

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0899

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 23, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # 105628). The employer filed a timely request for hearing. On July 28, 2023, ALJ Adamson conducted a hearing, and on August 3, 2023 issued Order No. 23-UI-232335, reversing decision # 105628 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective April 30, 2023. On August 11, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Oregon City School District employed claimant as an instructional assistant from September 2022 until May 4, 2023. As part of his job, claimant worked in a structured classroom with students who had cognitive disabilities.

(2) The employer prohibited their instructional assistants from engaging in inappropriate physical conduct with students, which the employer considered to be any kiss initiated by an assistant, whereas a hug, or a kiss initiated by a student were not considered violations. Claimant understood this expectation.

(3) On the afternoon of May 3, 2023, claimant escorted a student to her bus. The student was five-years-old and had Down syndrome. Claimant had been working with the student in the structured classroom setting for months. The student had spoken for the first time in class that day, and as the two reached the steps of the bus, claimant leaned in near to the student, telling her that he was proud of her. Then, "out of the blue," the student kissed claimant on the lips. Transcript at 19.

(4) One of the employer's staff members saw the interaction between claimant and the student. That afternoon, the staff member sent the employer's principal an email advising that they believed claimant had engaged in inappropriate contact with the student. The staff member and the principal scheduled a meeting the next morning to discuss the incident.

(5) On May 4, 2023, the principal met with the staff member. The employer understood the staff member to have stated during the meeting that claimant “was leaning in, and lip-to-lip contact was observed.” Exhibit 1 at 3 Investigation Notes. The principal then met briefly with claimant and placed claimant on probation pending an investigation. The employer then accessed bus video footage the showed the May 3, 2023 incident. The employer believed the video showed claimant initiating the kiss with the student. That afternoon, the employer’s student services director and human resources director met with claimant. Claimant denied kissing the student. The student services director and human resources director offered claimant an opportunity to view the video, which he did. After viewing the video, claimant acknowledged that the kiss had occurred but denied initiating it.

(6) On May 4, 2023, the employer presented claimant with a termination letter discharging him for allegedly violating their prohibition on inappropriate physical contact with students.

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 found that claimant had not initiated the kiss between himself and the student, but that the student had kissed claimant. Order No. 23-UI-232335 at 2. The order then concluded that, although claimant did not initiate the kiss, because he did not report the kiss to the employer when it happened, the employer discharged claimant for misconduct. Order No. 23-UI-232335 at 3-4. However, the record does not show that claimant’s failure to report the kiss was the reason the employer discharged him.

The record shows that the employer’s belief that claimant had initiated the kiss with the student, which it regarded as inappropriate contact, was the reason they discharged him. The employer’s May 4, 2023 termination notice made no mention of claimant’s failure to report the incident and listed the reason for discharging claimant merely as “Inappropriate physical contact with student.” Exhibit 1 at 2. Further, at hearing, when asked why the employer discharged claimant rather than impose a lesser form of discipline, the employer’s witness cited that the employer would be serving the student until she turned 21, the “need to protect her,” and stated “you know, I think there was, um, that inappro- -inappropriate physical contact you – you – you can’t kiss students.” Transcript at 13.

Thus, the employer discharged claimant because they believed that he initiated the kiss, and thereby engaged in inappropriate physical contact with the student. It is therefore the kiss, and the employer’s belief that claimant initiated it, that was the proximate cause of the discharge because it was the incident

without which the discharge would not have occurred when it did. The proximate cause is the focus of the discharge analysis. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). The employer had the burden to establish that the conduct constituting the proximate cause, the alleged inappropriate contact in the form of a kiss initiated by claimant, occurred.

The employer failed to meet their burden to prove that claimant engaged in inappropriate contact by initiating the kiss with the student. Although bus video footage existed of the May 3, 2023 incident, the employer did not offer the video into evidence. The staff member who allegedly witnessed claimant initiate the kiss did not testify. The principal who met with the staff member and allegedly learned from the staff member that claimant initiated the kiss did not testify. The employer offered the testimony of an employee, whose job was unspecified but who presumably worked in the employer's human resources office, who was not present for the kiss or the meeting between the staff member and the principal. This witness testified from investigation notes that the staff member said to the principal that "they saw on the steps of the bus . . . that [claimant] was leaning in and had lip to lip contact with the student." Transcript at 8; *see also* Exhibit 1 at 3 Investigation Notes (stating "The principal met with the reporting staff member – confirmed the location as steps of the bus, confirmed that [claimant] was leaning in, and lip-to-lip contact was observed"). Hearsay is admissible in unemployment hearings. However, the employer witness's testimony of what investigation notes state the staff member said to the principal about the kiss contains multiple layers of hearsay and therefore was entitled to diminished weight.

Claimant's account of what occurred on May 3, 2023 was based on personal knowledge. Claimant testified that the student had been mute that school year but had a breakthrough that day by saying "yes" and "no" during class. Transcript at 19. Claimant escorted the student to the bus, may have patted her on the shoulder, and then leaned in near to her telling her how proud he was of her. Transcript at 19. The student then suddenly "pecked" claimant on the lips, "out of the blue." Transcript at 19. As between this firsthand testimony and the employer's hearsay evidence, claimant's evidence is weightier and more reliable.

The employer's witness also testified to her observations of what the bus video footage showed. The witness stated the footage showed the student leaning in to hug claimant and claimant hugging the student, then the student said "I love you" and claimant said "I love you" back and then claimant "leaned in and they kissed on the mouth with lip contact." Transcript at 9. Claimant also viewed the video and testified to his observations of what it showed, stating that it showed him leaning in and talking to the student and the student lean in and give claimant the kiss. Transcript at 21. Claimant further stated that the video did not depict him or the student saying, "I love you," testifying that the student had "never put three words together the whole year." Transcript at 19. The employer's investigation notes, admitted as Exhibit 1, contains another account of what the video shows. It states that the video "includes multiple views that show clear contact between [claimant] and the student's lips." Exhibit 1 at 3 Investigation Notes. This sheds no light on whether claimant initiated the kiss. The notes further state, "After watching multiple times, from the view of the back of [claimant's] head, his head and the student's head appeared to be very close together. The student's hand is on the back of his neck." Exhibit 1 at 3 Investigation Notes. This, too, imparts no information as to who initiated the kiss.

Thus, viewing the record evidence as a whole, the employer did not establish that claimant initiated the kiss with the student. It bears noting that on May 4, 2023, claimant initially denied to the student services director and the human resources director that any kiss occurred, only acknowledging it had occurred after viewing the video footage. Claimant's initial failure to be forthright about the existence of the kiss is a factor that could undermine the reliability of his account. At hearing, claimant offered the explanation that he denied that the kiss occurred initially because he was being accused of initiating the kiss and was "still in denial at . . . that point." Transcript at 25. Although claimant's explanation is not entirely sensible, on this record, where the employer offered only hearsay evidence and their witness's characterization of what the video showed, all of which was rebutted by claimant's evidence, the employer did not meet their burden to prove that claimant violated their prohibition against inappropriate contact with students.

Accordingly, claimant was discharged, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-232335 is set aside, as outlined above.

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

DATE of Service: September 25, 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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