

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-1183

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 9, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, disqualifying claimant from receiving benefits effective May 9, 2021 (decision # 151124). Claimant filed a timely request for hearing. On September 30 and November 4, 2022, ALJ Lewis conducted a hearing, and on November 7, 2022 issued Order No. 22-UI-206778, reversing decision # 151124 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On November 28, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The employer also asserted that the hearing proceedings were unfair or the ALJ was biased. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) McCleery Dental, LLC employed claimant as a dental assistant from January 6, 2020 until May 13, 2021.

(2) On April 29, 2021, the employer issued a letter of reprimand to claimant in which they expressed concerns about how claimant interacted with a new employee. The letter stated that claimant had "approximately two weeks" to improve her interactions with the other employee, and that she would be discharged if she did not "demonstrate immediate progress." Exhibit 3 at 6. On April 30, 2021, claimant

responded to the employer's letter in writing, refuting some of the employer's claims in the original letter, stating that she had "been trying to be a team player and will continue doing so." Exhibit 2 at 2.

(3) Following the issuance of the letter of reprimand, the employer felt that claimant made some improvements in her interactions with the new employee, but also that claimant's behavior had regressed during her last few days working for the employer.

(4) On May 6, 2021, a patient in the clinic for an appointment requested that only vaccinated staff assist the doctor during their visit. Claimant was not vaccinated, of which the doctor, who was the owner of the practice, was aware. The new employee was treating the patient when claimant entered the treatment room to ask the doctor a question. The doctor was not in the room at the time. The new employee then yelled at claimant to leave the room because claimant was not vaccinated. Claimant was upset that the doctor had apparently disclosed claimant's vaccination status to the new employee, and that the new employee had shared this information with the patient. Afterwards, claimant reported her concerns to the doctor and the office manager. Claimant did not feel that they adequately addressed her concerns.

(5) On May 7, 2021, claimant and the new employee engaged in a conflict regarding the office's sterilization protocol. The employer felt that claimant was uncompromising and hostile towards the new employee.

(6) On May 13, 2021, the owner believed he overheard claimant speaking to the new employee about the incident that they had been involved in on May 6, 2021. The owner also believed that he and the office manager had previously told claimant not to speak about the May 6, 2021 incident with anyone else. As a result, on May 13, 2021, the employer discharged claimant due to their belief that claimant spoke to the new employee that day about the incident on May 6, 2021.

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

The record shows that the employer discharged claimant due to their overall concerns about claimant's interactions with the new employee. At hearing, the employer's witnesses detailed several incidents relating to this concern which led them to discharge claimant. Further, the owner testified that the decision to discharge claimant was not the result of one single incident, but rather "so many incidences... rolled into one that led to the final decision." September 30, 2022 Transcript at 30–31.

However, the owner also testified that the final incident that led him to discharge claimant on May 13, 2021 was that claimant had allegedly discussed the May 6, 2021 incident regarding the new employee yelling at claimant with the new employee on May 13, 2021. November 4, 2022 Transcript at 8-9. Thus, even if other incidents preceded the incident alleged to have occurred on May 13, 2021 and informed the employer's decision to discharge claimant, the alleged May 13, 2021 incident was the proximate cause of the employer's decision to discharge claimant on that day. The determination of whether claimant was discharged for misconduct therefore begins with an analysis of that incident. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *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). Prior incidents are analyzed only if necessary to determine whether the final incident was an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

The parties disagreed over two key points regarding the alleged incident on May 13, 2021: whether claimant actually discussed the prior May 6, 2021 incident with the new employee on that day, and whether the employer had previously warned claimant not to do so. The owner testified that he had overheard claimant speaking to the new employee about the May 6, 2021 incident, and that he and his office manager had warned claimant not to do so when claimant first spoke to them about the incident during the prior week. November 4, 2022 Transcript at 7. However, claimant denied both discussing the incident with the new employee on May 13, 2021 and that the employer had told her not to do so when they spoke a week prior. November 4, 2022 Transcript at 12–13; 10–11. Because neither party offered evidence to corroborate their testimony, the evidence is, at best, equally balanced as to whether claimant discussed May 6, 2021 incident with the new employee, and whether the employer had told her not to do so.

The employer bears the burden to establish misconduct by a preponderance of evidence. The record does not show that the alleged May 13, 2021 incident occurred, or that it occurred despite the employer's warning against it. Absent such a showing that claimant engaged in the alleged conduct for which she was discharged, the employer failed to establish that her discharge was for misconduct.

For the above reasons, the employer failed to establish that they discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-206778 is affirmed.

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

DATE of Service: February 3, 2023

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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