EO: Intrastate
BYE: 31-May-2025

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

579
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0739

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 2, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and claimant therefore was disqualified from receiving unemployment insurance benefits effective June 2, 2024 (decision # L0005412695).[1] Claimant filed a timely request for hearing. On October 1, 2024, ALJ Christon conducted a hearing, and on October 9, 2024 issued Order No. 24-UI-268811, modifying decision # L0005412695 by concluding that claimant was discharged for misconduct and therefore was disqualified from receiving benefits effective May 19, 2024. On October 21, 2024, 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) Strategic Pharmaceutical Solutions, Inc. employed claimant as a pharmacy technician from January 25, 2021 until May 24, 2024.

(2) The employer expected claimant to communicate professionally in the workplace with customers and with fellow employees. Claimant understood this expectation.

(3) While working for the employer, claimant used an instant messaging platform called Slack to communicate with other employees. The Slack channel claimant used was also used by 100 to 150 of the employer's other employees, consisting of pharmacy technicians, customer service workers, and managers. One of claimant's job tasks was to communicate with customers via a chat system to resolve

[1] Decision # L0005412695 stated that claimant was denied benefits from June 2, 2024 to May 31, 2025. However, decision # L0005412695 should have stated that claimant was disqualified from receiving benefits beginning Sunday, May 19, 2024 and until she earned four times her weekly benefit amount. *See* ORS 657.176.

customer issues. The chat system through which claimant communicated with customers was separate from the Slack channel through which claimant communicated with other employees. Claimant also occasionally used email to communicate with customers.

(4) On several occasions before October 23, 2023, claimant ended customer chats abruptly without resolving customer issues, informing the customers that they needed to call the employer's customer service line. On some of these occasions, claimant had migraine headaches and ended the chats abruptly by accident. Based on these incidents, on October 23, 2023, the employer gave claimant a final warning for not communicating professionally with customers and ending chats without providing resolution.

(5) On November 9, 2023, claimant used the chat system to communicate with a customer and ended the chat in an abrupt manner without resolving the customer's issue. The employer raised this incident with claimant and spoke with her "about correcting this behavior and navigating chats with . . . professionalism." Audio Record at 24:59.

(6) On December 21, 2023, claimant used the chat system to communicate with a customer. The customer became "escalated" and claimant ended the chat abruptly without resolving the customer's issue, informing the customer that they needed to call the employer's customer service line. Audio Record at 25:25. The employer spoke with claimant about this incident, saying that claimant needed to offer solutions to the customer rather than end the call abruptly without resolving the issue.

(7) On March 14, 2024, claimant had a performance review in which the employer conducted a quality assurance "spot check" with claimant. Audio Record at 25:52. The employer reminded claimant in the meeting of her October 23, 2023 final warning and of the occasions on November 9, 2023, and December 21, 2023 when claimant had not communicated professionally with customers. The employer concluded the meeting by advising that claimant needed to show immediate and sustained improvement in communicating professionally. The employer told claimant they would continue to monitor her chat and email communications with customers and her internal Slack communications with other employees. Audio Record at 26:13.

(8) On May 23, 2024, claimant posted an image, or "meme," on the employer's internal Slack channel. Audio Record at 9:41. The meme was a picture of a person and showed the message, "Why do I bother pressing 1 for English, if I can't get anybody who speaks English?" Audio Record at 11:48. Claimant thought the meme was funny and would be helpful. In claimant's view, "When people call customer service . . . we want somebody who speaks English . . . for the most part." Audio Record at 11:34. Claimant posted the meme such that all 100 to 150 employees on the Slack channel could view it. The meme was offensive to some of the employees who viewed it, and they reported the matter to the employer's Human Resources (H.R.) staff.

(9) On May 24, 2024, the employer's H.R. staff met with claimant and informed her that the meme she posted was offensive and that the employer had decided to discharge claimant for posting it. On that day, the employer discharged claimant for posting the meme.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 and good faith errors 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 for misconduct. The employer discharged claimant on May 24, 2024 for posting an offensive meme the previous day. The employer reasonably expected that their employees would communicate professionally with customers and coworkers, and claimant was aware of this expectation.

The meme was a form of unprofessional communication. It was communicative because claimant posted the meme on the employer's internal Slack channel where the image was viewable by 100 to 150 other employees. Claimant did so to convey a message that claimant thought was "funny" and "helpful." Audio Record at 11:30. Claimant testified that the purpose of the meme was to express the sentiment,

"When people call customer service . . . we want somebody who speaks English . . . for the most part." Audio Record at 11:34. Posting the meme was unprofessional because its message "Why do I bother pressing 1 for English, if I can't get anybody who speaks English?", exhibited a lack of respect for individuals who may have limited English proficiency. Audio Record at 11:48. Given that the meme was seen by as many as 150 individuals, some of whom were customer service workers, it is possible that employees who themselves were customer service workers and spoke English as a second language or with an accent viewed the meme. Regardless of whether any other employee complained about the meme, it was an objectively offensive and unprofessional communication.

Claimant's failure to communicate professionally in the workplace by posting the offensive meme was a wantonly negligent violation. Claimant was conscious of her conduct in posting the meme and acted with indifference to the consequences of her actions, particularly given that she posted the meme and in a way in which it was viewable by as many as 150 other employees. By posting the offensive meme, and as a matter of common sense, claimant knew or should have known that it would probably breach the employer's reasonable prohibition on unprofessional communications in the workplace. This is so because, beginning October 23, 2023 and continuing through March 2024, the employer had disciplined claimant numerous times for failing to communicate professionally.

For example, on October 23, 2023, the employer gave claimant a final warning for ending customer chats abruptly without resolving customer issues. On November 9, 2023, claimant ended a customer chat in an abrupt manner without resolving the customer's issue, and this conduct led the employer to speak with claimant "about correcting this behavior and navigating chats with . . . professionalism." Audio Record at 24:59. On December 21, 2023, after a customer became "escalated," claimant ended a customer chat abruptly informing the customer that they needed to call the employer's customer service line. Audio Record at 25:25. The employer spoke with claimant about this incident, advising that claimant needed to offer solutions to the customer rather than end the call without resolving the issue. Finally, on March 14, 2024, the employer conducted a quality assurance "spot check" with claimant at which time they reminded her of the prior occasions she had failed to communicate professionally. Audio Record at 25:52. The employer concluded the meeting by advising that claimant needed to show immediate and sustained improvement in communicating professionally, and that they would "continue to monitor her chat, email, and Slack communications." Audio Record at 26:13.

Thus, while the discipline claimant had received beginning October 23, 2023 and continuing through March 2024 had centered on claimant's unprofessional communications with customers using the employer's chat system, claimant should have known that the employer's prohibition on unprofessional workplace communications extended to internal Slack communications with other employees because the employer had specifically notified claimant that her Slack communications were subject to being monitored. Accordingly, the record shows that by posting the offensive meme, claimant violated the employer's prohibition on unprofessional workplace communications and did so with wanton negligence.

Claimant's wantonly negligent violation was not an isolated instance of poor judgment. This is so because claimant's May 23, 2024 violation of the employer's policy against unprofessional communications in the workplace was part of a pattern of other willful or wantonly negligent behavior. On October 23, 2023, the employer made claimant aware via the final warning they gave her that day that ending customer chats abruptly without providing resolution amounted to a violation of their

expectation that claimant communicate professionally in the workplace. Thereafter, claimant violated the expectation multiple times. Specifically, on November 9, 2023, claimant used the chat system to communicate with a customer and ended the chat in an abrupt manner without resolving the customer's issue. Further, on December 21, 2023, claimant used the chat system to communicate with a customer and ended the chat abruptly without resolving the customer's issue, informing the customer that they needed to call the employer's customer service line. These were each at least wantonly negligent policy violations because claimant consciously ended the chats in an unprofessional manner, indifferent to the consequences of doing so and knowing from each prior warning that it would likely violate the employer's expectations. Therefore, claimant's final instance of unprofessional communication in posting the meme was not a single or infrequent occurrence, and cannot be excused as an isolated instance of poor judgment.

Claimant's May 23, 2024 wantonly negligent violation of the employer's policy against unprofessional communications in the workplace was not a good faith error. Claimant had been advised on March 14, 2024 that her Slack communications would be monitored (as well as her chat and email communications), and that this was due to claimant's history of unprofessional communications. Claimant's meme was offensive and there was no reason to believe the employer would condone claimant's posting of it given the scrutiny the employer was subjecting to all of claimant's communications at the time. That it was not reasonable to believe the employer would condone the behavior is particularly true given that claimant published the meme broadly to as many as 150 individuals, some of whom were customer service workers, and some of whom may have themselves spoke English as a second language or with an accent. Thus, it was possible that the meme was seen by someone with traits the meme had been created to ridicule. The record fails to show that claimant believed in good faith that posting the meme would be acceptable to the employer.

Accordingly, claimant was discharged for violating the employer's expectations with wanton negligence and the violation was not an isolated instance of poor judgment or a good faith error. For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective May 19, 2024.[2]

DECISION: Order No. 24-UI-268811 is affirmed.

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

DATE of Service: November 14, 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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by phone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

[2] Although claimant was discharged on May 24, 2024, the effective date of her disqualification from benefits is the Sunday of the week in which the discharge occurred. Accordingly, because May 19, 2024 was the Sunday of the week that claimant's discharge occurred, that date is the effective date of her disqualification.

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. If you are unable to complete the survey online and wish to have 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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