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

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DS 005.00

# EMPLOYMENT APPEALS BOARD DECISION
# 2018-EAB-0937

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On August 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct (decision # 93711). Claimant filed a timely request for hearing. On August 30, 2018, ALJ Snyder conducted a hearing, and on September 7, 2018 issued Order No. 18-UI-116212, affirming the Department's decision. On September 27, 2018, claimant filed a timely application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based upon the hearing record. EAB did not consider the new information contained therein, nor did EAB consider Section II of claimant's legal arguments, "[Claimant] was fired for discriminatory reasons." Determining whether or not claimant's discharge was for lawful reasons is outside the scope of the EAB's legal authority, as is resolving any claims of unlawful termination under ORS chapter 659A. EAB has jurisdiction only over the unemployment insurance benefits work separation issue pursuant to ORS chapter 657.

**FINDINGS OF FACT:** (1) Clackamas Community College employed claimant, last as a network analyst and service desk technician, from November 2013 to June 27, 2018.

(2) On April 16, 2018, the employer issued claimant a written reprimand and placed him on a plan of assistance based on various past occurrences. The plan of assistance required claimant, in pertinent part, to engage in respectful communication, comply with directives to perform work, be respectful and courteous, refrain from reassigning work to others, engage in work during work hours, limit his cell phone use, refrain from derogatory or negative comments, and base any comments he made on facts. Claimant received and signed the plan of assistance.

(3) On June 12, 2018, while at work, claimant visited an external website and viewed a video that was not work-related. On June 13, 2018, claimant's manager told claimant that he was "letting the [video] thing go because people had been singing your praises." Exhibit 2.

(4) On June 13, 2018, claimant noticed some vendors standing at the front counter. Claimant asked an intern who they were. The intern told claimant they were waiting for a 9:30 a.m. meeting with another employee. Claimant observed that it was 9:28 a.m., and commented to the intern that the other employee should come greet them. Claimant's manager and the vendors heard claimant's comment. Claimant's manager told him that was enough, and claimant did not make any additional comments.

(5) Later on June 13, 2018, claimant spoke with his manager about removing a program the interns used from his workstation computer and placing it on a server. Claimant's manager said he would look into options, but did not give claimant any instructions with respect to the program. Claimant subsequently transferred the program to an external drive. An intern asked claimant how he should track his time, and claimant responded that he did not care. Claimant's manager stated that he did not want to hear employees making that statement, and believed claimant responded to him that he did not care.

(6) The manager then called claimant into a meeting and yelled at him for saying he did not care. Claimant returned to work, anxious, hyperventilating, and engaging in self-harm by superficially cutting his forehead with a box cutter. A coworker notified human resources of claimant's behavior, human resources took claimant into the meeting room again and expressed concerns about claimant's mental health and the possibility that he would harm or kill himself on the employer's property. The employer gave claimant the option of leaving work and going into a police hold or being transferred to a medical center for urgent mental health treatment. Claimant opted for medical treatment, and left work.

(7) The employer subsequently concluded that claimant's conduct had violated the terms of the April 16, 2018 plan of assistance. The employer concluded that viewing video was a failure to actively engage in work during work hours, claimant's behavior at the front counter showed a lack of regard for his location and who could hear him, and his comments were negative, not based upon facts, and a refusal to cooperate and maintain good working relations with others. The employer also concluded that claimant's comments after removing the computer program from his workstation were disrespectful.

(8) On June 27, 2018, the employer met with claimant and discharged him for allegedly violating the April 16, 2018 plan of assistance and the policies and requirements upon which that plan was based. At all relevant times claimant had mental health conditions including major stress, major depression, suicidal thoughts, claustrophobia and anxiety, difficulty interacting with others, and engaging in self-harm when stressed.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ, and conclude that claimant's discharge was 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. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that

amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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.

The ALJ concluded that claimant's discharge was for misconduct. In reaching that conclusion, the ALJ wrote that he "was discharged after he became visibly angry at work on June 13, 2018, and spoke inappropriately to coworkers, removed a software program from his work computer without permission, and then told his supervisor 'I don't care anymore.'" Order No. 18-UI-116212 at 3. The ALJ reasoned that claimant's conduct was wantonly negligent "because he had been placed on a plan of assistance on April 16, 2018 and told to stop behaving angrily and disrespectfully at work," and "knew that it would violate the Employer's expectations for him to remove a software program from his work computer and behave in a way that was perceptively angry and disruptive to his coworkers." *Id.* The record fails to support the ALJ's conclusions.

As a preliminary matter, the employer did not participate in the hearing. The employer's evidence about claimant's conduct during the relevant period consisted only of the packet of documents the employer submitted.[1] The documents did not allege that claimant appeared "visibly angry at work on June 13th," the plan of assistance did not state that claimant had been told to "stop behaving angrily" at work, did not allege any basis upon which to conclude claimant "knew that it would violate the Employer's expectations for him to remove a software program from his work computer," and did not allege that claimant was "perceptively angry . . . to his coworkers." Also notably, the employer did not allege that it discharged claimant for removing a software program from his work computer, and claimant specifically testified that he did not know he would get in trouble for removing it.[2] The ALJ's findings and conclusions to the contrary were, therefore, made in error.

The employer had the burden to prove misconduct in this case by a preponderance of the evidence. *See accord Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must have established that it is more likely that the events at issue occurred, and that claimant engaged in the alleged behavior either willfully or with wanton negligence. Because the employer did not participate in the hearing, the only record evidence about the employer's discharge decision and facts underlying the discharge decision were from the June 27, 2018 separation letter.

The employer alleged that it discharged claimant, in part, because on June 12, 2018 claimant watched videos that were not related to work rather than actively engaging in work. *See* Exhibit 1, separation letter, page 2. The employer did not refute, however, that on June 13, 2018, claimant's manager told him that he was "letting the [video] thing go because people had been singing your praises." *See* Exhibit

[1] The employer submitted a twelve-page exhibit that included: a fax cover sheet; a cover letter; two pages of policies including staff ethics/conflict of interest/outside employment, performance analysis and review, disciplinary action, college rules, termination of employment, resignation, firearms and destructive devices on college property, and workplace violence; a two-page "Plan of Assistance for [Claimant] effective April 16, 2018"; a one-page acknowledgement form; a two-page June 27, 2018 separation letter; and a three-page April 16, 2018 written reprimand.

[2] Claimant specifically testified that he didn't think he'd get in trouble for removing the software because he had found and installed it, "it was running completely unofficially," no one ever told claimant to run the software, and he didn't think he needed to run it. *See accord* Audio recording at ~ 21:00, 33:00.

2. The evidence as to whether or what extent claimant's video watching affected the employer's decision to discharge him is therefore equally balanced. Even in the unlikely event that claimant's video watching had been a driving factor in the employer's decision to discharge him, claimant's video watching was, more likely than not, not misconduct because the employer had not warned claimant against watching videos, the record fails to establish that claimant's video watching occurred during work time rather than during a break period, and the record lacks evidence establishing it is more likely than not that claimant knew or had reason to know that watching a single video would violate the employer's expectations.[3] Claimant's video watching therefore was not disqualifying misconduct.

The employer alleged that it discharged claimant because he "made several comments about [his] co-worker needing to greet" some vendors on June 13th. *See* Exhibit 1, separation letter, page 1. However, neither the separation letter nor any of the employer's other documents specified how many comments claimant made or what those comments were. Claimant testified that he made one comment in which he suggested that the coworker who planned to meet the vendors two minutes later should come greet the vendors. It is therefore more likely than not that claimant made only one comment.

The employer alleged that claimant's June 13th comment about his coworker needing to greet vendors demonstrated a lack of regard to his location and audience, were not based upon facts, were negative, and amounted to a "refusal to cooperate and maintain good working relations with all other employees, students, and the public. *Id.* However, neither the separation letter nor any of the employer's other documents specified how claimant's comment demonstrated a lack of regard to his location and audience, how the comment was false or negative, or how it demonstrated a refusal to cooperate or maintain good working relations. Claimant did not intend that his comment be perceived as negative. Audio recording at ~ 13:30-14:40. A comment that a coworker scheduled to meet with vendors in two minutes should greet them is not the type of comment that is so objectively objectionable, offensive, false, or negative that claimant knew or should have known making it would violate the employer's expectations or the April 16th plan of action. Nor is there any record evidence suggesting circumstances, such as claimant's tone or demeanor, that would make such an innocuous comment misconduct. It is also notable that when claimant's manager admonished claimant to stop the comment, he immediately complied. *Id.* at ~ 16:10.

The employer also alleged that it discharged claimant for violating the June 16th plan of assistance by shouting about removing software from his computer and repeatedly stating that he did not care.[4] The employer's hearsay report concerning the shouting and multiple incidents of stating that he did not care is vague and unsupported by other evidence; claimant's firsthand testimony was that he said he did not care a single time. Claimant's firsthand testimony outweighs the employer's evidence; the preponderance of the evidence therefore establishes that claimant said he did not care a single time.

[3] According to the April 16th written reprimand and plan of action, claimant's previous conduct included things like failing to take a break when he was trying to finish a work assignment and reassigning work without permission. The previous instances were so dissimilar to watching a video that being warned for the previous instances did not inform claimant that watching a video would be prohibited.

[4] The separation letter did not assert or establish that claimant violated the employer's expectations or the plan of assistance by removing the software.

The employer alleged that claimant's statement to a coworker that he did not care was disrespectful. The employer's evidence did not, however, describe what it was about claimant's words, tone, or behavior that conveyed disrespect. To any extent the phrase "I don't care" might be construed as innately disrespectful, and therefore a violation of the employer's expectations and the plan of assistance, claimant did not intend disrespect, and it is more likely than not that he did not realize he was being disrespectful at the time. Claimant's use of that phrase toward his coworker therefore was not the result of willful or wantonly negligent behavior attributable to him as misconduct.

In reaching this decision we considered that the ALJ concluded claimant "chose to behave in an angry and disruptive way" on June 13th. Order No. 18-UI-116212 at 3. That conclusion is not supported by the preponderance of the evidence, which included that at all relevant times claimant was experiencing symptoms of mental illness including major depression, suicidal thoughts and anxiety, which culminated in claimant engaging in self-harm by cutting his forehead and receiving emergency treatment for his mental health. It is unlikely under those circumstances that claimant rationally chose his words or tone such that those choices amounted to willful or wantonly negligent misconduct.

For the foregoing reasons, claimant's discharge was not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Order No. 18-UI-116212 is set aside, as outlined above.[5]

J. S. Cromwell, D. P. Hettle and S. Alba.

**DATE of Service: <u>November 1, 2018</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 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.

**<u>Please help us improve our service by completing an online customer service survey</u>**. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

[5] This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.