EO: Intrastate
BYE: 23-Dec-2023

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

144
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0428

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 14, 2024, 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 November 19, 2023 (decision # 92830). Claimant filed a timely request for hearing. On April 23, 2024, ALJ Strauch conducted a hearing, and on May 1, 2024, issued Order No. 24-UI-253240, reversing decision # 92830 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On May 7, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Emurgent Care LLC employed claimant as a lead medical assistant at their urgent care clinic from January 2023 until November 20, 2023.

(2) The employer expected that their employees would clock out when leaving the premises for their unpaid 30-minute meal break and that they would not close the clinic without authorization. Claimant understood these expectations. Following an incident in August 2023 when claimant closed the clinic during a lunch break and left the premises without clocking out, the employer issued a warning for violating these policies.

(3) On November 15, 2023, claimant's husband arrived at the clinic mid-day to drop off supplies for the clinic's owner. Claimant and her husband decided to leave the clinic to order food at a nearby restaurant. Claimant did not clock out before leaving. At the time claimant left, a receptionist was present. Claimant did not instruct the receptionist to close the clinic in her absence. Claimant did not turn off the clinic lights or intentionally lock the door as she left, and did not take keys with her to reenter the building.

(4) The employer's clinic manager arrived outside the clinic at the approximate time claimant was leaving. The manager watched claimant walk to and enter a nearby restaurant. The manager observed that the clinic door was locked, and that a sign was posted on the door stating that the clinic was closed for lunch. The manager telephoned the clinic's owner, who called claimant for an explanation and instructed claimant to return to the clinic. Claimant returned to the clinic less than 15 minutes after she left. The manager used her key to let claimant in. The manager found the receptionist in the clinic's break room, and the receptionist stated that claimant instructed her to close the clinic while claimant was at lunch. Claimant's husband remained at the restaurant until the food he and claimant ordered was ready, then brought the food to the clinic.

(5) The clinic's owner arrived that afternoon to investigate the unauthorized lunchtime closure of the clinic. The receptionist again admitted to having closed the clinic and posting the sign, and stated that she had done so at claimant's direction. The owner immediately discharged the receptionist. The owner decided to suspend claimant from work without pay for one day based on the receptionist's claim of her involvement and timecard records showing that claimant left for the restaurant without clocking out.

(6) At the end of the workday, the owner called claimant into her office and presented her with a written disciplinary notice regarding the suspension. Claimant denied any knowledge of the receptionist's activities in closing the clinic while she was at the restaurant. Claimant stated that she had not clocked out before leaving for the restaurant because she had not intended to take a 30-minute meal break, only a paid 15-minute rest break, and stated that she would clock out 30 minutes early to account for not taking the unpaid meal break. The owner did not believe these explanations and proceeded with the suspension. Claimant became upset, accused the owner of calling her a "liar," and initially refused to sign the disciplinary notice, though she later initialed it and left work. Transcript at 17. Claimant served the suspension the following day.

(7) Between November 16, 2023, and claimant's next scheduled work day, November 20, 2023, claimant texted one or more employees at the clinic about dissatisfaction with her job and the discipline she received for the November 15, 2023 incident. The owner later read these texts. The owner re-evaluated whether claimant's discipline was sufficient given her unwillingness to discuss the alleged infraction further or accept responsibility for it, displaying a poor attitude when she attempted to discuss the incident with claimant, and for texting others about the situation. The owner also considered several prior alleged infractions that the owner believed claimant had committed, of which the owner had been previously aware. Based on these considerations, the employer discharged claimant shortly after she arrived at work on November 20, 2023. Claimant did not work for the employer thereafter.

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).

The employer cited several infractions over the course of claimant's employment as reasons for her discharge. Exhibit 1 at 8. However, 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. *See e.g. Appeals Board Decision* 09-AB-1767, June 29, 2009. The employer was already aware of the infractions claimant allegedly committed prior to November 15, 2023, and the employer chose either not to discipline claimant for them or to impose a discipline less severe than discharging her. It was therefore the events of November 15, 2023, that caused the employer to suspend claimant, and claimant's actions in receiving and serving the suspension that caused the employer to discharge claimant upon her return from the suspension. Accordingly, only the events occurring on or after November 15, 2023, were the proximate cause of claimant's discharge, and are the focus of this analysis.

The employer discharged claimant primarily because she left work with her husband to purchase food without clocking out and, while absent, the receptionist temporarily closed the clinic (which the receptionist later claimed to have done at claimant's direction). Also factoring into the decision to discharge claimant was claimant's reaction to learning she was being suspended. The employer reasonably expected that their employees would clock out when leaving the premises for their unpaid 30-minute meal break and would not close the clinic without authorization. Claimant understood these expectations, as evinced by her having been warned for an incident involving alleged violations of the break and clinic closing policies in August 2023. For the reasons explained herein, the employer has not met their burden to show that claimant willfully or with wanton negligence violated the employer's policies on and after November 15, 2023.

Both the owner and the clinic manager testified that the receptionist admitted to closing the clinic in claimant's absence, but said that she had done so at claimant's direction. Transcript at 16, 46. Claimant testified that she did not direct the receptionist to close the clinic while she left for the restaurant and did not take her keys with her because she did not expect the clinic to have been closed, and had to be let in by the clinic manager. Transcript at 59, 63. Claimant's first-hand account of her interaction with the receptionist prior to leaving for the restaurant is entitled to greater weight than the hearsay accounts provided by the owner and clinic manager, and the facts have been found accordingly. Therefore, the employer has not shown by a preponderance of the evidence that claimant directed or knew about the closure of the clinic. The receptionist's actions during claimant's brief absence therefore did not constitute a violation of the employer's expectations on claimant's part.

The owner testified that employees were only required to clock out for their breaks if they left the premises during their 30-minute lunch break. Transcript at 13-14. Claimant testified that she understood this policy to only apply to unpaid lunch breaks and not to paid 15-minute rest breaks, and the employer did not rebut this testimony. Transcript at 60. Claimant testified that she was absent from the clinic while she went to and from the restaurant for less than 15 minutes. Transcript at 59. The clinic manager who observed claimant leave the clinic and return did not rebut this testimony. *See* Transcript at 45, 47. Claimant later explained to the owner that she had not clocked out because she intended the outing to constitute her 15-minute paid rest break. The owner did not believe that claimant intended to take only a

15-minute break on the assumption that claimant would take longer than 15 minutes to order and eat a meal with her husband, and therefore considered claimant leaving the premises for a lunch break without clocking out to violate the employer's policy. While the circumstances suggest that claimant may have intended to stay at the restaurant longer than 15 minutes had she not been called back to the clinic shortly after arriving, whether claimant would have taken a longer break had the clinic's closure not been discovered by management is a matter of speculation. The employer has not shown by a preponderance of the evidence that claimant was not entitled to a 15-minute paid rest break at the time she left, nor have they shown that the break actually exceeded 15 minutes. Therefore, the employer has not met their burden of showing that claimant violated policy by leaving the clinic for no more than 15 minutes without clocking out.

Finally, the parties gave differing accounts of how claimant responded when questioned about, and disciplined for, her alleged involvement in the clinic's temporary closure and failure to clock out during that time. The owner testified that claimant "stood up, started yelling and saying, 'How dare you call me a liar?'" and began to walk away. Transcript at 17. The owner further testified that she asked claimant to "please sit down so we can discuss further, and she said no. She threw the [disciplinary form] back at me. I asked her to sign it. She scribbled her initials and left." Transcript at 17. Claimant admitted that she had disputed the implication that she was a "liar" and testified she "took the piece of paper and put it on [the owner's] desk, in front of her." Transcript at 69. These accounts are no more than equally balanced, and to the extent they differ in the characterization of how claimant spoke and whether the paper was thrown or placed on the desk, the employer has not met their burden of proof and the facts have been found according to claimant's account.

Claimant's reaction to the owner accepting the receptionist's word over hers as to claimant's involvement in the clinic closure prompted claimant to become defensive, protest that she was not lying, and end the conversation by leaving because the owner had made it clear that she did not and would not believe claimant's account. Claimant nonetheless initialed the disciplinary form before leaving and served the one-day suspension. Claimant's compliance with the initial discipline, and choice to leave the conversation rather than continuing to dispute the facts of the event with the owner, suggest that claimant was not indifferent to the consequences of her actions. These actions, even when considered along with claimant's texted complaints to coworkers about her job and the incident in the days that followed, do not demonstrate a willful or wantonly negligent violation of the employer's reasonable expectations.

Because the employer did not show by a preponderance of the evidence that claimant willfully or with wanton negligence violated the employer's reasonable expectations, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-253240 is affirmed.

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

DATE of Service: <u>June 21, 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.

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

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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