EO: 700
BYE: 201938

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

285
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0130

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135806). Claimant filed a timely request for hearing. On January 11, 2019, ALJ Monroe conducted a hearing, and on January 17, 2019 issued Order No. 19-UI-122994, concluding claimant's discharge was not for misconduct. On February 4, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted timely written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered the parties' arguments only to the extent they were based upon information received into evidence at the hearing, and did not consider any new evidence when reaching this decision.

FINDINGS OF FACT: (1) Control Solutions, Inc. employed claimant as director of business development from October 2017 to September 24, 2018. The owner was located in Saint Helens, Oregon. Claimant worked remotely from Bend, Oregon.

(2) Beginning September 13, 2018, claimant and the owner exchanged a series of emails about the payroll schedule and whether the owner adhered to it as required by state law. The owner believed that he paid employees on time in accordance with the law. Claimant believed the owner did not and suggested that the owner modify the normal payroll schedule, run payroll the Friday before if payday fell on a weekend, run payroll on the scheduled payday even if the payday fell on a weekend, or develop a written payroll policy. Claimant alluded to having contacted the Bureau of Labor and Industries

(BOLI) about payroll law. Claimant notified the owner on September 19th that employees could complain about the employer to the BOLI if he did not maintain regular paydays. On approximately September 20, 2018, the owner sent an email to all employees establishing that the payroll policy was to pay on the 1st and 15th of every month, and if either fell on a weekend or holiday, pay on the next business day. Claimant did not initiate further communication with the owner about the payroll schedule, or express further concern to the owner about the payroll schedule or payroll policy.

(3) On September 21, 2018, the owner called claimant at approximately 10:30 a.m. to discuss their disagreement about payroll. The owner expressed displeasure that claimant had contacted BOLI about the payroll practices. The owner felt confident that he was lawfully paying employees and thought claimant was threatening to file complaints. The phone conversation was contentious, and at one point the owner suggested that he and claimant meet face to face. Claimant agreed but said it would have to be the following week because the owner could not travel from Saint Helens to Bend and arrive before claimant stopped working for the day.

(4) The owner disagreed that he did not have time to travel to Bend within claimant's work hours, and thought claimant was making herself unavailable for work during work hours. The owner told claimant to find another job and agreed to give claimant until November to find one. Claimant said she was not quitting, and asked the owner if she was being fired or laid off or provide something explaining the work separation in writing. The owner felt claimant was becoming "combative" and "making demands," and refused to state that she was being fired or laid off work or to send anything in writing. Transcript at 8, 12. The owner told claimant he was going out of his way to help her and be fair to her by giving her time to look for another job; claimant asked the owner again to specify if she was being laid off or terminated, and the owner told claimant that he was the boss, could do what he wanted, and was going to come to her house that afternoon.

(5) Claimant felt that the owner's tone was threatening and intimidating, and was concerned about the owner arriving at her house. She told the owner she was not available to meet him that day but could make other arrangements. She asked the owner what the point of meeting was since he had already decided to terminate her employment. The owner suggested that he could arrive at her house with a sheriff to collect the company property she had in her possession. After some additional conversation claimant asked if she still had until November. The owner said he would not say one way or the other and was not granting any requests at that point, said that things needed to remain amicable, and that he would come to her house with police if there was any trouble.

(6) After speaking with claimant the owner spoke with another company officer, who said that the owner should not trust claimant with its property or access to the business, and recommended that the owner fire claimant immediately. The owner then asked the information technology (IT) worker if claimant's computer was backed up and found out it was not.

(7) On September 21, 2018, shortly after 11:00 a.m., the owner instructed claimant to allow the IT worker remote access to her computer. Claimant allowed access. She had a number of personal items on the computer, including personal photos she had inadvertently downloaded to her work computer from her personal camera when trying to download work-related photos to the work computer from the camera. She also had authorization to use some of the employer's files to do a marketing study for her graduate program. She was not aware that the owner expected her to keep her work and personal files

separate and had a number of personal files on her work computer. She was concerned that the backup process might cause her to lose those materials, so she deleted, copied, and/or moved personal items from her work computer to an online drive. She did not remove any work-related materials.

(8) At 11:30 a.m., the owner sent a company-wide email titled "computer crimes" that stated, among other things, that theft of data was a computer crime, as was altering, destroying, or damaging any computer or data. The email stated, "No one is to delete or remove data unless authorized. Please confirm you have read this." Exhibit 1, September 21 email.[1]

(9) Between 11:00 a.m. and 1:47 p.m., the IT worker backed up claimant's computer via a remote connection using a product called "carbonite." Sometime shortly prior to 1:47 p.m., the remote session was terminated. The employer asked claimant to reconnect the remote session but claimant had finished work for the day and was not in proximity to her work computer, so she could not immediately reconnect. At approximately 2:14 p.m., the owner sent a text message to claimant that stated, "I would advise not to delete anything from the computer in the meantime." Exhibit 1, text messages.

(10) On September 24, 2018, the owner instructed the IT worker to resume maintenance on claimant's computer when he began work. The owner had seen that claimant's desktop included a multitude of personal files and folder, had been told that claimant had already deleted a number of items he thought were work-related, and concluded she had been working on personal matters during work hours. At lunchtime, the owner received a call from Bend police relating that claimant felt fearful for her life and was concerned that the owner was going to arrive at her house. The owner felt at that point that he "could not trust her any further" and "it just didn't make sense to, uh, to continue." Transcript at 67-68.

(11) On September 24, 2018, the owner sent claimant an email terminating her employment effective immediately for insubordination, gross misuse of company equipment for personal reasons, and unauthorized removal of data and files from the company computer. The owner subsequently exchanged other text messages with claimant about the continued backup of her computer and her termination.

CONCLUSIONS AND REASONS: We agree with the ALJ 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 of an employee. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

[1] The record does not include evidence as to whether or not claimant confirmed having read the email.

The employer discharged claimant alleging that she engaged in gross misuse of company equipment for personal reasons, insubordination, and unauthorized removal of data and files from the company computer. The employer clarified at the hearing that it was the events of September 21, 2018 and September 24, 2018 that caused the employer to decide to discharge her on September 24th. Transcript at 5. The specific incidents underlying the employer's allegations therefore appear to be that on September 21st, claimant repeatedly asked the owner to clarify, in writing, whether the employer's planned termination of her employment in November 2018 was going to be a termination or layoff. She also refused the employer's request to meet with her. The employer also alleged claimant deleted files from the company computer after having been told not to do so.

The employer alleged that claimant engaged in gross misuse of company equipment for personal reasons. Claimant did not dispute that she used the employer's computer for personal reasons. However, she did so based upon the apparently mistaken belief that the employer did not prohibit employees from intermingling their personal and professional use of equipment. For example, claimant took work-related photographs on her personal camera, and made personal use of her work computer, without understanding that the employer expected her to refrain from doing so. Claimant also testified, unrefuted, that she had the owner's permission to use some company resources for a graduate study project, which suggests that the line between personal and professional use of equipment and resources was not clear-cut. *See* Transcript at 53-54. The evidence presented by both parties was in conflict. Absent a substantiated basis for considering either witness lacking in credibility, the evidence about whether or to what extent claimant's personal use of the employer's computer equipment was prohibited is no better than equally balanced, and the party with the burden of persuasion, the employer, has failed to show that misconduct occurred with respect to this issue.[2]

The employer discharged claimant for allegedly being insubordinate, but the record fails to show that the employer had a policy that defined insubordination. The term "insubordinate" in common usage means "disobedient to authority."[3] "Disobedient" means "refusing or neglecting to obey."[4] Insubordination in the context of an employer-employee relationship is therefore refusing or neglecting to obey someone in authority, here the owner. With respect to the September 21st phone call, the employer did not allege that he gave claimant any instructions with respect to her requests to clarify whether she was being terminated or laid off. Once the owner told claimant he was not going to answer her question, claimant stopped asking. Claimant was not insubordinate with respect to that portion of the phone call.

The record shows that claimant refused the owner's request to meet on September 21st. Using the above-stated definition, it was likely insubordinate for claimant to refuse the owner's request to meet. He had positional authority in the situation and claimant refused or neglected to obey. The next question is

[2] We note that even if we had considered the additional evidence the employer submitted with its written argument our decision on this issue would remain the same. The threshold issue is not whether claimant used the employer's computer for personal reasons, especially since claimant did not dispute engaging in some personal use, it is whether claimant knew or had reason to know that the employer prohibited such conduct. Given the overlap between claimant's personal and professional use of her personal and professional equipment and resources, at least some with the owner's knowledge and permission, the record fails to substantiate that claimant knew or should have known that such intermingled use was not allowed.

[3] *See* https://www.merriam-webster.com/dictionary/insubordinate

[4] *See* https://www.merriam-webster.com/dictionary/disobedient

whether claimant's insubordination in that instance was willful or wantonly negligent misconduct. There is no dispute that claimant was conscious of her decision to refuse the owner's request to meet with her and intended to disobey that instruction. However, the owner's request was made at approximately 10:30 a.m. It would take the owner approximately three hours to travel to claimant's home for that meeting, giving claimant three hours' notice of the meeting. Claimant was scheduled to stop working earlier than usual that day, at 11:30 a.m., two hours before the meeting would occur. Claimant therefore was refusing the owner's request for her to meet him after-hours with only three hours' notice. Under the circumstances, it is more likely than not that the owner's request was not a reasonable one. OAR 471-030-0038(1)(d)(C) states that "[a] conscious decision not to comply with an unreasonable employer policy is not misconduct." Claimant's insubordinate refusal to meet with the employer on September 21st therefore was not misconduct.

The employer also alleged that claimant was insubordinate because she deleted and moved items from the employer's computer and computer system after having been told not to do so. There is no dispute that the employer instructed claimant not to remove items from her personal computer on September 21st at 11:30 a.m. and approximately 2:14 p.m. Likewise, there is no dispute that claimant deleted or copied some materials from the employer's computer to an online drive. The employer did not, however, establish on the record whether claimant acknowledged receipt of the 11:30 a.m. instruction, or when she did so. Nor did the owner identify what time any of claimant's deletions or copies occurred. When asked when claimant deleted or copied items, the owner testified, "Ohhhh, probably multiple days starting on the 21st. Um, uh, the 20th. Wait – wait a minute. I'm sorry. Not the 20th. Um, yeah. I would – I would ask her for further clarification on that." Transcript at 70. The employer has the burden of proof in a discharge case, and could not establish when the deletions and copies occurred, much less that they occurred after the owner instructed her not to do so on September 21st. In the absence of that evidence, the record fails to show that claimant was insubordinate when she deleted or copied files from her company computer to an online drive, or that her deletions and copies amounted to willful or wantonly negligent violations of the standards of behavior the employer had the right to expect of her.

Finally, it is unclear on this record whether or to what extent claimant's contact with BOLI about the owner's payroll practices caused or contributed to the owner's plan to terminate claimant's employment in November 2018. Likewise, it is unclear whether or to what extent claimant's contact with Bend police prior to lunchtime on September 24th about the owner's possible arrival at her home caused or contributed to the owner's decision to discharge claimant on September 24th. However, the proximity of claimant's contact with BOLI and complaint to police suggest the possibility that there might have been a connection between those events and the owner's decisions about claimant's employment. To any extent the owner's employment decisions were based upon those events, at least on this record, claimant's contact with BOLI or with Bend police were not willful or wantonly negligent misconduct.[5]

[5] Generally speaking, individuals have the right to contact regulatory agencies about suspect employer practices and are protected from retaliation based upon such contact; as such, an employer's prohibition of such contact would be an unreasonable expectation, and even a willful violation of an unreasonable employer expectation is not misconduct. Likewise, generally speaking, individuals have the right to contact police if they are concerned about their safety. Although there are circumstances under which an individual's contact with police might amount to misconduct, for example, if an individual contacted police to knowingly file a false report or knowingly and falsely accuse someone of a crime. However, this record does not suggest the presence of such circumstances.

The preponderance of the evidence in the record before EAB for review shows that claimant's discharge was not for willful or wantonly negligent misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 19-UI-122994 is affirmed.

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: March 7, 2019

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 Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición 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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