EO: Interstate
BYE: 15-Mar-2025

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

023
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0782

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective March 17, 2024, through May 31, 2025 (decision # L0004550285). Claimant filed a timely request for hearing. On October 21, 2024, ALJ Strauch conducted a hearing, and on October 29, 2024, issued Order No. 24-UI-271288, modifying decision # L0004550285 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective March 17, 2024, and until she requalified under Department law. On November 7, 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 her 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) The Kroger Co. employed claimant from July 5, 2016, through March 19, 2024. Claimant worked as a creative manager for the employer's in-house apparel and home furnishings brands, which were sold at the employer's retail stores. Claimant was considered the employer's "design guru." Transcript at 5. In this role, claimant oversaw a department of approximately 30 employees.

(2) The employer maintained policies governing how employees were permitted to use the employer's computers. These policies included not using one's "personal computer to… send ourselves documents to print or do anything else" and "not… using [the employer's] computers for anything personal or taking any information from the company." Transcript at 14–15. The employer also maintained a "privacy policy" forbidding employees from "shar[ing] any information from the company to anyone outside of the company… that would not have anything to do with [the employer's] business" or using

such information for personal purposes. Transcript at 15-16. The employer published these policies in their employee handbook, which they required all employees to read and understand. The employer also conducted annual trainings on compliance with their computer-use policies. Claimant was aware of these policies, and, as a manager, was responsible for ensuring her subordinates complied with them.

(3) The employer required employees at a certain level or higher, including claimant, to complete an "ethics statement" on an annual basis. Transcript at 8–9. This statement included two questions that the employee was required to answer. The first asked, "Have you, any member of your family, or any business interest of yours or your family had any interest or relationship that may conflict with the interests of the company?" Transcript at 18. The second question asked, "Have you provided any services to any business enterprise other than the company? This would include serving as a consultant, independent contractor, agent, director, officer, general partner, sole proprietor, or employee of a business other than the company[.]" Transcript at 18–19.

(4) In or around 2022, claimant interviewed a job candidate for one of the teams she oversaw, and learned during the interview that the candidate had his own apparel company as well. Before offering the candidate the position, claimant asked her supervisor if it was okay to hire the candidate, as he had his own apparel company, and the supervisor told claimant that it was "fine." Transcript at 38. The supervisor did not tell claimant that the candidate would be required to disclose his company on the ethics statement, or anything similar.

(5) At some point in or around 2022 or 2023, claimant began to develop her own boutique line of apparel, which she primarily intended to sell in local venues such as night markets, farmer's markets, and pop-up sales. Claimant sold items of clothing similar to what the employer sold, such as solid-colored t-shirts and tank tops. However, claimant used higher quality materials for her apparel than those used in the employer's products, and aimed her brand at a different segment of the market than the employer did. For instance, while the employer might sell a plain t-shirt for $18, claimant's sold for about $60 or $70. Claimant's employment was not subject to a noncompete agreement, and she did not believe she was required to disclose to the employer that she was operating her own business.

(6) At various points between August 2023 and February 2024, claimant sent herself documents or information from her work computer to her personal cell phone. These included budget documents that claimant needed for reference when taking market research trips with her staff members, talking points that claimant intended to use during work-related presentations, and an email with a subject line referencing the employer's initial markup (IMU) configurations for some of their products, but which did not contain any confidential business information. Claimant sent this information to her personal phone because she needed it for business purposes but did not have a work-issued phone, or her work email on her personal phone.

(7) In February 2024, claimant completed her annual ethics statement, and answered no to both of the questions listed above, despite owning her own apparel company. Claimant answered no to the first question because she believed that her products were not competing with the employer's, due to the difference in scale between the businesses and the different market segments towards which the products were aimed. Claimant answered no to the second question because, due to the use of the word "enterprise," she believed that it was only asking her if she had been providing services to another large company such as a competing national retail chain.

(8) On March 12, 2024, the employer received two anonymous complaints alleging that claimant had been working on her own apparel company "that was directly in… competition" with the employer's business. Transcript at 8. The employer investigated the matter, and confirmed that claimant had been working on her own line of clothing, which they believed showed that claimant had falsely answered the questions on her February 2024 ethics statement. The employer also learned that claimant had sent information from her work computer to her personal phone, as detailed above, which they believed constituted violations of their computer-use and privacy policies.

(9) On March 19, 2024, the employer discharged claimant because they believed she had given false answers to the questions on the ethics statement, and because she had sent work information from her work computer to her personal phone.

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).

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 she had sent work information from her work computer to her personal phone, and because they believed she had given false answers to the questions on the February 2024 ethics statement. As explained below, the order under review correctly concluded that the former did not constitute misconduct. Order No. 24-UI-271288 at 4. The order under review also concluded that the latter "violated the employer's reasonable expectations that she answer questions in the ethics report truthfully," and that this was not an isolated instance of poor judgment because it created an irreparable breach of trust in the employment relationship. Order No. 24-UI-271288 at 6–7. However, although the record does show that claimant's responses to the ethics statement questions were incorrect and that giving those answers was wantonly negligent, it does not show that claimant's having done so created an irreparable breach of trust in the employment relationship.

As for claimant's use of her work computer to send work information to her personal phone, the record does not show that claimant violated the employer's policies by doing so. The employer's witness described those policies at hearing as requiring that employees not use one's "personal computer to… send ourselves documents to print or do anything else"; "not… using [the employer's] computers for anything personal or taking any information from the company"; and not "shar[ing] any information from the company to anyone outside of the company… that would not have anything to do with [the employer's] business" or using such information for personal purposes. The record shows that claimant's use of her work computer or the information it contained were solely for work related purposes. It does not show, for instance, that claimant printed documents from her personal computer, used work information for her own personal purposes, or shared the employer's private or proprietary information with anyone outside the company.

The employer's witness also testified, "[S]o if she did not have company e-mail on her phone, um, it still would not have been allowed to have an e-mail information to – to one's self personally. That all would have had to have been on her work computer on her work e-mail." Transcript at 44–45. This suggests that the employer may have expected employees to refrain from engaging in the type of conduct that claimant engaged in. However, given that the policies that the employer's witness had earlier testified to did not state that they prohibited such conduct, it is not clear that this expectation was stated in a policy that the employer communicated to claimant or other employees. Therefore, even if claimant's conduct here did violate the employer's expectations, the employer has not met their burden to show that claimant either knew or had reason to know of such expectations, and therefore has not shown that claimant violated any such expectations willfully or with wanton negligence.

As for claimant's answers to the questions on the ethics statement, the record shows that claimant's responses were wantonly negligent violations of the employer's standards of behavior. It can be reasonably inferred that claimant understood the employer expected her to answer the questions on the ethics statement accurately. By the plain reading of the questions, claimant did not give accurate answers to those questions.

The first question asked whether claimant or her relations had any interest that may conflict with the interests of the company. The wording of the question, particularly the use of the word "may," is broad. Based on claimant's explanation that her company's products were aimed at a different market segment than the employer's products, and that she had intended to sell her products primarily in small, local venues, claimant's belief that her products did not compete with the employer's was reasonable. However, given that the products are nevertheless similar in many ways, it is arguable that they *might have* competed with the employer's. In other words, claimant's answer to this question amounted to a categorical denial of a possibility—that her interests competed with the employer's interests—that she could not rule out. It is fair to say, then, that claimant's answer to this question was not accurate.

The second question asked if claimant had provided services to any business enterprise other than the employer, including, a sole proprietorship. Claimant responded no to this question, believing, based on the use of the word "enterprise," that the question was only asking if she had provided services to any large competing businesses, such as other national retailers. This was clearly an inaccurate response to the question, as claimant knew that she had been providing services to her *own* business, which appears from the record to have been a sole proprietorship. Because claimant's responses to both questions were inaccurate, she violated the employer's reasonable expectation that she provide accurate responses on the ethics statement.

Claimant's inaccurate answers to the questions were wantonly negligent. That claimant gave the answers she did suggests that, rather than asking the employer for clarification on what the questions meant, she simply answered the questions in a way that she believed to be correct. Claimant's failure to seek clarification in the face of questions that she apparently did not understand shows that she provided answers to the questions without regard to the consequences of answering them incorrectly. Therefore, claimant's inaccurate responses to those questions amounted to a wantonly negligent violation of the employer's standards of behavior.

However, claimant's testimony nevertheless indicated that she believed that she had answered those questions accurately, based on her reading of the questions, and that she therefore did not intentionally give inaccurate answers to the questions. In other words, claimant's failure to give accurate answers to the ethics questions was not a willful violation of the employer's standards of behavior. To be clear, claimant's reading of the ethics questions was not reasonable. In the first question, claimant resolved an ambiguity in the question without any apparent inquiry to determine if she had answered it correctly. In the second question, claimant interpreted the question by reading out of it the sentence explaining what the word "enterprise" meant in that context.

However, claimant testified that she answered the ethics questions based on her genuine, if flawed, interpretations of the language in those questions. That testimony is supported by the record's failure to show that the employer objected to claimant's business itself, but merely that they objected to her answers to the ethics questions that would have allowed her to disclose the business. The employer's witness did not testify that the employer found that claimant's business competed with their own interests, or that employees were categorically forbidden from operating such businesses. On the contrary, claimant explained that her supervisor had previously told her that it was okay to hire an employee who operated his own apparel company, suggesting that the practice was not inherently forbidden by the employer's policies. This lends further support to claimant's position that she answered

the questions in a way she believed to be accurate, because the record does not show she had reason to believe she needed to hide her own business from the employer.

Thus, even though claimant's inaccurate responses to the ethics questions were wantonly negligent, they nevertheless constituted an isolated instance of poor judgment. As explained above, claimant's computer use was not a willful or wantonly negligent violation of the employer's standards of behavior. There is no indication in the record that claimant had engaged in any other conduct that would constitute willful or wantonly negligent violations of the employer's standards of behavior. Therefore, claimant's conduct in answering the ethics questions was isolated. Claimant's conduct was also the result of poor judgment, in that she failed to seek clarification from the employer before attempting to answer the ethics questions.

The record does not show, however, that claimant's conduct violated the law, was tantamount to unlawful conduct, created an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. A determination of whether a claimant's conduct caused a breach of trust is objective, not subjective, and the employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not. *See Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009); *see accord Isayeva v. Employment Dep't.*, 266 Or App 806, 340 P3d 82 (2014). As to whether claimant's conduct created an irreparable breach of trust, the fact that claimant provided inaccurate answers that she nevertheless believed to be true is relevant. *See Freeman v. Employment Dep't.*, 195 Or App 417, 98 P3d 402 (2004) (in concluding that claimant's conduct was "too severe" to be excused, EAB focused entirely on the severity or result of the conduct, when the isolated instance of poor judgment analysis "logically involves an examination of the claimant's decision making process that led to the consequences, as well as the nature or gravity of the conduct or consequence itself"); *see accord Jones v. Employment Dep't.*, 199 Or App 571, 112 P3d 453 (2005); *Callaway v. Employment Dep't.*, 225 Or App 650, 202 P3d 196 (2009); *Smithee v. Employment Dep't.*, 228 Or App 346, 208 P3d 965 (2009); *Fox v. Employment Dep't.*, 261 Or App 560, 323 P3d 530 (2014); *Isayeva v. Employment Dep't.*, 266 Or App 806, 340 P3d 82 (2014).

Had claimant knowingly answered the ethics questions falsely, that arguably would be an irreparable breach of trust, as an employer could not reasonably continue to trust an employee who intentionally lied on an ethics statement. Here, however, claimant's answers to the ethics questions, even if false, were made unintentionally. Had claimant been given the opportunity to correct her mistake, the employer could have reasonably trusted her to provide accurate answers to the questions on future ethics statements. Therefore, claimant's conduct did not create an irreparable breach of trust in the employment relationship. Instead, it was an isolated instance of poor judgment, which is not misconduct.

For the above reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 24-UI-271288 is set aside, as outlined above.

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

DATE of Service: <u>December 16, 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 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.

NOTE: This decision reverses the ALJ's order denying claimant benefits. Please note that in most cases, payment of benefits owed will take about a week for the Department to complete.

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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