

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0584

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 22, 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 April 21, 2024 (decision # L0004200079). Claimant filed a timely request for hearing. On July 19, 2024, ALJ Gutman conducted a hearing, and on July 24, 2024, issued Order No. 24-UI-260132, modifying decision # L0004200079 by concluding that claimant was discharged for misconduct and disqualified from receiving unemployment insurance benefits effective April 7, 2024.¹ On August 9, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's application for review was accompanied by a letter from the Oregon Board of Pharmacy, dated August 1, 2024, that was not part of the hearing record. As the letter contains no new fact evidence regarding the events that led to claimant's discharge, it is construed as a written argument implying that, to the extent claimant's actions during the final incident violated policy or applicable law, the violation should be viewed as *de minimis*. The letter is new information that was not part of the hearing record, but circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019) because at the time of hearing claimant had not received the letter. Claimant did not declare that she provided a copy of this argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019), and therefore it was not considered. However, even if EAB had considered this argument, it would not have affected EAB's decision because the basis of the Board of Pharmacy's decision not to take disciplinary action against claimant is not explained in the letter, and the standard used to arrive at such a decision likely differs substantially from the standard applicable to questions of eligibility for unemployment insurance benefits.

¹ Although Order No. 24-UI-260132 stated that it affirmed decision # L0004200079, it modified that decision by changing the effective date of the disqualification from April 21, 2024, to April 7, 2024. Order No. 24-UI-260132 at 4.

FINDINGS OF FACT: (1) PeaceHealth employed claimant as a pharmacy technician at a hospital from August 8, 2016, until April 8, 2024.

(2) The employer expected that their employees would not give medicine that they had been prescribed to another employee to take. Claimant understood this expectation.

(3) As part of her training to become licensed as a pharmacy technician, claimant was made aware that it was unlawful to give away a prescription drug except pursuant to a valid prescription and in her capacity as a pharmacy technician.

(4) On March 25, 2024, claimant brought to work two Ritalin pills she had obtained pursuant to a valid prescription. Ritalin is a Schedule II controlled substance under state and federal law. During her shift, claimant offered her co-worker the two pills because the co-worker told claimant that she had also been prescribed medication to treat a condition for which Ritalin is commonly prescribed, but had forgotten to take it that day. Claimant did not know at the time that the co-worker had actually been prescribed a drug other than Ritalin. The co-worker did not ingest the pills but took them home and claimant later retrieved them. The employer reviewed surveillance footage of the incident, which depicted claimant first turning her back to the camera in an attempt to conceal the transfer of pills.

(5) On April 5, 2024, the employer confronted claimant about the incident and claimant admitted that she knew giving the co-worker the pills would violate the employer's policy and applicable law.

(6) On April 8, 2024, the employer discharged claimant for violating their prescription drug policy.

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).

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 employer discharged claimant because, while at work, she gave a co-worker prescription medicine to take that had been prescribed to claimant. The employer reasonably expected that their employees would not "tak[e] drugs prescribed for others," as stated in a written policy provided to claimant at hire, and therefore also expected that an employee would not provide such drugs to another employee to take. Exhibit 2 at 1. Claimant admitted having received a copy of this policy and testified that she was "responsible to know the laws and policies" regarding the handling of controlled substances as part of her occupational licensure. Audio Record at 23:39. Claimant did not dispute that she gave her prescription medicine to the co-worker as alleged. Audio Record at 22:04. Claimant's testimony suggested, however, she believed that the fact the co-worker did not ingest the pills but took them home and claimant retrieved them "a few days later" should be considered in mitigation. Audio Record 27:53.

Claimant testified she had believed giving a co-worker her own prescription medication was acceptable "if it was the same strength of medication [prescribed]." Audio Record at 26:08. The record shows, however, that the co-worker had discussed no specifics regarding what medication she had been prescribed and that claimant learned only after she gave the pills to the co-worker that the co-worker had been prescribed a different medication. *See* Audio Record at 26:23. Additionally, claimant agreed that she and the co-worker intentionally positioned themselves to conceal the pill transfer, explaining, "It wasn't necessarily for the camera. I believe there [was]. . . at least one other caregiver in the breakroom. . . I was just giving it to her and just trying to not have people see." Audio Record at 27:12. That claimant did not ask her co-worker what medication and dosage she had been prescribed before giving her the pills suggests that claimant was not acting out of a mistaken belief that sharing medication was acceptable if both she and the coworker had received identical prescriptions. It can be inferred from this failure to inquire, as well as claimant's attempt to conceal the pill transfer from the view of others, that claimant understood what she was doing was likely to violate the employer's policy. Because of claimant's demonstrated indifference to the consequences of her actions, she acted willfully or with at least wanton negligence in violating the policy.

However, isolated instances of poor judgment are not misconduct. The incident was isolated, as the employer testified that claimant had not otherwise been accused of willful or wantonly negligent violations of policy during her nearly eight years of employment. Audio Record at 9:47. The incident involved judgment in that claimant made a conscious decision to give her co-worker the pills, and this evinced poor judgment given claimant's knowledge of the employer's policies and laws governing the handling of controlled substances. Nevertheless, claimant's conduct cannot be excused as an isolated instance of poor judgment because it violated the law. ORS 689.527(6) provides, "A person may not sell, give away, barter, dispense, distribute, buy, receive or possess any prescription drug except as authorized by law." Claimant's co-worker had not been prescribed Ritalin. Further, claimant did not act in her capacity as a pharmacy technician in dispensing the Ritalin, but instead gave of her own personal supply. This act, more likely than not, violated the law. Accordingly, it was not an isolated instance of poor judgment and constituted misconduct.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective April 7, 2024.

DECISION: Order No. 24-UI-260132 is affirmed.

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

DATE of Service: August 26, 2024

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 desisyong ito.

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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