

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0215

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and therefore was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 62242). The employer filed a timely request for hearing. On February 9, 2024, ALJ Strauch conducted a hearing, and on February 20, 2024, issued Order No. 24-UI-248400, reversing decision # 62242 by concluding that claimant was discharged for misconduct, and therefore was disqualified from receiving benefits effective September 24, 2023. On February 27, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Both claimant and the employer filed written arguments. EAB considered the employer's argument when reaching this decision. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) The Coos Bay-North Bend Water Board employed claimant as their finance director from 2009 until September 29, 2023. The employer operated as a municipally owned water utility. As finance director, claimant managed the employer's finance division, which was responsible for budgeting, auditing, expenses, revenue projections, and similar matters. Additionally, because the employer did not have a human resources department, the finance division handled some personnel matters, such as employee benefits and payroll.

(2) The employer's personnel manual contained a policy which, in relevant part, required "All employees... regardless of whether contacts are direct or indirect, are expected to be courteous, efficient, helpful in all their work assignments." Transcript at 15. The policy also stated, "Service at the Water Board is a highly collaborative effort. All employees are expected to treat one another with respect and courtesy. Teamwork is essential as employees will find that their and the Water Board's

performance and success... are dependent upon each other and the positive relationships they maintain.” Transcript at 13–14. Claimant was aware of and generally understood this policy. Additionally, as claimant managed a team that handled confidential personnel matters, the employer expected claimant to maintain the confidentiality of their employees’ sensitive personal information.

(3) In August 2018, claimant received “ethics training,” and thereafter signed an agreement which stated that he would refrain from “making malicious, false, and harmful statements about others (including gossip)” and “publicly disclosing another’s private information.” Exhibit 1 at 5.

(4) On November 1, 2021, claimant “became frustrated with his staff” and behaved in a manner which the employer felt was “unprofessional.” Transcript at 17. On November 4, 2021, the employer “coached” claimant about the incident and advised him “to either practice listening or flatly remove himself from the situation until cooler heads can prevail” in situations “where his emotions might evolve into disrespect[.]” Transcript at 18–19.

(5) In June 2022, the employer issued claimant a “written reprimand” due to claimant’s conduct during interactions with a vendor. Transcript at 17.

(6) Following the June 2022 warning, claimant made efforts to improve how he interacted with others in the workplace. These efforts included regular meetings with the employer’s general manager, and taking trainings on topics such as dealing with difficult people, communicating better, and how to document disciplinary issues.

(7) On August 30, 2023, claimant took a phone call with a vendor who provided trainings for claimant and his staff. During the call, the vendor informed claimant that one of claimant’s staff members had improperly registered for a training course in a way that cost the employer more money than it should have spent on the course, and which would require claimant to take several steps to correct the mistake. Claimant responded by stating to the vendor, regarding the staff member in question:

And then we’ve got a little bit of training, and I told ‘em before you do your class, please, you know, call me, and of course [the staffer] thinks he’s a guru of – and he’s not. I mean he barely knows how to use his cell phone to – as a phone, not even to text with. And so now he’s made us a mess, and we gotta clean it up, and the reason I’m saying this out loud is so everybody can hear it in my group, and we can get it fixed. So – ‘cause now – now we have to go to three different departments in [the vendor’s company], and I’m explaining to my group ‘cause they’re kinda frowning at me because of what I’m saying, but we have to go to three different companies, or places in [the vendor’s company] to get this mess cleaned up, and guess who gets to deal with it. So I get a little grumpy because I was told to tell them to work through me, and then they choose not to.

Exhibit 3 at 4:40 to 5:29. During this call, claimant specifically spoke to the vendor while his office door was open, so that claimant’s staff “could see how easy it was to get the refund” on the training course. Transcript at 34.

(8) On August 31, 2023, claimant was sitting in his office when his payroll clerk approached him and told him that the employer’s recently-hired customer service manager (CSM) needed help in

understanding an aspect of employee benefit eligibility relating to insurance coverage for an ex-spouse of a former employee. The three discussed the matter in claimant's office. During the discussion, the CSM expressed relief at having passed her three-month review, as she had been nervous about it. Claimant attempted to assuage the CSM's anxiety by jokingly suggesting that "you have to do really bad stuff, like shoot somebody, to be terminated" by the employer. Transcript at 38. Claimant then asked his payroll clerk who was the last person who had been discharged, and the clerk provided claimant with the name. Claimant told the payroll clerk that they should not discuss the former employee further. Next, claimant addressed the CSM about the insurance coverage question she had been trying to address, and used the circumstances of a former employee to explain the issue. Claimant did not name the employee, their position, or the employee's former spouse during the discussion.

(9) Later on August 31, 2023, the general manager was informed of claimant's conversation with the CSM and the payroll clerk. The general manager was told that claimant disclosed confidential information about a former employee, with an employee (the CSM) "who should not have been privileged to the information," and that "the conversation took place in an open floor setting where other employees could hear." Exhibit 1 at 4. The general manager investigated the matter and, in the course of the investigation, learned of claimant's August 30, 2023, phone call with the vendor. The general manager felt that claimant's statements during the phone call were "unwarranted and very unprofessional." Exhibit 1 at 5.

(10) On September 29, 2023, following additional investigation and internal discussion regarding claimant's employment status, the employer discharged claimant. The employer discharged claimant because they felt that, during the incidents on August 30 and 31, 2023, claimant had violated the employer's policies and expectations regarding interactions with others and handling of confidential information.

CONCLUSIONS AND REASONS: Claimant was discharged, 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).

Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant due to his behavior during two separate incidents in late August 2023, which they believed violated their expectations regarding interactions with others and disclosure

of confidential employee information. The order under review concluded that the second of these incidents—the alleged discussion about a former employee on August 31, 2023—was the final incident which led the employer to discharge claimant. Order No. 24-UI-248400 at 4. The order under review further concluded that claimant’s actions during that incident constituted misconduct because while claimant did not actually identify the former employee in the case example he provided to the CSM, he had directed his payroll clerk to identify the most-recently discharged employee, and thereafter “immediately continued discussing benefit eligibility in a scenario similar to that of the just-named, fired employee.” Order No. 24-UI-248400 at 4. The order under review also concluded that this incident was not an isolated instance of poor judgment because claimant’s conduct during the phone call on August 30, 2023, was also a willful or wantonly negligent violation of the employer’s standards of behavior. Order No. 24-UI-248400 at 4. The record does not support these conclusions.

As a preliminary matter, the misconduct analysis under OAR 471-030-0038(a) typically focuses on the last incident that occurred prior to discharge.¹ Here, however, the employer learned about both of the August 2023 incidents after the fact and, after a monthlong investigatory and pre-discharge process, discharged claimant due to his behavior during both incidents. Therefore, both are addressed as the final incidents which led to claimant’s discharge. The record shows that neither of these incidents constituted misconduct.

Regarding the August 30, 2023, phone call, it is clear from the record that claimant’s statements regarding the staff member were intended to be somewhat insulting, which arguably violated the employer’s policy requiring employees to “treat one another with respect and courtesy.” However, claimant’s choice of phrasing (for instance, stating that the staff member “barely knows how to use his cell phone”) suggests that claimant was engaging in what he believed to be lighthearted hyperbole to poke fun at the staff member, rather than engaging in malicious behavior. Further, claimant’s explanation during that call that he was “saying this out loud so everyone can hear it in [his] group” shows that his purpose during the call was to demonstrate to his staff how to manage or correct their enrollments in the vendor’s training programs.

Claimant’s decision to communicate this information to his staff in this manner may well have been poorly calculated, but the employer has not met their burden to show that it constituted a willful or wantonly negligent disregard of the employer’s standards of behavior. While claimant was aware of the employer’s policy that required treating others with courtesy and respect, the wording of that policy is not so specific that claimant either knew or reasonably should have known that making those statements during the phone call would violate it. Additionally, after the written warning he received in June 2022, claimant took several steps, such as enrolling in trainings, to improve how he interacted with others in the workplace. This shows that claimant took the employer’s policy seriously and attempted to adhere to it, which suggests that his conduct during the call was more likely attributable to a lack of skill in how he addressed staff errors, rather than a conscious disregard of how the employer expected him to handle such matters. Finally, claimant’s apparent purpose in making those statements was, broadly, to save the employer money and improve staff productivity. Thus, even if claimant violated the employer’s policy

¹ 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).

by making those statements during the phone call, his decision to do so was, at worst, a good faith error, which is not misconduct.

Regarding the August 31, 2023, incident, the employer has also failed to meet their burden to show that claimant's conduct constituted a willful or wantonly negligent disregard of their standards of behavior. Although it is clear that the employer expected claimant to maintain the confidentiality of sensitive personal information relating to current or former employees, the record lacks a detailed explanation of what information, precisely, constitutes confidential or sensitive information, how that information might be used or accessed, and by whom. The employer did not submit a copy of their policy regarding confidential or sensitive information, nor was it read in the record. In fact, even in the employer's detailed letter explaining to claimant the reason that he was discharged, the employer noted only that claimant's actions violated the employer's policy of expecting employees to be "courteous, efficient, and helpful in all of their work assignments."² Additionally, while the record shows that claimant signed an agreement in 2018 not to "publicly disclos[e] another's private information,"³ the record does not otherwise show how the employer defined "publicly" or "another's private information."

In short, a bare assertion that claimant violated the employer's confidential-information policy, without evidence as to what the policy required or forbid, is insufficient to support a conclusion that claimant's behavior actually violated that policy. Similarly, without either a detailed explanation of the policy itself, or claimant's own admission that he knowingly disregarded the policy during the meeting on August 31, 2023, the record does not show that claimant either knew or had reason to know that his conduct *would* violate the policy. Claimant made no such admission at hearing.

Finally, while claimant gave a detailed explanation of the insurance-coverage circumstances that he was trying to explain to the CSM,⁴ he also explicitly testified that he never used the name of the former employee in question, or their position, or the name of the former employee's former spouse, during the explanation to the CSM. Transcript at 42. It is possible that a party to that conversation may have been able to deduce whom claimant was referring to. Here too, however, the record lacks evidence to show that this anonymized discussion of a former employee's former spouse's post-employment insurance coverage violated the employer's policy regarding the disclosure of confidential information merely because it may have been possible to infer one or more of the parties being discussed. Therefore, the employer has failed to meet their burden to show that claimant willfully, or with wanton negligence, disregarded the employer's standards of behavior during the meeting on August 31, 2023.

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

DECISION: Order No. 24-UI-248400 is set aside, as outlined above.

² See Exhibit 1 at 9.

³ The employer asserted this in a September 11, 2023 pre-disciplinary letter. See Exhibit 1 at 4. The agreement was not discussed at hearing.

⁴ See Transcript at 39–40.

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

DATE of Service: April 8, 2024

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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف 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 دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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