

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0021

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 8, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective October 9, 2022 (decision # 70444). Claimant filed a timely request for hearing. On December 16, 2022, ALJ Clemons conducted a hearing at which the employer failed to appear, and on December 20, 2022 issued Order No. 22-UI-210449, affirming decision # 70444 by concluding that the employer discharged claimant for misconduct and that claimant was therefore disqualified from receiving benefits. On December 24, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a medical assistant from October 20, 2014 until October 15, 2022.

(2) The employer expected that their employees would not use or disclose protected health information to which they had access except as necessary in the performance of their work, and would not access information on patients with whom they had a personal relationship. Claimant was made aware of this expectation because it was conveyed to him at yearly trainings.

(3) Claimant had been involved in a romantic relationship with a coworker. The employer became aware of this relationship, which ended in March 2021. The coworker subsequently separated from employment in 2021. The coworker last contacted claimant by telephone in November 2021.

(4) The employer's electronic medical record system functions in such a way that when an employee searches for a patient's medical information, search results appear that list the names of several patients whose names most closely match the search. As the cursor hovers over each name in the list, their contact information displays automatically on the screen, but no medical information is visible.

(5) In July 2022, claimant was using the employer's computer system to search for a patient's medical record in the course of his work duties. The patient's name was similar enough to the former coworker's name that the former coworker's name appeared in the search results. The former coworker's contact information was automatically displayed for approximately 30 to 45 seconds as claimant intentionally allowed the cursor to hover over their name. Claimant memorized the former coworker's telephone number during this time, but took no other action to use or disclose it, and did not attempt to contact the former coworker. Claimant knew that because of his relationship with the former coworker, this intentional accessing of their information violated the employer's policy.

(6) In October 2022, acting on an anonymous tip to audit claimant's computer usage, the employer discovered that claimant had briefly viewed the former coworker's telephone number without any work-related need to do so. The employer placed claimant on paid administrative leave while they investigated the matter.

(7) On October 12, 2022, the employer informed claimant that he was being discharged for improperly viewing confidential information, effective October 15, 2022. Claimant remained on paid leave through that date.

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. OAR 471-030-0038(3)(a) (September 22, 2020) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. The employer has the burden to prove misconduct by a preponderance of the 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 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).

The order under review concluded that the employer discharged claimant for misconduct because he intentionally viewed the coworker's information in knowing violation of the employer's policy. Order No. 22-UI-210449 at 4. The record does not support this conclusion because claimant's actions constituted an isolated instance of poor judgment, which is not misconduct.

The employer discharged claimant because he used their computer system to view the telephone number of a former coworker with whom claimant had a personal relationship, and who was also a patient of the employer, without a work-related need to do so. The employer reasonably expected that their employees would refrain from accessing confidential information of patients unless necessary to perform their work. The record shows that claimant did not affirmatively seek out this telephone number, but was presented with the opportunity to view it when his former coworker's name appeared in search results during an authorized use of the system. Claimant did not open the former coworker's medical record, but passively allowed the system to display their telephone number, which claimant then intentionally caused to remain on the screen for 30 to 45 seconds. Claimant looked at the number long enough to memorize it, but did not write it down or disclose it to anyone else. He did not use the telephone number or otherwise try to contact the former coworker. Claimant understood that because of his relationship with the former coworker and the lack of a work-related reason to view the coworker's information, the employer's policy prohibited him from accessing the former coworker's information for any reason. By looking at the number and memorizing it, claimant acted with indifference to the consequences of his actions, and willfully or with wanton negligence violated the standards of behavior which an employer has the right to expect of an employee.

However, such a violation was not misconduct if it was an isolated instance of poor judgment. The record demonstrates no other disciplinary history, and therefore this was properly considered a single occurrence. Claimant made a conscious decision to allow the coworker's telephone number to be displayed long enough for him to memorize it, and knew as he did it that he was violating the employer's reasonable policy against doing so. He therefore exercised poor judgment in this isolated instance.

Further, the record does not show that claimant's actions exceeded mere poor judgment. Because claimant did not view the coworker's medical information, in part because the employer's system separated it from contact information, and claimant did not use or disclose the telephone number, the record does not demonstrate any injury to the former coworker or to the employer that would constitute an irreparable breach of trust or make a continuing employment relationship impossible. Regulations implementing the Health Information Portability and Accountability Act of 1996 (HIPAA) prohibit the unauthorized use or disclosure of protected health information. 45 C.F.R. 164.508. Claimant briefly

viewed a patient’s telephone number without accessing their actual health information or using or disclosing the telephone number. The employer has not met their burden to show that claimant’s actions constituted an “examination” of protected health information such that claimant “used” protected health information, as that term is defined in the regulations.¹ Accordingly, the record does not show that claimant’s actions exceeded mere poor judgment. Therefore, claimant’s actions were not misconduct because they were an isolated instance of poor judgment.

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

DECISION: Order No. 22-UI-210449 is set aside, as outlined above.

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

DATE of Service: February 24, 2023

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.

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¹ 45 C.F.R. 160.103 defines “use” to mean “with respect to individually identifiable health information, the sharing, employment, application, utilization, examination, or analysis of such information within an entity that maintains such information.”



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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