

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0649

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 29, 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 February 18, 2024 (decision # L0004019081).¹ Claimant filed a timely request for hearing. On August 21, 2024, ALJ Janzen conducted a hearing, and on August 22, 2024, issued Order No. 24-UI-263381, reversing decision # L0004019081 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 September 11, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare that they provided a copy of their September 11, 2024, argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). That argument and the employer's October 1, 2024, argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (May 13, 2019). Specifically, the employer has not shown that they were prevented from offering at hearing first-hand testimony from a witness who viewed the surveillance footage or badge swipe logs at issue, or from offering the actual footage or badge access logs into evidence. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). EAB considered the employer's October 1, 2024, argument to the extent it was based on the record at hearing.

FINDINGS OF FACT: (1) Curry Health District employed claimant as an endoscopy technician at their hospital from March 4, 2014, until February 15, 2024.

¹ Though decision # L0004019081 stated that the disqualification period was from February 18, 2024, to February 15, 2025, disqualifications resulting from work separations are indefinite and end only when sufficient wages in subject employment have been earned to requalify. *See* ORS 657.176.

(2) The employer expected that their employees would adhere to the Health Insurance Portability and Accountability Act (HIPAA) by protecting patients' health information. This included not using one's employee badge to allow unauthorized visitors into access-restricted areas of the hospital. Claimant understood this expectation.

(3) On January 15, 2024, claimant was working in an office in an area of the hospital open to the public. Twice during her shift, claimant used her badge to enter an access-restricted area of the hospital to complete work-related tasks. On both occasions while in the access-restricted area, claimant encountered a former employee speaking to other employees, including claimant's supervisor. Claimant spoke briefly with the former employee both times and did not believe that the former employee's presence was unauthorized because she was interacting with other current employees and a supervisor who were authorized to be in the area. The former employee was not authorized to be in the area and ultimately entered an operating room where surgery was being performed, which the employer considered to be a HIPAA violation.

(4) Later, while still claimant was still working in the office in the public area, the former employee tapped on the window to claimant's office. Claimant again spoke with the former employee and escorted her to the public elevator to exit the building. Claimant was still unaware that the former employee had not been authorized to be in the access-restricted area earlier, and claimant was unaware of how she gained access to the area.

(5) At some point after the former employee left the hospital, management became aware of her unauthorized presence in the access-restricted area and conducted an investigation which included reviewing surveillance footage. The person serving as chief human resources officer at that time called claimant and accused her of having used her badge to grant access to the former employee. Claimant adamantly denied having allowed the former employee access and stated that they had no contact with each other prior to claimant twice seeing the former employee already in the access-restricted area. The employer denied claimant's request to see the video footage purportedly depicting claimant using her badge to admit the former employee.

(6) After claimant was alerted to the investigation, she contacted the former employee to ask how she had gotten into the access-restricted area. The former employee told claimant that she had entered a publicly accessible elevator on a specific floor that allowed her to bypass secured points of entry requiring a badge on the access-restricted surgical floor. This security vulnerability was well-known to employees and former employees and had previously been the subject of complaints to hospital management.

(7) On January 29, 2024, the employer suspended claimant from work indefinitely pending further investigation of the incident. Claimant did not return to work thereafter, and on February 15, 2024, was informed that she was discharged for the alleged HIPAA violation.

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 discharged claimant because they believed that on January 15, 2024, claimant used her badge to twice admit an unauthorized former employee to an access-restricted area of the hospital in violation of HIPAA policy. The employer reasonably expected that their employees would not admit unauthorized visitors into access-restricted areas of the hospital in accordance with their HIPAA compliance policy. Claimant understood this expectation.

In support of the employer’s contention, their chief human resources officer at the time of the hearing, who had not been serving in that role on January 15, 2024, or during the ensuing investigation, testified that she reviewed the reports of investigators who purportedly reviewed surveillance video and wrote that it depicted claimant using her badge to admit the non-employee to the surgical suite. Transcript at 6. This was the employer’s only witness at hearing, and she testified that she had no first-hand knowledge of the events and had not seen any video footage herself. Transcript at 26. The report on which the witness’s testimony was based also included the accounts of two witnesses who told investigators that claimant “was in the [operating room] with the [former] employee and brought her in.” Transcript at 6-7.

In contrast, claimant testified that she did not admit the former employee to the access-restricted area and that on both occasions when claimant and the former employee were together in that area, the former employee was there before claimant entered. Transcript at 13-14. Both parties agreed that claimant denied having used her badge to admit the former employee when questioned by the employer. Claimant also testified that the former employee later disclosed to her how she had entered the access-restricted area without the assistance of any current employee, which claimant recounted in detail at hearing. Transcript at 18. The employer did not rebut the assertion that someone could have entered the access-restricted area by the method described.

In weighing the evidence, claimant’s first-hand account of the events of January 15, 2024, is entitled to greater weight than the hearsay accounts of those who purportedly watched the video footage and interviewed witnesses not present at the hearing, and the facts have been found accordingly. While the hearsay account claimant offered to show that the former employee entered the access-restricted area without anyone’s assistance is no more than equally balanced with the employer’s hearsay account that video footage depicted the former employee entering with claimant’s assistance, it nonetheless established that it was possible for someone to enter the area without assistance, regardless of whether it happened on this occasion. That such a possibility existed further supports the weight of claimant’s account. Therefore, the employer has failed to meet their burden of showing by a preponderance of the evidence that claimant admitted the former employee to the access-restricted area and thereby violated the employer’s HIPAA compliance policy. Accordingly, the employer has not shown that claimant was discharged for misconduct.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits as a result of the work separation.

DECISION: Order No. 24-UI-263381 is affirmed.

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

DATE of Service: October 4, 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 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 الاستئناف 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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