

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0769

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 26, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct and claimant therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 124516). The employer filed a timely request for hearing. On January 18, 2024, the Office of Administrative Hearings (OAH) served notice of a hearing on decision # 124516 scheduled for January 30, 2024, at 9:30 a.m. On January 30, 2024, the employer failed to appear for the hearing, and ALJ Messecar issued Order No. 24-UI-246854, dismissing the hearing request due to the employer's failure to appear. On February 20, 2024, Order No. 24-UI-246854 became final without the employer having filed a request to reopen the January 30, 2024, hearing.

On July 22, 2024, the employer filed a late request to reopen. On October 3, 2024, ALJ Goodrich conducted a hearing, and on October 11, 2024, issued Order No. 24-UI-269074, allowing the employer's late request to reopen, canceling Order No. 24-UI-246854, and reversing decision # 124516 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective September 24, 2023. On October 31, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant did not declare that she provided a copy of her argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019). The argument also 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 as required by OAR 471-041-0090 (May 13, 2019). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

EAB considered the entire hearing record, including witness testimony and any exhibits admitted as evidence. EAB agrees with the part of Order No. 24-UI-269074 allowing the employer's request to reopen. That part of Order No. 24-UI-269074 is **adopted**. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Interpath Laboratory, Inc. employed claimant as a phlebotomist from June 6, 2016, until September 29, 2023. Claimant worked most recently at one of the employer's locations in Eugene, Oregon. Transcript at 31.

(2) The employer expected their employees to refrain from using profanity or abusive language in the workplace. Claimant was aware of and understood this expectation. The employer also expected their employees to treat patients with respect, even if the patients are rude. This expectation was contained in the employer's employee handbook. Claimant reviewed and signed the handbook at hire and on an annual basis during each year of her employment.

(3) Though claimant had reviewed and signed the handbook, she formed the "personal opinion" that "sometimes you have to be a little rude and . . . assertive" to patients. Transcript at 45. Throughout claimant's years working for the employer, if she perceived a patient as being rude to her, she "was usually rude back to them." Transcript at 42. Claimant was frequently disrespectful to patients and the employer received more patient complaints about claimant's rude behavior than for any of their other phlebotomists. In claimant's June 2022 performance review, the employer raised with claimant the patient complaints about her rude behavior.

(4) On June 26, 2023, claimant had another performance review. In the review, the employer advised claimant that she was not meeting their attendance expectations. The employer also raised with claimant instances in which the employer viewed her as having been insubordinate to managers and disrespectful toward coworkers. The employer reviewed their expectations with claimant and advised they would assess her performance again in 90 days.

(5) On September 22, 2023, the employer informed claimant that she had not met the expectations discussed with her on June 26, 2023. The employer's operations manager advised claimant that with the next work schedule at the beginning of October 2023, the employer would be moving claimant to their other location in Eugene, the location where the operations manager worked, so that claimant could work under the operations manager and she could review claimant's work.

(6) On September 25, 2023, claimant saw an email communication between the operations manager and a coworker that claimant interpreted as being about claimant's job performance and as stating that claimant "didn't do anything." Transcript at 40.

(7) On September 26, 2023, claimant was at work with a coworker and with a patient present in the lobby. A second coworker arrived at the workplace and approached claimant. In an attempt at a joke referencing the email claimant had seen, the coworker stated, "I'm just going to follow suit and do what [claimant] does and I'm not going to do . . . a thing." Transcript at 40. In the presence of the two coworkers and with the patient in the lobby within earshot, claimant responded, "yes, because [I don't] do a fucking thing around here." Transcript at 40.

(8) One of claimant's coworkers informed the operations managers of claimant's use of foul language in the presence of the two coworkers and with a patient being able to hear it. The employer considered claimant's conduct to violate their expectation that employees refrain from using profanity or abusive language in the workplace.

(9) On September 29, 2023, the employer discharged claimant for the September 26, 2023, incident in which she used foul language in the presence of the coworkers and within earshot of a patient.

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) (September 22, 2020). 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 of the September 26, 2023, incident in which she used foul language in the presence of the coworkers and within earshot of a patient. At hearing, the employer’s operations manager testified that the employer prohibited employees from using profanity or abusive

language and that this expectation was contained in the employee handbook, which claimant had reviewed and signed. Transcript at 25, 27. Claimant testified that she was aware of the expectation that she refrain from using profanity or abusive language in the workplace. Transcript at 39. Claimant also conceded that she had stated “yes, because [I don’t] do a fucking thing around here” in the presence of the two coworkers and with a patient nearby being able to hear. Transcript at 40-41. The record therefore shows that claimant’s conduct violated a known duty to refrain from using profanity or abusive language in the workplace.

Claimant violated this employer expectation with at least wanton negligence. Although claimant’s use of foul language may have been an impulsive reaction to the coworker’s joke or to claimant’s perception that others had spoken critically about her job performance in an email, claimant nevertheless acted with indifference to the consequences of her actions in using the foul language, was conscious of her conduct, and knew or should have known that her conduct would probably result in a violation of the employer’s standards of behavior. As such, claimant’s conduct on September 26, 2023, was a wantonly negligent violation of the employer’s expectations.

Claimant’s wantonly negligent violation was not an isolated instance of poor judgment. The employer also expected their employees to treat patients with respect, even if the patients are rude. The record supports the conclusion that claimant had violated this expectation with wanton negligence prior to her September 29, 2023, discharge.

At hearing, the operations manager testified that the employer expected their employees to treat patients with respect, even if the patients are rude, and this expectation was contained in the employee handbook. Transcript at 35, 46. The operations manager testified, un rebutted, that claimant reviewed and signed the employee handbook at hire and on an annual basis during each year of her employment. Transcript at 27. The employer also raised with claimant her rude behavior toward patients during her June 2022 performance review. Claimant testified at hearing that “sometimes you have to be a little rude and . . . assertive” to patients but described this as a “personal opinion” and not an expectation conveyed to her by the employer. Transcript at 45.

The record therefore shows, at a minimum, that claimant should have known that she was bound by the expectation to treat patients with respect, even if the patients are rude. Nevertheless, at hearing, claimant candidly testified that if she perceived a patient as being rude to her, she “was usually rude back to them.” Transcript at 42. Throughout claimant’s years working for the employer, claimant was frequently disrespectful to patients and the employer had received more patient complaints about claimant’s rude behavior than for any of their other phlebotomists.

This evidence demonstrates that prior to her discharge for wantonly negligently violating the employer’s prohibition on the use of profanity in the workplace, claimant had a pattern of wantonly negligently violating the employer’s expectation to treat patients with respect. Therefore, the September 26, 2023, incident of using foul language for which claimant was discharged was part of a pattern of other willful or wantonly negligent behavior. Accordingly, the September 26, 2023, incident was not “isolated” within the meaning of OAR 471-030-0038(1)(d)(A), and claimant’s conduct on September 26, 2023 cannot be excused as an isolated instance of poor judgment.

Claimant's conduct on September 26, 2023, also was not a good faith error. The record does not contain evidence that claimant was operating under a mistaken understanding about whether the employer would find her use of foul language acceptable or that she violated the employer's expectation to benefit the employer or advance their interests. Claimant conceded at hearing that she was aware of the employer's expectation and that she had violated it by using the foul language. Transcript at 39, 40-41.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective September 24, 2023.

DECISION: Order No. 24-UI-269074 is affirmed.

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

DATE of Service: December 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 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 telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

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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

ទោរទៅ – តម្រូវការនេះមិនមែនជាភារកិច្ចរបស់យើងទេ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

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، می توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
 Email: appealsboard@employ.oregon.gov
 Website: www.Oregon.gov/employ/pages/employment-appeals-board.aspx

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