EO: 200
BYE: 202310

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

339
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0646

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 111224). The employer filed a timely request for hearing. On May 26, 2022, ALJ Lucas conducted a hearing, and on June 3, 2022 issued Order No. 22-UI-195269, affirming decision # 111224. On June 7, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Praxis Medical Group Inc. employed claimant as a patient services representative from January 22, 2021 to March 17, 2022.

(2) The employer expected claimant to refrain from communicating with her manager in a disrespectful or threatening manner. Claimant understood that expectation as a matter of common sense.

(3) In late 2021 or early 2022, claimant's mother was hospitalized with a severe illness, which caused claimant to be absent from some of her shifts. Claimant sought to use leave under the Family and Medical Leave Act (FMLA) to cover her absences, but had difficulty completing the FMLA paperwork. On January 25, 2022, claimant's mother died. Claimant believed her manager had been insensitive by insisting on completion of the FMLA paperwork during the time of her mother's illness and death. Claimant's perception that the manager had been insensitive caused her to become resentful toward the manager.

(4) On March 13, 2022, claimant texted her manager advising that she would not be able to come to work the next day. The manager texted back that she needed to know the nature of claimant's absence. In response, claimant texted, "nature of my absence is stress caused by my boss." Transcript at 10. Shortly thereafter, claimant sent the manager another text that stated, "so how was that answer . . . ? Was that good enough for you? Did that get to the point? You probably need to get your own shit together before you start questioning your staff." Transcript at 10.

(5) A few hours later, claimant attempted to call the manager. The manager did not answer and claimant left a voicemail message. In the message claimant stated, "Hello . . . , I'm sorry that you're not able to take the call 'cause you're too fucking scared to talk to me about the situation. I will be at work tomorrow." Transcript at 22.

(6) The manager listened to the voicemail and informed the employer's Human Resources (H.R.) department of claimant's communications. An H.R. worker then called claimant to gain her perspective about the communications. The H.R. worker believed that claimant's tone during the conversation was angry and abrupt, and told claimant not to come in to work on March 14, 2022. After the telephone conversation with the H.R. worker, claimant made a public post on a social media website that was critical of some of the employer's practices.

(7) On March 15, 2022, the employer placed claimant on administrative leave pending an investigation of her conduct. On March 17, 2022, the employer discharged claimant for communicating with her manager on March 13, 2022 in a disrespectful and allegedly threatening manner.

(8) Prior to March 13, 2022, claimant's working relationship with her manager and the employer's H.R. staff had been positive. Claimant had not received any discipline from the employer prior to her conduct on March 13, 2022.

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 violating their expectation that claimant refrain from communicating with her manager in a disrespectful or threatening manner.[1] The record shows that claimant's behavior on March 13, 2022 violated the employer's expectations with at least wanton negligence. On that day, claimant communicated with the manager in a disrespectful manner via text and voicemail messages. Claimant's communications contained sarcastic rhetorical questions and foul

[1] At hearing, the witness for the employer testified that claimant's March 13, 2022 social media post violated the employer's social media use policy, but did not specify how the post did so, and, in any event, testified that the alleged social media policy violation was not the reason the employer discharged claimant. Transcript at 6, 14. Therefore, claimant's alleged violation of the social media policy was not the proximate cause of the discharge, and this decision is instead focused on claimant's communications with her manager. *See Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

language, and her voicemail message appeared to taunt or possibly even threaten the manager for not answering when claimant called. Claimant knew or should have known as a matter common sense that communicating with her manager in a taunting and possibly even threatening manner via messages that contained foul language and questions intended to mock probably violated the employer's expectations. The record therefore establishes that claimant's text and voicemail communications with the manager on March 13, 2022 amounted to a wantonly negligent violation of the employer's expectations.

However, claimant's wantonly negligent conduct on March 13, 2022 was not misconduct because it was an isolated instance of poor judgment. Under OAR 471-030-0038(3)(b), isolated instances of poor judgment are not misconduct. 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 wantonly negligent violation of the employer's expectations was isolated. Claimant's conduct did not amount to a repeated act or pattern of wantonly negligent behavior. Although claimant's breach of the employer's expectations occurred via a series of texts and a voice mail message, for purposes of OAR 471-030-0038(1)(d)(A), claimant's wantonly negligent conduct on March 13, 2022 constituted a single occurrence in the employment relationship. *See Perez v. Employment Dep't*, 164 Or. App. 356, 992 P.2d 460, 467 (1999) ("'[The] isolated instance of poor judgment' analysis focuses on whether the incident was 'a single occurrence in the employment relationship,' . . . and not whether the incident involved more than one component 'act' by the employee.") (quoting *Waters v. Employment Div.*, 125 Or. App. 61, 865 P.2d 368, 369 (1993)).

In *Waters*, the employer discharged the claimant after he left three angry messages on his supervisor's answering machine over the course of an evening. 865 P.2d at 369. EAB concluded the conduct was not

an isolated instance of poor judgment because the claimant's messages were "repeated" in nature. *Waters*, 865 P.2d at 369. The Court of Appeals reversed, holding that the multiple messages occurring over the course of one evening were a single occurrence in the employment relationship. *Waters*, 865 P.2d at 369. Just as the multiple answering machine messages constituted a single occurrence in *Waters*, in this case, claimant's texts and voicemail message occurring within a short period on March 13, 2022 constituted a single occurrence in the employment relationship, rather than a repeated act or pattern of willful or wantonly negligent behavior.

Claimant also spoke with the employer's H.R. worker on March 13, 2022 in a manner that the worker perceived as angry and abrupt, and made a social media post that day that was critical of the employer. However, the employer's evidence regarding claimant's telephone conversation with the H.R. worker amounted only to portions of an email summary included in the record as an exhibit, which did not describe the conversation in much detail. As a result, that evidence and was not sufficient to establish that the conversation constituted a willful or wantonly negligent violation of the employer's expectations. *See* Exhibit 1 at 1. However, even if it was a willful or wantonly negligent violation, under *Waters* and *Perez*, discussed above, it would be treated as a component act of a single occurrence rather than a separate occurrence because it occurred within a short period after the texts and voicemail message, all of which happened over the course of a single day.

Similarly, although the employer asserted at hearing that claimant's March 13, 2022 social media post also violated the employer's expectations, the witness for the employer failed to specify how the post did so other than to state generally that it violated the employer's social media use policy. Transcript at 6, 14. The employer did not establish the post was a willful or wantonly negligent violation of the employer's expectations and, even if it was, it too would be treated as a component act of a single occurrence of poor judgment, and not a separate occurrence. As a result, the employer failed to establish that claimant's exercise of poor judgment on March 13, 2022 was a repeated act or pattern of willful or wantonly negligent behavior, and not a single occurrence.

Finally, the record does not show that claimant's conduct on March 13, 2022 exceeded mere poor judgment. Claimant's conduct neither violated the law nor was tantamount to unlawful conduct. Claimant's conduct on March 13, 2022 also did not amount to an irreparable breach of trust because it did not involve an act of dishonesty, theft, or the like. Nor does the record show that claimant's behavior made a continued employment relationship impossible. Although claimant's communications were disrespectful and could be interpreted as threatening, claimant's relationship with the employer was, more likely than not, salvageable. Claimant's working relationship with her manager and the employer's H.R. staff prior to March 13, 2022 had been positive. The record shows that the death of claimant's mother and frustration associated with the FMLA leave process caused claimant to "lash out" and act "out of character" on March 13, 2022. Transcript at 27. This suggests that what induced claimant's wantonly negligent conduct was temporary in nature and would not interfere with a continuing employment relationship.

For these reasons, claimant was discharged for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-195269 is affirmed.

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

DATE of Service: September 13, 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.

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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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