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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
2023-EAB-0022

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 24, 2022, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was disqualified from receiving unemployment insurance benefits effective September 25, 2022 (decision # 144701). Claimant filed a timely request for hearing. On December 7, 2022, ALJ Fraser conducted a hearing, and on December 14, 2022 issued Amended Order No. 22-UI-209856, modifying decision # 144701 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective October 2, 2022.[1] On December 26, 2022, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Coca-Cola Bottling Company employed claimant from November 1, 2021 until October 3, 2022. Claimant worked as a merchandiser, stocking Coca-Cola products at grocery stores.

(2) The employer had an anti-harassment policy that prohibited employees from engaging in horseplay with coworkers and from physically harassing or threatening coworkers. Claimant underwent trainings on these expectations upon hire.

(3) On September 13, 2022, claimant finished stocking shelves at a store and decided to help two coworkers who were stocking shelves at a different store that was located near claimant's route. One of the coworkers was a trainee with whom claimant had a friendly relationship and had been communicating with via social media. Claimant arrived at the store and helped her coworkers stock shelves. While doing so, claimant gave the trainee's hair "a light tug," which was consistent with what

[1] Amended Order No. 22-UI-209856 amended Order No. 22-UI-209332, which ALJ Fraser had previously issued on December 8, 2022. Order No. 22-UI-209332 erroneously stated that claimant's effective date of disqualification was September 25, 2022. *See* Order No. 22-UI-209332 at 4. Amended Order No. 22-UI-209856 modified the effective date of disqualification from September 25, 2022 to October 2, 2022. *See* Amended Order No. 22-UI-209856 at 4. However, the amended order stated that it had affirmed decision # 144701 when it had modified that decision by changing the effective date of disqualification. Amended Order No. 22-UI-209856 at 4.

the two had done while working together in the past. Transcript at 31. The trainee then called claimant "a little shit" and the two went about their work. Transcript at 31. In addition, while helping her coworkers, claimant, while in a rush, threw several pallets down a ramp. When she did so, the last pallet hit a graded part of the ramp and fell down near the trainee. The pallet did not hit the trainee, and claimant did not throw the pallet in the direction of the trainee intending to hit her.

(4) The next day, claimant tried calling the trainee because the trainee was scheduled to work at a store that was unfamiliar to her and claimant wanted to describe the store to her. The trainee did not answer claimant's call. Claimant then texted the trainee "don't answer my phone call one more time and . . . watch what happens[.]" Transcript at 34. The trainee sent claimant a response text that contained laughing emojis and explained that she did not answer because she was dealing with another coworker.

(5) On or about September 14, 2022, one of the trainee's other coworkers told claimant's supervisor that claimant had pulled the trainee's hair. The supervisor told the trainee to make a report to him about claimant's conduct. On September 17, 2022, the trainee sent the supervisor an email detailing the incidents in which claimant pulled her hair, threw the pallet near her, and sent the text about failing to answer when claimant called. The supervisor forwarded the matter for review by the employer's human resources department and employee relations board.

(6) On October 3, 2022, the employer discharged claimant for violating their anti-harassment policy based on the incidents in which claimant pulled the trainee's hair, threw the pallet in the trainee's direction, and sent the text about failing to answer when claimant called.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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).

The order under review concluded that claimant's conduct of pulling the trainee's hair, throwing the pallet in the trainee's direction, and sending the text about failing to answer when claimant called was misconduct because it violated the employer's anti-harassment policy with at least wanton negligence and was not an isolated instance of poor judgment. Amended Order No. 22-UI-209856 at 3. The record does not support the conclusion that claimant's conduct was misconduct.

The employer failed to meet their burden to show that they discharged claimant for misconduct. As to the hair-pulling incident, the employer did not establish that claimant violated the employer's expectations willfully or with wanton negligence. The record shows that claimant gave the trainee's hair

"a light tug" while helping her stock shelves on September 13, 2022. Transcript at 31. Lightly pulling the hair of a coworker is horseplay, which the employer prohibited. However, the record supports the conclusion that claimant did not know and understand that such behavior was prohibited. At hearing, claimant testified that she underwent trainings on the employer's expectations upon hire but was not specifically aware of the employer's anti-harassment policy. Transcript at 23. Claimant's conduct was consistent with what she and the trainee had done while working together in the past, and the record does not show that the trainee considered claimant's behavior harassment so as to suggest that claimant should have known her conduct was a policy violation. Rather, the trainee reacted in an ostensibly friendly manner by calling claimant "a little shit," and then going back to work as normal. Transcript at 31. The trainee reported the incident only after a different coworker informed the trainee's supervisor that claimant had pulled the trainee's hair and then the supervisor directed the trainee to make a report. That the trainee's response to the hair-pulling was friendly and the trainee only reported the matter at the supervisor's insistence supports that nothing about the trainee's response to claimant would suggest to claimant that her conduct was unacceptable to the employer. These facts show that claimant did not violate the prohibition against horseplay willfully because she did not know about it. Nor did claimant violate the expectation with wanton negligence as the record fails to show claimant knew or should have known that her conduct would probably result in a violation of the employer's expectations.

Likewise, the record fails to show that claimant's throwing of the pallet in the trainee's direction was a willful or wantonly negligent violation of the prohibition against physically harassing or threatening coworkers. The pallet did not hit the trainee and claimant did not throw the pallet in the direction of the trainee intending to hit her. Instead, the pallet simply fell down near the trainee after it hit a graded part of the ramp. Although claimant was throwing the pallet down the ramp in a rush, at worst, claimant's rush work with the pallet was an example of ordinary negligence, not wanton negligence which is required to establish misconduct under ORS 657.176(2)(a).

Finally, the employer did not show that claimant's sending of the text to the trainee about failing to answer when claimant called was misconduct. The record shows that claimant, who had a friendly relationship with the trainee, sent a text message stating "don't answer my phone call one more time and . . . watch what happens[.]" Transcript at 34. The trainee then sent claimant a response text containing laughing emojis and explained that she did not answer claimant's call because the trainee was dealing with another coworker. Thus, the record supports both that claimant's text was intended as a joke and that the trainee did not perceive it as a threat. Viewed in context, that statement "don't answer my phone call one more time and . . . watch what happens" was not overtly threatening. Transcript at 34. Therefore, the employer did not show that claimant's sending of the text to the trainee about failing to answer when claimant called was a willful or wantonly negligent violation of the employer's policy against threatening coworkers.

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

DECISION: Order No. 22-UI-209856 is set aside, as outlined above.

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

DATE of Service: February 24, 2023

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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 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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