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State of Oregon

Employment Appeals Board

875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0121

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 21, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective August 20, 2023 (decision # 103616). Claimant filed a timely request for hearing. On December 19, 2023, ALJ Sachet-Rung conducted a hearing, and on December 22, 2023, issued Order No. 23-UI-244066, reversing decision # 103616 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On January 8, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Artistic Plastic Surgery employed claimant as a certified medical assistant at their clinic from April 13 to August 21, 2023.

(2) The employer expected that their employees would act with "professionalism," meaning that they "should not say words like . . . 'mistake'" in the presence of patients. Transcript at 7. Claimant understood this expectation. The employer's practice was to discharge an employee for any violation of their policies warranting a "write-up" if the employee had received two previous "write-ups" for any reason. Transcript at 9.

(3) On June 19, 2023, claimant became frustrated with a coworker while they were in a treatment room in the presence of others. Claimant gathered her things and left the room, "bumped" the room door closed, "and it slammed." Transcript at 22. Claimant did not intend for the door to slam. The following day, the employer issued claimant a write-up for acting unprofessionally in slamming the door. Claimant apologized to the coworker and her supervisor.

(4) On August 16, 2023, the employer issued claimant a second write-up for not following procedure regarding a scheduling matter that resulted in a patient's surgery being delayed. Claimant believed that she had completed her portion of the scheduling procedure properly and that the error was the result of "miscommunication" between claimant and a "fill-in" employee who was serving as the surgery scheduler while the employee ordinarily performing that work was on leave. Transcript at 22-23.

(5) On August 18, 2023, the clinic's doctor learned he had to leave for an emergency that afternoon and the staff was therefore contacting patients with afternoon appointments to come in before the doctor left. As this was taking place, claimant was in a treatment room with a coworker, assisting the doctor in performing a procedure on a patient. Claimant left the room to see if the last rescheduled patient that the doctor needed to treat before leaving had arrived. Claimant called the patient, who said she was on her way to the clinic, and then returned to the treatment room. Claimant told the coworker and the doctor, in the presence of the patient they were treating, that the last patient was on her way and that "mistakes had been made," apparently referring to an error in rescheduling that patient. Transcript at 19. Claimant then stated she was leaving the treatment room to prepare for the last patient's arrival. Claimant realized later that she "shouldn't have picked the word 'mistake'" when explaining the situation and attributed her having said the word to being "in a hurry" and "trying to do the best [she] could." Transcript at 20. The employer did not believe the scheduling error was claimant's fault "at all," but believed her use of the word "mistake" in front of the patient violated their professionalism policy and warranted her third write-up. Transcript at 27.

(6) On August 21, 2023, the employer discharged claimant because she violated their professionalism policy on August 18, 2023, after having received the June 19 and August 16, 2023, write-ups. The employer believed that the August 18, 2023, incident was "not more severe than some of the other write-ups," but they "had other concerns about [claimant's] job performance" and felt "things weren't going well." Transcript at 9. The employer would not have discharged claimant "without that third write-up[.]" Transcript at 9-10.

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 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).

Claimant was discharged because she mentioned a scheduling "mistake" in front of a patient on August 18, 2023. The employer expected that their employees would not mention the word "mistake" in the presence of patients as a matter of "professionalism." Claimant was aware of this expectation. The employer's witness testified that this incident, alone, would not have caused them to discharge claimant. Transcript at 9-10. Rather, she explained, "Our policy is three write-ups and you're done." Transcript at 9. A discharge analysis focuses on the proximate cause of the 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. Therefore, the August 18, 2023, incident was the proximate cause of claimant's discharge and is the subject of the misconduct analysis.

At hearing, claimant's account of the three incidents for which she received write-ups, including the final incident, differed in minor ways from that of the employer's witness, and the accounts were no more than equally balanced. As the employer bears the burden of proving misconduct, claimant's account is entitled to greater weight where the accounts differ, and the facts have been found accordingly. Common to both accounts of the final incident was claimant's use of the word "mistake" in front of a patient who was being treated. Transcript at 8, 19. Claimant acknowledged that her use of that word in such a situation "might not have been appropriate" given her understanding of the employer's professionalism policy, and that she "shouldn't have picked the word[.]" Transcript at 19-20. The employer has shown that claimant violated their expectation regarding professionalism by her use of the word "mistake" in front of a patient.

However, the record does not show that claimant's violation of the employer's policy was willful or wantonly negligent. The evidence does not suggest that claimant intended to embarrass the employer or frighten the patient being treated by mentioning in her presence that a minor scheduling "mistake" had occurred, particularly as the mistake did not involve the patient who was present. The violation was therefore not willful. The circumstances claimant described of being "in a hurry" due to a sudden rescheduling of multiple patients needing to be treated in a short time period that day, while also assisting with an ongoing surgical procedure, suggest a hectic environment where claimant's attention was divided among multiple tasks. Transcript at 20. Additionally, claimant had worked for the employer for only four months. While claimant understood the employer's professionalism policy, it is unlikely

that within a matter of months she would have grown accustomed to habitually avoiding mention of the specific words prohibited by the policy, which are otherwise in common use. It is therefore reasonable to infer that claimant did not act consciously and with indifference to the consequences in saying the word "mistake." Accordingly, claimant was not wantonly negligent in violating the policy.

Moreover, even if claimant had been conscious of her decision to mention a "mistake" in front of the patient and was indifferent to the consequences of doing so despite knowing it probably violated the employer's expectations, such a decision, though wantonly negligent, would constitute an isolated instance of poor judgment. Such a conscious decision would necessarily have involved judgment and, as claimant knew that the employer prohibited such conduct, it would have involved poor judgment. As to whether the act constituted a single or infrequent occurrence, the employer cited two previous write-ups issued to claimant. However, the record does not show that either of these two prior incidents constituted willful or wantonly negligent violations of the employer's standards of behavior.

In the first incident, claimant caused a door to slam. However, as claimant testified her intention was only to "bump" the door enough to close it, that it instead slammed was the result of, at most, ordinary negligence. Transcript at 22. In the second incident, the employer believed claimant responsible for a scheduling error that delayed a patient's treatment, while claimant maintained that the error was solely the fault of another employee. Transcript at 12, 22-23. Even if the employer's account of this incident were accepted as fact, the record contains insufficient detail regarding the error to conclude that claimant's act or failure to act violated a reasonable expectation of the employer through more than ordinary negligence. Because the employer has not shown, by a preponderance of evidence, that claimant committed other willful or wantonly negligent violations of policy, the final incident was isolated. Further, the final incident did not exceed mere poor judgment, in that it did not involve illegal activity, constitute an irreparable breach of trust in the employment relationship, or otherwise make a continued employment relationship impossible. Therefore, even if found to be a wantonly negligent violation, the final incident would have been excused as an isolated instance of poor judgment.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-244066 is affirmed.

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

DATE of Service: <u>February 23, 2024</u>

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.
<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to <u>https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey</u>.

You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.

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 – 本判决会影响您的失业救济金。 如果您不明白本判决， 请立即联系就业上诉委员会。 如果您不同意此判决，您可以按照该判决结尾所写的说明，向俄勒冈州上诉法院提出司法复审申请。

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 فورا، 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 دستورالعمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.