

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0973

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 13, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was therefore disqualified from receiving unemployment insurance benefits effective June 26, 2022 (decision # 120059). Claimant filed a timely request for hearing. On August 22, 2022 and August 26, 2022, ALJ Ramey conducted a hearing, and on September 2, 2022 issued Order No. 22-UI-202044, concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation. On September 20, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's written argument was considered to the extent it was based on the record.

FINDINGS OF FACT: (1) Werner Gourmet Meat Snacks Inc. employed claimant as a shipping and receiving coordinator from April 30, 2018, through June 29, 2022.

(2) At the time of claimant's hire, she acknowledged reading and understanding the employer's written policies which prohibited insubordination, dishonesty, and inability or unwillingness to get along with other employees. It also required that use of the email system comport with the employer's standards of ethics and professionalism.

(3) On December 3, 2021, the employer counseled claimant that she should direct concerns or suggestions about other employees' performance or workplace procedures to management rather than directly to each employee concerned.

(4) On March 16, 2022, after receiving various complaints about claimant's interactions with others, the employer counseled claimant that her tone and attitude in communicating orally and in writing with customers and fellow employees needed improvement. Claimant agreed to complete additional training and weekly meetings with the employer to assist in this improvement.

(5) From January 2022 through June 2022, claimant suggested four or five times to her manager that the employer consider changing the shipping cutoff time from 4:00 p.m. to 3:00 or 3:30 p.m. to increase efficiency for her department and for the benefit of the employer's shipping vendors. The manager refused to implement this suggestion.

(6) On June 24, 2022, a vendor emailed claimant asking for suggestions on improving a situation involving the timeliness of receiving shipping paperwork. Claimant replied to the email discussing her suggestion about cutoff times that management had repeatedly rejected, and opining that she should resubmit her suggestion of a 3:00 p.m. cutoff to management, but framed as if it had been a request from the vendor. Exhibit 1 at 10. Claimant then asked the vendor about what cutoff time they needed, and the reply was that they needed a cutoff time between 4:00 p.m. and 5:00 p.m., depending on the number of orders. Exhibit 1 at 9, 10. Nonetheless, claimant replied to the email that she would tell her manager that the vendor was requesting 3:30 p.m. be set as the cutoff time. Exhibit 1 at 11. Claimant did not copy her manager on the emails with the vendor, despite claimant's coworker advising her to do so. The manager was not at work that day.

(7) On June 27, 2022, claimant spoke to her manager and mischaracterized the vendor's inquiry as a proposal to change the cutoff time, just as she had planned to do in the email. The manager angrily dismissed claimant's proposal and an argument ensued.

(8) On June 28, 2022, the employer learned of the email exchange with the vendor and suspended claimant while it investigated further. On June 29, 2022, the employer discharged claimant for violations of its written policies prohibiting insubordination, dishonesty, and inability or unwillingness to get along with other employees.

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). "[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 reasonably expected that claimant would use their email system in an ethical and professional manner. They also reasonably expected claimant would not behave in a dishonest or insubordinate way. Claimant's disclosure to the vendor that she disagreed with the employer's policy on the shipping cutoff time and that it was a source of conflict with her manager was an unprofessional use of the employer's email system. She devised a plan to mischaracterize the vendor's inquiry as a demand to change the cutoff time and detailed this plan to the vendor by email, which was unethical in addition

to being unprofessional. Claimant admitted that her emails violated the employer's policies and reasonable expectations regarding her behavior. August 22, 2022 Transcript at 29, 33.

Had claimant's manager not been absent on June 24, 2022, claimant likely would have approached him with her proposal for changing the cutoff time immediately. Instead, she had to wait until the next business day, June 27, 2022. Claimant testified that despite her written plan to "manipulate" and "lie" to her manager, she decided instead to truthfully relay the vendor's request to simply have the vendor's paperwork to them by 4:00 p.m. August 22, 2022 Transcript at 30. Claimant testified that the manager's "very harsh and abrasive" response led her to complain to human resources about his attitude. August 22, 2022 Transcript at 30. Claimant's account of this conversation is at odds with the manager's account, as well as that of a coworker who witnessed the encounter. The manager and coworker testified that claimant characterized the vendor's inquiry as a demand to change the shipping cutoff time to 3:00 p.m. August 26, 2022 Transcript at 6, 8. This testimony is consistent between these witnesses and with claimant's written plan from the email, and therefore most credible. Claimant's actions in making these statements to the manager constituted dishonesty and insubordination in violation of the employer's written policies and reasonable expectations regarding her conduct.

Claimant willfully violated the standards of behavior which an employer has the right to expect of an employee. However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020). 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).

An "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. *Perez v. Employment Department*, 164 Or. App. 356, 366 (Or. Ct. App. 1999). Though claimant violated the employer’s reasonable expectations by planning her insubordinate act in an email on one day and executing that plan the next business day, these actions constitute a single, ongoing occurrence in the employment relationship. The employer has cited two previous instances of discipline in the year prior to claimant’s discharge. However, there is insufficient evidence to conclude that either prior instance involved an exercise of poor judgment. Claimant was coached on how to improve her relations with fellow employees and bring concerns directly to management on these occasions. There is nothing to indicate that claimant was aware of any deficiencies in these areas prior to the employer identifying the need for additional training and supervision to overcome them. These deficiencies were of a different nature than the dishonesty, insubordination, and lack of professionalism and ethics demonstrated in the final act. Therefore, claimant’s actions on June 24, 2022, and June 27, 2022, were not a repeated act or part of a pattern of willful or wantonly negligent behavior. They qualify as an isolated act.

Claimant made a conscious decision to act in devising and executing her plan, as well as by including the vendor in it. Her testimony demonstrates that her actions were willful, particularly with regard to the emails she wrote. She knew that what she wrote in the emails violated the employer’s reasonable standards of behavior.

Claimant’s actions did not violate the law and were not tantamount to unlawful conduct. Determining the existence of an “isolated instance of poor judgment” requires an examination of the seriousness of the asserted misconduct and the claimant’s mental state or decision-making process that led to the conduct. *Isayeva v. Emp’t Dep’t*, 340 P.3d 82, 84 (Or. Ct. App. 2014). While an employee’s intentional dishonesty is always serious, it appears in this instance to have had no effect on the employer’s relationship with the vendor, and caused only minor inconvenience to her manager in having to reject claimant’s request to move the cutoff time yet again. The claimant acknowledged the wrongfulness of her actions and was therefore unlikely to repeat them. Her motives were to improve work processes for the benefit of the employer and its vendors and not solely for personal gain. With proper training and supervision, it is more likely than not that claimant could have continued successfully in her employment. The employer has not presented sufficient evidence to conclude that, viewed objectively, claimant’s acts constituted an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Therefore, claimant’s actions fall within the standards of an isolated instance of poor judgment and are not misconduct.

The employer discharged claimant, but not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits based on her work separation.

DECISION: Order No. 22-UI-202044 is affirmed.

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

DATE of Service: December 8, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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