

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0912

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 9, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective April 23, 2023 (decision # 92825). Claimant filed a timely request for hearing. On July 17, 2023 and continuing on July 18, 2023, ALJ Chiller conducted a hearing, and on August 7, 2023 issued Order No. 23-UI-232548, affirming decision # 92825. On August 15, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Telecare Mental Health Services of Oregon, Inc. employed claimant as a qualified mental health associate from June 3, 2019 until April 28, 2023.

(2) The employer expected that their employees would follow their directives, particularly as they related to safety, and that their employees would not engage in unprofessional behavior. Claimant acknowledged receiving a copy of the employer's written policy reflecting these expectations at the time of hire.

(3) Through an arrangement with the employer, claimant and other employees were permitted to park their vehicles in a nearby parking garage with access restricted to those provided a remote control garage door opener. Claimant regularly parked her car there. The garage was maintained and controlled by an outside entity rather than by the employer directly.

(4) On April 5, 2023, the employer sent an email to all employees informing them that the parking garage door was broken and therefore they would not have access to the garage until at least April 13, 2023. The email directed the employees to immediately remove their vehicles from the parking garage so they would not be “trapped in there.” Exhibit 2 at 1-2. Claimant received and read the email that day.

(5) On April 6, 2023, claimant requested of the employer that they pay for claimant’s transportation to and from work until the parking garage was accessible, as she was afraid for her safety and the safety of her car if she could not park it in the garage. The employer considered this request and ultimately denied it.

(6) Claimant next worked on April 9, 2023. That day, she used her remote control to open the parking garage door and parked her car inside. There were no other vehicles in the garage and she therefore assumed that she was still not allowed to park there. Claimant was asked by a maintenance worker at the garage how she got into the garage, and was advised by that worker not to park there until the door was fixed. Claimant inspected the door and doubted that anything was wrong with it. Claimant left her car parked inside the garage, and parked in the garage for the next two days, April 10, 2023 and April 11, 2023. During her early morning breaks, claimant would remove her car from the garage to avoid the employees responsible for the garage from seeing that she was parking there and potentially confronting her about parking there while the door was not fixed again.

(7) On April 11, 2023, a second email was sent by the employer to their employees reiterating that they should not be parking in the garage, citing the risk of their cars being trapped in there “or the bigger issue of the springs finally breaking and the door slamming down mid open,” and further describing parking in the garage as “a serious safety risk.” Exhibit 2 at 1. Claimant received and read the email.

(8) On April 12, 2023, claimant attempted to open the parking garage door with her remote control, but it did not work because the electricity to the opening mechanism had been disconnected. Claimant pulled a chain on the door to open it manually and parked her car inside while she worked an overnight shift.

(9) The following morning, on April 13, 2023, claimant went to retrieve her car during her morning break and discovered that an employee of the entity responsible for the garage had parked his truck outside the garage door to prevent use of the door. Claimant manually opened the door using the chain and tried to maneuver her car around the truck and out of the garage but was unable to do so. Claimant made contact with the employee, who asked claimant to accompany him to an office in the garage to ascertain her identity and find out why she continued to park in the garage despite having been repeatedly warned not to park there. The interaction became contentious, as claimant refused to believe the door was actually broken, and claimant stated her intention to continue parking there. Claimant used her phone to record video of a portion of the interaction. The employee eventually moved the truck, and claimant removed her car from the garage. Then, in view of the employee who had just warned her of the door’s danger, claimant returned to the garage and used the chain to manually lower the door, resulting in another contentious exchange with the employee.

(10) Immediately following this incident, the involved employee reported the matter to the employer. In his report, he contended that claimant stated she “would hit my truck with her vehicle if I did not move

it.” Exhibit 5 at 2. Claimant denied making this statement and submitted a portion of the video she recorded to the employer. The employer suspended claimant while they investigated the matter.

(11) On April 28, 2023, after concluding their investigation, the employer discharged claimant for repeatedly parking in the garage despite having been directed not to, and for engaging in unprofessional behavior.

CONCLUSIONS AND REASONS: Claimant was discharged 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).

A discharge analysis focuses on the proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did. *Appeals Board Decision 09-AB-1767*, June 29, 2009. The employer alleged more than one cause for claimant’s discharge, though these causes arose from the same series of incidents.

The record shows that the employer discharged claimant because she repeatedly parked her car in the garage despite being directed not to do so for safety reasons, and because she behaved unprofessionally in her interaction with the employee maintaining the garage. In the written notice discharging claimant, the employer wrote that claimant was being discharged for “threatening to hit a . . . truck with your car if they didn’t move out of your way,” and that claimant was in the garage at that time “[d]espite being informed that the garage was closed for repairs and it was not to be used.” Exhibit 4 at 1. At hearing, the employer’s witness, who was involved in the decision to discharge claimant, described the encounter between claimant and the garage maintenance employee for which she was discharged as “unprofessional. . . in her tone and interaction,” and that she was discharged for both acting unprofessionally and violating a safety directive with regard to not using the parking garage. July 17, 2023 Transcript at 11, 21-22. This witness further testified that it was difficult to say, hypothetically, if claimant would have been discharged only for an unprofessional interaction if she had not also disregarded the employer’s directive not to park in the garage, or whether she would have been discharged for disregarding that directive if an unprofessional interaction had not taken place, because the witness was not authorized to make such a decision on her own. July 17, 2023 Transcript at 22-27. However, she added that that in previous instances of employees violating safety directives “that have risen to – to a high level of concern” that employees were discharged. July 17, 2023 Transcript at 23.

For these reasons, it can be reasonably inferred that, more likely than not, the employer discharged claimant for violating their directive regarding the parking garage, irrespective of the encounter with the

garage maintenance employee. It can also be reasonably inferred that, more likely than not, the employer discharged claimant for her interaction with that employee as the employer understood it to have occurred, irrespective of claimant's disregard of the directive not to park in the garage. Accordingly, each reason asserted by the employer was a proximate cause of claimant's discharge and is subject to analysis for misconduct.

The employer expected that their employees would follow their directives, including the directive that they not park in the garage, and that they would not engage in unprofessional behavior. Claimant understood these expectations after being presented with written policies reflecting them when hired. Claimant was aware of the directive not to park in the garage through emails she received on April 5, 2023 and April 11, 2023, and through conversations with employees maintaining the garage.

Claimant did not dispute that she continued to park in the garage after both the April 5, 2023 and April 11, 2023 emails. She also did not dispute that she knew she was directed by the employer not to park in the garage on the days she did so, as evidenced by the emails she read, conversations with others, observing that no other cars were parked there, and eventually by the electricity to the door being disconnected. During the week of April 9, 2023, claimant used her early morning breaks to move her car out of the garage before garage maintenance workers arrived, specifically to avoid detection of her use of the garage. Claimant's actions in parking in the garage while knowing the employer had expressly prohibited it therefore constituted a willful violation of the employer's expectation that claimant follow their directives.

However, claimant implicitly raised the issue of the reasonableness of the directive. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). The justifications for claimant's willful violation of the employer's directive that claimant advanced at hearing largely centered on her belief that the garage door did not actually pose a danger, and that she had fears for her safety and the safety of her car if she could not park in the garage. The employer's directive against parking in the garage was reasonable because it was based on information provided to them by the operators of the garage that the door was unsafe. Even if the operators of the garage were mistaken about the door's condition, this would not have rendered the employer's prohibition on their employees' use of the garage unreasonable, particularly given the potential for danger based on the information the employer had received. Similarly, claimant's preference for parking in the garage despite the potential danger it posed, as opposed to parking in other places or commuting to work by alternate means that would have alleviated her safety concerns, did not render the directive objectively unreasonable. Accordingly, claimant willfully violated a standard of behavior which an employer has the right to expect of an employee, and therefore committed misconduct by parking in the garage after April 5, 2023.

However, isolated instances of poor judgment are excepted from the definition of misconduct pursuant to OAR 471-030-0038(3)(b). To 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. OAR 471-030-0038(3)(b)(A). Claimant parked in the garage, knowing the employer had directed her not to do so, on a regular basis on and after April 9, 2023 and until the incident of April 13, 2023. Claimant also expressed her intention to continue doing so at the conclusion of that incident. Claimant's actions on April 13, 2023 in parking in the garage and stating an intention to continue doing so, for which she was discharged, therefore constituted a repetition of other acts on the preceding days

that willfully violated the employer's reasonable expectation. Accordingly, the acts for which claimant was discharged were not isolated and therefore not excepted from the definition of misconduct as an isolated instance of poor judgment.

In light of claimant's willful violation of the employer's expectation regarding not parking in the garage, it is unnecessary to address the alleged violation of the employer's expectation regarding unprofessional behavior because a discharge for misconduct has already been established.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 23, 2023.

DECISION: Order No. 23-UI-232548 is affirmed.

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

DATE of Service: October 2, 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 ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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