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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0485

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 29, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective January 14, 2024 (decision # L0003386949). Claimant filed a timely request for hearing. On May 21, 2024, ALJ Mellor conducted a hearing, and on May 30, 2024, issued Order No. 24-UI-255376, reversing decision # L0003386949 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On June 4, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Clackamas County employed claimant as a flagger in their roads department from the summer of 2023 until January 11, 2024.

(2) The employer expected claimant to treat coworkers and other employees in a courteous and professional manner, and not to subject them to abuse. Claimant understood this expectation.

(3) On October 18, 2023, the employer assigned claimant to mentor a new flagger. While the new flagger was working, claimant noticed the flagger was not a safe distance from the traffic lane. Claimant saw a vehicle coming, told the flagger to move back, and grabbed the flagger's vest and physically pulled him back about five feet. Claimant's supervisor learned that claimant had physically pulled the flagger. The supervisor met with claimant and advised him that he was to observe and offer support while mentoring the flagger but was not allowed to physically touch the flagger.

(4) In November or early December 2023, claimant was with a coworker traveling to a job location. While the coworker drove, claimant used his personal cell phone to navigate to the job location. As claimant did so, he received a random text message that contained an explicit photo of a woman wearing only underwear. Claimant opened the text message, and laughed about it. The coworker asked claimant what it was. Claimant responded that "some random person just sent me a . . . photo" and showed the photo to the coworker. Transcript at 26.

(5) On December 5, 2023, claimant attended an employee training class, and, during a break, went with a coworker to a designated area to smoke a cigarette. The coworker was the same individual claimant had shown the explicit photo to. Another employee was present in the smoking area when the two arrived. Claimant noticed that the employee was wearing a lanyard that listed her preferred pronouns as "she" and "her." Transcript at 23.

(6) Claimant was curious whether the employer made lanyards listing preferred pronouns available to all employees because he worked with a transgender individual whom he noticed wrote their preferred pronouns on their work vest, and whom he thought might benefit from a lanyard listing preferred pronouns. Claimant asked the employee if the lanyard listing her preferred pronouns was issued by the employer. When claimant asked this question, claimant's coworker walked away from the conversation. The employee with the lanyard answered that the employer issued the lanyards to anyone who wanted one. The employee then finished her cigarette and left the smoking area.

(7) The employee with the lanyard informed the employer about the conversation claimant initiated regarding the lanyard. The employer began an investigation. In an interview with the employer, the employee stated that claimant had asked her whether she was required to wear the lanyard and said, "people make such a big deal out of things." Transcript at 7. The employee also stated that claimant then said, "We wouldn't need to be confused about pronouns unless it was more like for someone who had a freak show in the circus" and "I can guarantee you nobody ever gets my pronouns wrong." Transcript at 7. The employee stated that claimant then laughed and asked if people called the employee by the wrong pronouns. The employee stated she told claimant she needed to get back to work and left the smoking area.

(8) On December 14, 2023, the employer interviewed claimant. In the interview, claimant stated that he merely asked the employee if the lanyard listing one's preferred pronouns was standard issue. Claimant denied making any comment relating to a "freak show in the circus," stating that no one ever gets his pronouns wrong, or asking the employee if people ever get her pronouns wrong. Transcript at 9.

(9) On December 19, 2023, the employer interviewed claimant's coworker who had accompanied him to the smoking area. The coworker stated that he recalled claimant asking about the lanyard and thought claimant "kind of referred to [the lanyard] in a way" that was "dumb or stupid." Transcript at 10. However, the coworker stated that he could not recall anything else about the conversation because he had walked away.

(10) At the end of the interview with the coworker, the employer asked the coworker if he wanted to share anything else. The coworker advised that while they were working together, claimant had shown him a semi-nude photo of a woman, which had made the coworker uncomfortable.

(11) On January 4, 2024, the employer issued a notice of proposed discharge to claimant. On January 8, 2024, the employer met with claimant to discuss the notice of proposed discharge. The employer explained that because of the December 5, 2023, incident, the fact that claimant had shown the explicit photo to the coworker, and the prior incident from October 18, 2023, the employer had decided to "basically mov[e] forward with . . . separation . . . of [claimant's] employment." Transcript at 12-13. On January 11, 2024, the employer discharged claimant.

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).

In a discharge case, the focus of the analysis is on the proximate cause, that is, the incident or incidents without which the discharge would not have occurred when it did. *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 record shows that the proximate cause of the employer's decision to discharge claimant was the December 5, 2023, incident involving the conversation about the lanyard and the fact that claimant had shown the explicit photo to the coworker. This is so because these two points were either the subject of the employer's investigation, as was the case with the December 5, 2023, incident, or had come to light as a result of the investigation, as was the case with claimant's showing the explicit photo to the coworker. These two incidents, as well as the October 18, 2023, incident when claimant pulled the flagger, were listed in the notice of proposed discharge issued to claimant. Transcript at 11-13, 16-17. However, the October 18, 2023, incident when claimant pulled the flagger was not the proximate cause of the discharge because it occurred months before the discharge, was noted at the time, and resulted in claimant receiving no discipline but merely an advisement of what the employer's expectations were regarding claimant's mentoring of the flagger. Because the October 18, 2023, incident was not the proximate cause of the discharge, whether it constituted a willful or wantonly negligent violation of the employer's expectations need not be addressed.

As to the December 5, 2023, incident involving the conversation about the lanyard, the employer failed to meet their burden to prove that claimant violated the employer's expectations willfully or with wanton negligence. The employer had a reasonable right to expect claimant to treat employees professionally and to not subject them to abuse. Claimant understood these expectations. However, the

weight of the evidence favors claimant's account of what occurred during the December 5, 2023, lanyard conversation, and claimant's account of what occurred does not amount to a violation of the employer's expectations.

The employer offered hearsay evidence, generated during their investigation, of the employee's account of what claimant stated on December 5, 2023. Among other things, this account indicated that claimant had made a reference to "a freak show in the circus" and had laughingly asked the employee if people called her by the wrong pronouns. Transcript at 7. The employer also offered a hearsay account of claimant's coworker, who was described as reporting that he thought claimant referred to the lanyard "in a way" that was "dumb or stupid" but who otherwise knew nothing about the interaction because he had walked away. Transcript at 10. Claimant testified from personal knowledge at hearing that he had asked the employee if the lanyard listing her preferred pronouns was issued by the employer, which he was curious about because he believed such a lanyard would be beneficial to one of his coworkers. Transcript at 23-24. Claimant's testimony at hearing was consistent with the account he reported to the employer during their investigation. Transcript at 9-10. Given that first-hand testimony from personal knowledge is entitled to more weight than hearsay, that claimant's testimony was consistent with the account he gave to the employer during their investigation, and that the employer has the burden of proof in a discharge case, the weight of the evidence favors claimant's account of what occurred during December 5, 2023, incident, and the facts of this decision have been found accordingly. Because claimant merely asked the employee if the lanyard listing her preferred pronouns was issued by the employer, claimant did not violate the employer's expectations.

As to claimant's conduct in showing the explicit photo to the coworker, the employer failed to demonstrate that, by showing the photo, claimant breached their expectation that he treat the coworker in a courteous and professional manner, and not to subject him to abuse. Claimant received the explicit photo on his cell phone unexpectedly, while using the phone to help navigate the vehicle the coworker was driving. The photo itself, though explicit, depicted a person who was wearing underwear and was not nude. Furthermore, claimant showed the photo to the coworker only after the coworker asked what it was. Given these facts, particularly that claimant showed the photo to the coworker only after he had asked what it was, the record fails to show a willful violation because it is not evident that claimant intended to subject the coworker to abuse, harassment, or otherwise unprofessional treatment by showing the photo. Nor did claimant act with wanton negligence because the record fails to show that, by showing a photo the coworker had asked about, claimant knew or should have known that a violation of the employer's prohibition against abuse or unprofessional treatment would probably result. Though claimant could simply have kept the photo to himself, and failed to act with circumspection when he showed it to the coworker, this imprudent behavior was, at most, an instance of ordinary negligence. A violation of an employer's expectation resulting from ordinary negligence does not constitute misconduct under OAR 471-030-0038(3)(a).

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

DECISION: Order No. 24-UI-255376 is affirmed.

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

DATE of Service: July 11, 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.

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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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