EO: 200
BYE: 202450

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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0282

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2024, 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 # 74417). The employer filed a timely request for hearing. On March 12, 2024, ALJ Contreras conducted a hearing, and on March 15, 2024, issued Order No. 24-UI-250154, affirming[1] decision # 74417 by concluding that claimant voluntarily quit work with good cause and therefore was not disqualified from receiving benefits based on the work separation. On March 19, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Coos County School District # 9 employed claimant, most recently as an attendance advocate and wrestling coach, from January 13, 2019, until December 17, 2023. Claimant worked at a junior high school within the employer's district.

(2) The employer maintained a policy regarding the prevention of child abuse and sexual harassment. This policy did "not advise" that employees touch students, "unless to keep a student safe in their line of work." Transcript at 10–11. The employer provided their employees with trainings on this policy. Claimant most recently attended a training on this policy on or around September 5, 2023, prior to the beginning of the 2023-2024 academic year. However, claimant understood the policy only to forbid employees from "physically harm[ing] a student." Transcript at 17.

(3) As an attendance advocate, claimant was often posted in the hallways of the school between class periods. Occasionally, a student would "kinda reach up and pinch" claimant as they passed by him. Transcript at 16. Claimant understood this to be "playful," and would sometimes respond by pinching the student back "in a joking manner." Transcript at 16. Claimant never pinched a student with the intent

[1] Although Order No. 24-UI-250154 stated that it modified decision # 74417, it affirmed that decision because the outcome concluding that claimant's work separation did not disqualify him from receiving benefits remained the same. Order No. 24-UI-250154 at 5.

of hurting them. Claimant engaged in this type of exchange on "a couple different days" of the 2023-2024 academic year, with about three different students. Transcript at 17. Claimant also saw others behave in similar conduct "all the time at the school." Transcript at 17.

(4) On September 15, 2023, claimant was stationed in the school's yard during lunchtime when he noticed a student, D, using a cell phone and ear buds, which the school did not allow students to do. Claimant had previously felt that he and D had a good rapport, and D was one of the students with whom he had previously engaged in "joking" pinching in the hallways. After warning D several times to put the phone and earbuds away, claimant ultimately confiscated D's electronics, which angered D. As a result, D used foul language towards claimant, and pushed and punched claimant in the back. Claimant walked away from D, and handed D's electronics to the school's principal, who was nearby.

(5) Later on September 15, 2023, D reported to his stepmother that claimant had given him "purple nurples" (hard pinching and twisting of the nipples) on September 11, 2023, and also reported that claimant had at one point "knifed" D (swiping him across the nose with the knuckle of one's thumb). Exhibit 1 at 4. D was also examined by medical staff, who observed small bruises of various sizes on his chest, and "a small reddish mark and swelling" near the bridge of his nose. Exhibit 1 at 5. Based in part on these observations, D's case was referred to the Office of Training, Investigations and Safety (OTIS) for investigation into potential abuse of D by claimant.

(6) On September 18, 2023, the employer suspended claimant with pay, pending the outcome of the OTIS investigation. On October 19, 2023, while the OTIS investigation was still pending, the employer allowed claimant to return to work under a last-chance agreement (LCA). The LCA imposed several requirements on claimant, including a demotion, mandatory re-training, and regular check-ins with his supervisors. Additionally, the LCA stipulated that it would be nullified, and that the employer would "reconsider the disciplinary outcome," if the OTIS investigator determined that claimant constituted a "threat of harm" to students in the employer's district. Exhibit 2 at 1.

(7) Claimant continued working for the employer through Friday, December 15, 2023, and complied with the terms of the LCA during that time. On or around that day, the employer received the final investigation report from OTIS, which concluded that there was "reasonable cause to believe physical abuse by [claimant] to D," and that the allegations against claimant were "founded." Exhibit 1 at 8. As a result of the report's conclusion, the employer determined that claimant posed a "threat of harm" to students and nullified the LCA. Thereafter, the employer provided claimant with a "dismissal notice with a request to show for a due process hearing" to be held on Monday, December 18, 2023. Transcript at 12. Claimant was notified at that time that the superintendent "was going to be acting on a dismissal." Transcript at 12.

(8) After notifying claimant about the pending dismissal, the employer's human resources director advised claimant to resign instead of being discharged. On December 17, 2023, acting on the human resources director's advice, claimant voluntarily quit work in order to avoid being discharged.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS

657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (September 22, 2020). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time.

Per OAR 471-030-0038(5)(b)(F), leaving work without good cause includes resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct.

Claimant voluntarily quit work on December 17, 2023, to avoid being discharged. The record indicates that the employer would very likely have discharged claimant the following day if he had not quit, given that the employer had issued claimant a "dismissal notice," and that they told claimant that the superintendent "was going to be acting on a dismissal." The record does not directly show that being discharged would have significantly negatively impacted claimant's future employment prospects in the education field if he had been discharged. However, it can reasonably be inferred that it would have had such an effect, given that the employer's human resources director personally advised claimant to resign.

The Court of Appeals has held that such circumstances constitute good cause for quitting when the potential discharge would not have been for misconduct. *See McDowell v. Employment Dep't*., 348 Or 605, 236 P3d 722 (2010) (claimant had good cause to quit work to avoid being discharged, not for misconduct, when the discharge was imminent, inevitable, and would be the "kiss of death" to claimant's future job prospects); *Dubrow v. Employment Dep't.*, 242 Or App 1, 252 P3d 857 (2011) (a future discharge does not need to be certain for a quit to avoid it to qualify as good cause; likelihood is not dispositive of the issue but it does bear on the gravity of the situation). Therefore, if claimant's pending discharge on December 18, 2023, would not have been for misconduct, he would have had good cause to quit to avoid that discharge. As discussed below, claimant's pending discharge would not have been for misconduct.

It should be noted that although claimant's interaction with D on September 15, 2023, spurred the investigation and abuse allegations that ultimately led the employer to decide to discharge claimant, the OTIS report actually shows that claimant's alleged physical contact with D likely occurred on one or more dates prior to September 15, 2023. For instance, D's stepmother told the investigator that claimant had given D a "purple nurple" on September 11, 2023. *See* Exhibit 1 at 4. Therefore, all of the allegations of physical contact are considered to be the reason that the employer intended to discharge claimant.

It should be further noted that the parties offered conflicting evidence regarding the extent of claimant's physical contact with D. While the employer asserted that the allegations of claimant's having harmed D (by pinching or "knifing" him) were founded, claimant testified that he never pinched any student with the intention of hurting them, nor did he ever "knife" a student. Transcript at 6, 16–17. However, it is not necessary to resolve this conflict because the employer did not meet their burden to show that claimant knew or had reason to know that his behavior would likely have violated the employer's expectations.

At hearing, the ALJ asked the employer's witness what their policy was "with regard… to touching students generally," to which the employer's witness responded, "We… do not advise that, unless to keep a student safe in their line of work, that we don't touch students in that manner." Transcript at 10–11. The employer did not read any portion of the policy itself into the record, nor did they submit a copy of the policy into evidence. It is reasonable to infer from this statement that the employer expected their staff to refrain from touching students *in any manner*, except as necessary in matters of safety. However, the employer's use of the phrase "touch… in that manner" leaves room for interpretation as to what was actually allowed, or what was communicated to staff in trainings.

Claimant's testimony at hearing suggests that he had a significantly different understanding of the policy. Claimant explained that his understanding of the employer's policy "on touching a student" was, "I know you can't physically harm a student. The whole playful thing, like no I never heard that before." Transcript at 17. Claimant further explained that he had "never seen anything like [what the employer's witness described] in the trainings." Transcript at 18. Given the lack of specificity in the employer's testimony, the employer has not met their burden to show that claimant either knew or had reason to know that his occasional "joking" pinching of students would violate the employer's expectations.

Furthermore, to the extent that claimant's conduct violated the employer's expectations, the employer has failed to meet their burden to show that claimant's conduct was not the result of a good faith error, which is not misconduct.[2] The record shows that claimant understood his conduct to be lighthearted in nature, not intended to cause harm, and seemingly part of his efforts to build rapport with students. Additionally, claimant testified that he saw similar things happen at the school "all the time," suggesting that he witnessed other staff or faculty engage in similar behavior with students. Given this testimony, the record suggests that, more likely than not, claimant mistakenly and in good faith engaged with D in a manner that he believed to be harmless and in compliance with the employer's policies. Because the record therefore shows that claimant more likely than not violated the employer's expectations due to a good faith error, claimant's discharge, had he not quit, would not have been for misconduct.

Because the employer did not meet their burden to show that claimant would have been discharged for misconduct if he had not quit, and, further, because claimant was advised by the employer's human resources director to quit to avoid being discharged, claimant voluntarily quit work for a reason of such gravity that he had no reasonable alternative but to quit. Therefore, claimant voluntarily quit work with good cause, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 24-UI-250154 is affirmed.

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

DATE of Service: <u>April 26, 2024</u>

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

[2] *See* OAR 471-030-0038(3)(b).

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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