

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0723

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 27, 2023, 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 February 12, 2023 (decision # 120918). Claimant filed a timely request for hearing. On June 6, 2023, ALJ Kaneshiro conducted a hearing, and on June 7, 2023 issued Order No. 23-UI-227198, affirming decision # 120918. On June 27, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Addiction Counseling & Education Services SE employed claimant as an insurance specialist from January 28, 2019 until February 14, 2023.

(2) The employer expected claimant to communicate respectfully with her supervisor and comply when instructed by her supervisor to have a meeting. Claimant knew this expectation.

(3) Claimant and a coworker had a tense working relationship. For a period of time prior to February 14, 2023, claimant and this coworker communicated with each other primarily through email, in a manner that was not productive and made “each other’s lives miserable.” Transcript at 8. This coworker was the sister of claimant’s supervisor.

(4) On or about February 7, 2023, claimant met with the employer’s human resources manager and executive director about her working relationship with the coworker. Thereafter, the employer scheduled a meeting between claimant and her supervisor for February 14, 2023 to discuss the matter.

(5) On February 14, 2023, claimant’s supervisor approached claimant about the meeting scheduled for that day. When the supervisor mentioned the meeting, claimant “just snapped.” Transcript at 16. Claimant stated, under her breath, that the supervisor had “never done anything about [the coworker] before so I have nothing to say. You can talk to my attorney.” Transcript at 15. The supervisor asked

“What did [you] say,” and claimant responded, more audibly, “I have nothing to say, you can talk to my attorney.”¹ Transcript at 15.

(6) Later on February 14, 2023, the employer discharged claimant because of the statements claimant made earlier that day. The employer considered claimant’s statements to violate their expectations that claimant communicate respectfully at work and that claimant participate in a meeting when instructed to do so by her supervisor.

(7) Prior to discharging claimant, the employer had not disciplined claimant for any violations of their expectations. On some performance evaluations, the employer had scored her communication style as a two on a scale of one to three and left a comment on one evaluation stating, “We still have some challenges around communications, and to work on refinements in communication.” Transcript at 18.

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 order under review concluded that the employer discharged claimant for misconduct because the statements claimant made on February 14, 2023 violated the employer’s expectations with wanton negligence, and claimant’s conduct was not an isolated instance of poor judgment. Order No. 23-UI-227198 at 3. The record supports that claimant’s comments were a wantonly negligent violation of the employer’s expectations. However, the record shows that her conduct was an isolated instance of poor judgment, and therefore not misconduct.

The employer expected claimant to communicate respectfully with her supervisor and to comply when instructed by her supervisor to have a meeting. Claimant knew these expectations. The record evidence is sufficient to conclude that claimant violated these expectations with wanton negligence when, in response to her supervisor’s mention of their scheduled meeting, she twice stated, “I have nothing to say, you can talk to my attorney.” Transcript at 15.

However, claimant’s conduct on February 14, 2023 did not constitute misconduct because it was an isolated instance of poor judgment. Per OAR 471-030-0038(3)(b), isolated instances of poor judgment

¹ Claimant’s reference to an attorney was “metaphorically said.” Transcript at 16. The record does not indicate claimant was pursuing any legal action against the employer.

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 fails to show that claimant’s conduct on February 14, 2023 was a repeated act or part of a pattern of other willful or wantonly negligent behavior. At hearing, the employer’s witness testified that she had been told that claimant had “been talked to numerous times” about her communication style, but conceded that the employer had not disciplined claimant for violating their expectations prior to February 14, 2023. Transcript at 12. Claimant testified that on some performance evaluations, the employer had scored her communication style as a two on a scale of one to three and left a comment on one evaluation that, “We still have some challenges around communications, and to work on refinements in communication.” Transcript at 18.

These facts do not establish that concerns raised about claimant’s communication style during her evaluations amounted to violations of the employer’s expectations. Nor is it evident that any of claimant’s communications made prior to February 14, 2023, even if they were violations of the employer’s expectations, were willful or wantonly negligent in nature. As such, the employer failed to meet their burden to establish that claimant’s conduct on February 14, 2023 was a repeated act or part of a pattern of other willful or wantonly negligent behavior.

Moreover, claimant’s actions on February 14, 2023 did not exceed mere poor judgment. Responding to the supervisor’s mention of their scheduled meeting in a disrespectful manner did not violate the law, nor was it tantamount to unlawful conduct. Nor does the record show that the conduct created an irreparable breach of trust in the employment relationship, as it did not involve, for example, dishonesty, self-dealing, cheating, or theft. Nor did claimant’s comments make a continued employment relationship

impossible, as the record fails to show that the character of claimant's comments made her relationship with the supervisor unsalvageable or that having the meeting go forward on February 14, 2023 was essential to the existence of the employment relationship.

For these reasons, the employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 23-UI-227198 is set aside, as outlined above.

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

DATE of Service: August 4, 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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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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