be, EAB based its findings on this point on claimant's evidence.

Accordingly, the record shows that claimant did not know and understand that she violated the employer's expectations by submitting a time card with a March 6, 2021 entry for two hours of work that she was not scheduled to work or by reporting two hours of work when she actually worked less than two hours that day. Because claimant did not know and understand that her conduct breached the employer's expectations, the record fails to show that the employer discharged claimant for engaging in a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of her. Therefore, as to this reason for discharging claimant, the employer did not establish that they discharged claimant for misconduct under ORS 657.176(2)(a).

With respect to the expectation conveyed in the trustee's April 12 and April 19, 2021 emails, that employees not bring their pets to H.S.O.'s home, the employer did not meet their burden to show that claimant violated this expectation. At hearing, the trustee testified that she never personally observed claimant bring a dog to H.S.O.'s home, but believed claimant had breached the no-pets policy based on what she heard from a coworker of claimant. April 26, 2022 Transcript at 22, 27. The trustee then discharged claimant on April 23, 2021, in part, for allegedly violating the no-pets policy. After doing so, the trustee found a doghouse and bed in H.S.O.'s guest bedroom closet, which the trustee assumed belonged to claimant, although other members of the caregiving team owned pets as well. April 26, 2021 Transcript at 10-11, 34-35. The employer's other witness, a coworker of claimant (but not the coworker who told the trustee that claimant had breached the no-pets policy), testified that she had observed claimant bring her dog to H.S.O.'s home only prior to the trustee's April 12 and April 19, 2021 emails that established the no-pets policy. May 2, 2022 Transcript at 5-6. Claimant, for her part, testified that prior to the trustee's April 2021 emails it was commonplace for employees to bring their pets to H.S.O.'s home and that she had brought her dog from time to time but stopped doing so a month or two before the trustee sent the April emails because the dog grew older. May 2, 2022 Transcript at 24-25, 47. Claimant further testified that the dog house and bed the trustee found in H.S.O.'s closet after discharging claimant did not belong to claimant and she had not left any dog-related materials at H.S.O.'s home. May 2, 2022 Transcript at 25-26. Further, in an email claimant sent to the employer after her discharge, she requested the return of personal items, but did not ask for any of the dog-related materials the trustee found in the closet to be sent to her, which is consistent with claimant's testimony that the dog-related materials did not belong to her. Exhibit 3 at 36. Accordingly, the weight of the evidence favors claimant's account because claimant's testimony was a first-hand account that was in accord with the testimony of the coworker and the trustee based her belief that claimant breached the no-pets policy solely on hearsay (because she discovered the doghouse, which could have belonged to a different employee, only after discharging claimant).

In their written argument, the employer asserted that claimant's account, that she had not brought her dog to H.S.O.'s home after the trustee sent her April emails, was inconsistent with an email claimant sent the trustee on April 23, 2021 after the employer discharged her. Employer's June 27, 2022 Argument at 12; Exhibit 3 at 36. In that email, claimant, without specifying when, listed employees who had brought pets to H.S.O.'s home, and stated "I followed suit on bringing my pup" and "I do take responsibility for my actions." Exhibit 3 at 36. The statements in the email are not inconsistent with

claimant's testimony because the email statements do not specify when claimant brought her dog to H.S.O.'s home and so can be interpreted as conveying that claimant had brought her dog to H.S.O.'s home prior to the trustee's April 2021 emails. May 2, 2022 Transcript at 24-25. The employer also contended in their argument that claimant's account was unreliable because she did not appear for the final session of the hearing, which was held on May 17, 2022. Employer's June 27, 2022 Argument at 12. The failure of claimant to appear on May 17, 2022 does not affect the reliability of claimant's testimony. Therefore, notwithstanding the assertions made in the employer's written argument, the weight of the evidence favors claimant's account that she did not bring her dog to H.S.O.'s home after the trustee's April 2021 emails establishing the no-pets policy. Therefore, on this disputed issue, EAB based its findings on claimant's evidence, and, as a consequence, the employer did not meet their burden to show that claimant violated the no-pets policy. Thus, as to this reason for discharging claimant, the employer did not establish that they discharged claimant for misconduct under ORS 657.176(2)(a).

Finally, as to the allegation that claimant aggressively dropped a hairbrush in H.S.O.'s lap and directed foul language toward her, the employer did not meet their burden to show that claimant violated their expectation. At hearing, the trustee testified that one of the reasons the employer discharged claimant on April 23, 2021, was because, shortly before the discharge, one of claimant's coworkers informed the trustee that claimant had thrown a hairbrush at H.S.O. and directed foul language at her. April 26, 2022 hearing at 6, 16-17. The coworker who provided this information to the trustee testified at hearing that sometime in 2020 she had observed claimant become frustrated while brushing H.S.O.'s hair, drop (not throw) the hairbrush aggressively in H.S.O.'s lap, tell H.S.O. to "brush [her] own damn teeth," and testified that she did not observe claimant hurt H.S.O. in any way during the incident. May 2, 2022 Transcript at 8-9. However, in contrast, claimant testified that the hairbrush incident did not happen, she was not aggressive toward H.S.O., she did not direct foul language at H.S.O., and had never intentionally hurt H.S.O. in any way. May 2, 2022 Transcript at 36-37, 40. Viewed objectively, the evidence on whether claimant dropped a hairbrush in H.S.O.'s lap and directed foul language toward her was equally balanced.

In their written argument, the employer asserted that the evidence was not equally balanced because, they contended, the coworker was a neutral third party and therefore provided the more reliable account. Employer's June 27, 2022 Argument at 12. However, it is not accurate to regard the coworker as neutral because at hearing, the trustee testified that the coworker remained one of the employer's employees. April 26, 2022 Transcript at 42-43. Because the coworker remained an employee and presumably relied on the employer for her livelihood, it is reasonable to conclude that the coworker was not neutral because she might have an interest in providing evidence favorable to the employer. Accordingly, notwithstanding the assertions made in the employer's written argument, the evidence on whether claimant dropped a hairbrush in H.S.O.'s lap and directed foul language at her was equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion—here, the employer—has failed to satisfy their evidentiary burden. Consequently, on this disputed issue, EAB based its findings on claimant's evidence. Therefore, the employer did not meet their burden to show that claimant violated their expectation that she not be physically aggressive or direct foul language toward H.S.O. Accordingly, as to this reason for discharging claimant, the employer did not establish that they discharged claimant for misconduct under ORS 657.176(2)(a).

For these reasons, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-194625 is affirmed.

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

DATE of Service: September 9, 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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