

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0734

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 9, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged but not for misconduct and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 71544). The employer filed a timely request for hearing. On June 5, 2023, ALJ Kaneshiro conducted a hearing, and on June 13, 2023 issued Order No. 23-UI-227714, reversing decision # 71544 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective February 12, 2023. On July 2, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered claimant's written argument in reaching this decision. In the argument, claimant expresses disagreement with, and functionally objects to, the ALJ's admission of Exhibit 3, which consists of the camera footage from the bus claimant drove on November 14, 2022 and shows the incident that led to claimant's discharge. Written Argument at 2. The bases of claimant's objection are that the evidence was not provided before the start of the hearing, that claimant did not agree at hearing to the ALJ's request for the evidence, and that claimant did not have an opportunity to "respond to the" ALJ's "decision[]," after the ALJ admitted the exhibit into evidence. Written Argument at 2.

Claimant's objection to admission of the exhibit into the record is overruled. At hearing, the ALJ expressed his intention to leave the record open to receive the bus footage, and gave claimant an "opportunity to state what [he] wanted to state for the record," however, claimant did not object at that time and otherwise stated that he wished to be served with the camera footage by certified mail. Transcript at 44. The ALJ subsequently received the evidence and in issuing the order under review, noted that the evidence was admitted as Exhibit 3, subject to either party objecting in writing within seven days. Order No. 23-UI-227714 at 1. Claimant did not file an objection.

Thus, claimant had opportunities to object but failed to do so until he submitted his written argument. As to claimant's point that he was not provided with Exhibit 3 prior to the hearing, it is correct that

documentary evidence is typically required to be served on opposing parties before commencement of the hearing. *See* OAR 471-040-0023(4) (effective August 1, 2004). However, under OAR 471-040-0023(5), service before the hearing may be dispensed with “if inclusion of the evidence in the record is necessary to conduct a full and fair hearing.” The bus footage is a high quality fixed angle color video with clear audio that depicts what transpired during the November 14, 2022 incident and, as such, is highly relevant and material to this case. Therefore, inclusion of the bus footage into the record was necessary to ensure a full and fair hearing and it was appropriate to admit Exhibit 1 despite its not having been served on claimant prior to the hearing.

FINDINGS OF FACT: (1) Nyssa Public School District 26 employed claimant as a bus driver from October 3, 2013 until February 15, 2023.

(2) The employer expected their employees to refrain from using inappropriate physical force with students. The expectation was a part of professionalism training the employer offered claimant annually and was contained in the employer’s training manual for bus drivers. Claimant believed he had never received any written policies or training regarding physical force with students.

(3) On the afternoon of November 14, 2022, claimant was driving his bus, taking students home from school. The students were a mixture of elementary, middle school, and high school students. Among the students on the bus were three siblings, a young woman, age 17, and two boys, who were eleven and nine-years-old, respectively. Claimant was a 48 year-old adult male.

(4) The boys were misbehaving by changing seats while the bus was in motion. The boys’ behavior frustrated claimant and he announced on the bus intercom, “You realize, I have no intention of taking you to your house, right? You’re going right back to the elementary with me. You and your brother and your sister are all going back. Enjoy the ride.” Exhibit 3 Bus Camera Footage at 49:57.

(5) A few minutes later, claimant radioed his supervisor and stated, “I have [the boys]. They won’t stay in their seats so I’m just gonna bring them back to the elementary. And mom can pick them up. Their older sister’s with them too in the back so I’ll bring her back, too.” Exhibit 3 Bus Camera Footage at 1:01:55. The supervisor responded, “Sounds good, if they’re not gonna listen.” Exhibit 3 Bus Camera Footage at 1:01:55. Claimant then radioed a different employee and advised he would be bringing the boys back to the elementary school. Claimant did not mention the sister. At no point did claimant ever check whether the siblings’ mother was available to pick up the children from school.

(6) Thereafter, claimant arrived at the siblings’ stop. The siblings approached the front of the bus and the younger boy tried to exit the bus, but claimant extended his arm and blocked his path. The sister asked why the siblings could not go to their house and stated that their mother was at work. One of the boys stated that they would be at school until late if they returned to the school. The younger boy tried to exit again and claimant grabbed a jacket the boy was holding, then stood up and sternly told the children to sit down or he would call the police. The siblings retook their seats and claimant stated that arrangements had been made with the school and the siblings could discuss with the school how they would get home. The sister explained that their mother worked until 7:00 p.m. It was then about 4:00 p.m. Claimant again stated, “You will be returning to the school, arrangements have been made.” Exhibit 3 Bus Camera Footage at 1:15:31.

(7) Claimant completed the rest of his stops and then, rather than go to the elementary school, drove the siblings to the employer's middle school. The middle school was the school bus pick up area for high school students, and claimant thought he should drop the sister off there. When claimant arrived, the sister was seated in the passenger side seat nearest the exit, with the eleven-year-old boy in the seat behind her, and the nine-year-old boy in the driver's side seat nearest the exit. Claimant informed the sister that she was required to report to an administrator of the high school to which the sister replied, "Okay, and they," meaning her brothers, "are coming with me." Exhibit 3 Bus Camera Footage at 1:28:10. Claimant then stood up facing the sister, with his back to the boy in the driver's side seat, and repeatedly stated, "Exit my bus." Exhibit 3 Bus Camera Footage at 1:28:16. The sister refused to exit without her brothers and as she and claimant argued, the boy in the driver's side seat tried to move past claimant.

(8) With his back to the nine-year-old boy, claimant blocked the boy with his hip, then wrapped his left arm around the boy's neck and flung him backward in the seat. Claimant leaned back in the seat and blocked the boy in with his body. As claimant did so, the sister stood up and attempted to walk up the aisle toward the back of the bus and away from claimant. Claimant reached out his right arm, grabbed the sister by her waist, and pushed her forward. The sister said, "don't touch me," and moved her left arm forward with an open palm toward claimant's face or shoulder area. Exhibit 3 Bus Camera Footage at 1:28:42. Claimant spun the sister around and pushed her down the stairs and off the bus. The nine-year-old boy then tried to follow his sister down the stairs. Claimant grabbed the boy, flung him into the passenger side seat, and with his arms extended onto the child's chest, pressed the boy into the side of the bus.

(9) A school counselor saw the sister exit the bus and approached claimant. Claimant opened the bus door to speak with the counselor and the boys ran out of the bus. The counselor stated, "What the hell is going on in here, you don't get to do what you just did." Exhibit 3 Bus Camera Footage at 1:29:20. Claimant responded, "I did a push and shove," and then repeated, "I did a push and shove and block, she cannot throw punches at me, it's on camera." Exhibit 3 Bus Camera Footage at 1:29:20. The counselor took the siblings and claimant drove the bus back to the bus garage.

(10) On November 15, 2022, the employer placed claimant on administrative leave because of his conduct during the November 14, 2022 incident. The employer's assistant superintendent viewed the camera footage from the bus claimant drove on November 14, 2022, and reported the matter to the police. The police department conducted an investigation. The prosecutor opted not to pursue criminal charges against claimant. On January 30, 2023, the employer met with claimant and his union representative about the incident.

(11) On February 15, 2023, the employer discharged claimant. The employer determined that discharging claimant was warranted because of "the physical force of trying to push the female student off the bus" and "also grabbing the younger student and . . . sitting on him[.]" Transcript at 7.

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).

Claimant violated the employer's expectations with wanton negligence by using inappropriate physical force with the students on November 14, 2022. On that date, claimant blocked the nine-year-old boy with his hip, then wrapped his arm around the boy's neck, flung the boy backward in the seat, and blocked the boy into the seat with his body. Claimant later grabbed the sister by her waist, and pushed her forward, spun her around, and pushed her down the stairs and off the bus. Then, claimant grabbed the nine-year-old boy again, flung him into the passenger side seat, and with his arms extended onto the child's chest, pressed the boy into the side of the bus. Although the sister and boy offered some physical resistance to claimant, such as when the sister moved her left arm forward with an open palm toward claimant's face or shoulder area, the record shows that claimant was the aggressor during the incident and therefore used physical force with the children that was not appropriate.

Claimant was conscious of his conduct. A few moments after pushing the sister off the bus and subduing the nine-year-old boy, a counselor confronted claimant about his actions. Claimant stated to the counselor, "I did a push and shove," and then repeated, "I did a push and shove and block[.]" Exhibit 3 Bus Camera Footage at 1:29:20. These statements prove that claimant was aware that he used physical force against the children.

The record also shows that claimant acted with indifference to the consequences of his actions. Claimant invited the confrontation with the siblings by insisting on disciplining them by returning them to school, rather than simply letting the children off at their home, and then, once at the middle school, attempting to separate the two young boys from their teenage sister. It was claimant's idea to return the three children to school. The record shows that after he observed the boys changing seats, claimant announced on the bus intercom, "You realize, I have no intention of taking you to your house, right? You're going right back to the elementary with me. You and your brother and your sister are all going back. Enjoy the ride." Exhibit 3 Bus Camera Footage at 49:57. Only after making this announcement did claimant radio his supervisor and obtain permission to discipline the siblings (all three of them, even though only two of them were misbehaving) by returning them to school. In obtaining this permission, claimant failed to first check whether the siblings' mother was available to pick up the children from school.

Upon reaching the siblings' stop at about 4:00 p.m., claimant prevented the siblings from exiting the bus. The children informed claimant that their mother worked until 7:00 p.m., meaning they likely would be without a ride home for about three hours. Nevertheless, claimant persisted in driving the siblings back to the employer's middle school. Once there, claimant insisted on separating the sister from the boys and claimant's use of force against the children ensued shortly thereafter. The record fails to show that punishing the children by returning them to the school was necessary, or that discipline could not be imposed on a different date or in a different form than by returning the siblings to school on

a day when their mother could not pick them up for three hours. The record further fails to show that claimant could not have simply required the siblings to report to one of the employer's schools without separating them by, for example, allowing all three of them to report to the middle school together. Because claimant's use of force on the children flowed from claimant's indifference to the consequences of his actions in these respects, the record demonstrates that claimant acted with indifference to the consequences of his actions in violating the employer's expectations on November 14, 2022.

Finally, the record shows that claimant should have known that his use of physical force would probably result in a violation of the employer's standards of behavior. At hearing, claimant denied ever receiving any written policies or training regarding use of physical force. Transcript at 25, 31. In contrast, the employer's witness testified that inappropriate physical force was prohibited, and stated that the expectation was a part of claimant's professionalism training and was contained in the employer's training manual for bus drivers. Transcript at 6, 15. Claimant may not have been aware of a specific written policy on use of physical force. Nevertheless, having worked nearly a decade as a school bus driver, claimant should have known as a matter of common sense and usual custom that it was prohibited to grab a nine-year-old schoolboy, fling him into a seat, and then with his arms extended onto the child's chest, press the boy into the side of the bus. Likewise, claimant should have known it would violate the employer's expectations to grab a teenage student who was attempting to move away from him by her waist, then spin her around, and then forcibly push her down the stairs and off the bus.

Accordingly, the record shows that claimant was indifferent to the consequences of his actions, was conscious of his conduct, and should have known that his inappropriate use of force on the schoolchildren would probably result in a violation of the employer's standards of behavior. As such, claimant's breach of the employer's expectations on November 14, 2022 was wantonly negligent.

Claimant's wantonly negligent conduct exceeded mere poor judgment and therefore was not an isolated instance of poor judgment. 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).

Here, claimant's wantonly negligent violation created an irreparable breach of trust in the employment relationship. Claimant was a bus driver who transported primary and secondary school children from school to their homes. As such, the employer trusted claimant to provide a safe environment to the students in his care, free of inappropriate use of physical force. By grabbing, flinging, and pushing the sister and the younger boy on November 14, 2022, claimant subjected the children to harm and breached the employer's trust. The breach of trust was irreparable and made a continued employment relationship impossible. The record shows that employment relationship could not be salvaged as the employer "found the incident to just be so egregious and so obvious[] that he should not have put the hands on students" that they viewed the incident as justifying police involvement and reported the matter to law enforcement. Transcript at 16. Although the prosecutor opted not to pursue charges, the record supports that it would not be possible for the employer to continue to employ claimant given that they thought claimant's treatment of the siblings might have been a crime. Further, given that the boys were eleven and nine-years-old respectively and so would ride the bus for years to come, along with the fact that the employer was a rural school district¹ with limited ability to reassign drivers and routes, continuing to employ claimant was impossible because doing so likely would have posed an unacceptable risk that the siblings would have to ride claimant's bus again in the future.

Claimant's wantonly negligent violation was not a good faith error. The record fails to show that the employer would find it acceptable for claimant to wrap his arm around the boy's neck, and grab, fling, and push the boy, as well as his sister.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective February 12, 2023.

DECISION: Order No. 23-UI-227714 is affirmed.

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

DATE of Service: August 15, 2023

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.

¹ At hearing, claimant testified that the employer was a school district of a town of 2,267 people. Transcript at 36.

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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

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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