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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0640

Reversed
Disqualification

PROCEDURAL HISTORY: On July 19, 2024, 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 # L0005236621). The employer filed a timely request for hearing. On September 3, 2024, ALJ Fraser conducted a hearing, and on September 5, 2024, issued Order No. 24-UI-264890, affirming decision # L0005236621. On September 10, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ashland Public School District No. 5 employed claimant as a school bus driver from May 16, 2022, to June 4, 2024.

(2) In accordance with the employer's "safe schools" policy, students in the employer's district are told that they should "report if there's a problem or concern." Transcript at 9. The employer also required their employees to take trainings directing them, among other things, not to tell students to withhold important information from the students' parents. Claimant took these trainings, signed an acknowledgment that she had received a copy of the handbook that included the related policies, and was aware of those policies.

(3) Claimant maintained a personal tradition of ordering pizza at the end of the academic year for the students who rode her bus. Claimant observed this tradition "every year since [she has] been a bus driver." Transcript at 23. At the beginning of the 2023-2024 academic year, claimant promised the students on her bus that she would buy them pizza at the end of the year.

(4) At some point in 2024, the employer's director of transportation, to whom claimant reported, told claimant not to give pizza or other food to the students on her bus, for worry of triggering food allergies or causing choking while the bus was in motion. Claimant understood the director's instructions.

(5) On May 28, 2024, claimant was driving her bus when one of her students asked claimant if the employer's bus drivers were allowed to let anyone other than assigned students on their buses, and claimant explained to the student that the drivers were not allowed to do so. The student then told claimant that the driver of another school bus had let someone other than an assigned student onto that driver's bus. Claimant responded by telling the student not to tell anyone "that could tell on" the other bus driver, because the other driver could be discharged for doing so, and was "a really good person and you wouldn't want that." Transcript at 9.

(6) Also on May 28, 2024, claimant ordered and served pizza to the students on her bus, as she had promised at the beginning of the academic year that she would do. Claimant understood that this violated the transportation director's instructions not to serve the students food on the bus, but felt that she should do so anyway because she had promised them pizza at the beginning of the year. When claimant served the students the pizza, she told them that she "had a way of getting rid of the pizza boxes so that [the transportation director] wouldn't know," and further advised the students, "…make sure you go home and eat dinner tonight or I might get in trouble." Transcript at 13.

(7) Also on May 28, 2024, claimant related to one of the students a story about claimant going to a bar and drinking alcohol with college football players. Claimant also announced to the students that one of the buildings they were passing in the bus, and at which some of those students lived, was designated as low-income housing, effectively broadcasting to the entire group of students that some of them were from low-income families.

(8) The director of transportation received an email from a parent who was concerned about "an incident on her student's morning bus" that claimant had driven. Transcript at 10. The director reviewed the May 28, 2024, audio and video footage from claimant's bus, learned of the various incidents that had occurred on claimant's bus that day, and investigated the matters. During the course of the investigation, the director of transportation came to believe that the employer's superintendent intended to discharge claimant because her conduct during the May 28, 2024, incidents violated the employer's policies.

(9) On June 4, 2024, claimant met with her union representative shortly before the two were scheduled to meet with the director of transportation and the superintendent. The union representative told claimant that the employer was "moving for termination," which claimant understood to mean that she was about to be discharged. Transcript at 18. Once the meeting started, claimant asked the employer if she could resign in lieu of being discharged. The employer allowed claimant to resign, which she did. Claimant resigned in lieu of being discharged because she was concerned that being discharged would negatively affect her prospect of working as a bus driver for another school district.

CONCLUSIONS AND REASONS: Claimant quit work without good cause.

Nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (September 22, 2020). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(2)(a). An individual is separated from work when the employer-employee relationship is severed. OAR 471-030-0038(2)(a)

The order under review concluded that the separation was a discharge, reasoning that because "the employer's witness testified that claimant's employment would not continue after the June 4, 2024, meeting… claimant would not have been allowed to work after the June 4, 2024, meeting even if she did not submit her resignation[.]" Order No. 24-UI-264890 at 3. However, the record shows that claimant resigned in lieu of being discharged. While the record suggests that the employer may have ultimately discharged claimant if she did not resign during the June 4, 2024, meeting, the record does not show that intended to discharge her during the meeting. And even if the employer did intend to discharge claimant during the meeting, claimant resigned before the employer discharged her. As such, it was claimant, and not the employer, who moved to sever the employment relationship, and the work separation therefore was a voluntary leaving, and not a discharge.

Voluntary quit. 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. Under 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 quit work to avoid being discharged. Under OAR 471-030-0038(5)(b)(F) quitting work to avoid being discharged is without good cause if the discharge would have been for misconduct. Thus, to determine whether OAR 471-030-0038(5)(b)(F) applies, it is necessary to determine whether claimant's discharge would have been for misconduct. As discussed below, the record shows that claimant quit to avoid being discharged for misconduct, and therefore without good cause.

Potential discharge. 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). "'[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 are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer intended to discharge claimant due to her conduct during four separate incidents while she drove her school bus on May 28, 2024: serving her students pizza on the bus while essentially swearing them to secrecy; advising a student not to report another bus driver who had let someone other than an assigned student onto their bus; pointing out low-income housing and disclosing that some of the students on the bus lived there; and telling some of the students a story involving claimant's consumption of alcohol at a bar. Of these four, the employer did not meet their burden to prove that the latter two of these four incidents constituted misconduct. To be clear, disclosing to the students that some of their peers were from low-income families and telling students a story about drinking with college football players were probably ill-advised decisions on claimant's part. However, the employer failed to show that claimant knew or should have known those incidents probably violated the employer's policies or expectations. Therefore, to the extent that the employer intended to discharge claimant, in part, for those two incidents, neither constituted misconduct.

However, the record establishes that the first two of the above incidents constituted misconduct. As for the incident in which claimant told the student not to report another bus driver who had let an unauthorized individual on their bus, this directly violated the employer's "safe schools" policy requiring employees not to tell students to withhold important information from the students' parents. Claimant was aware of this policy, and with indifference to the consequences of her actions, consciously engaged in conduct she knew or should have known probably violated the policy. Claimant's having told the student not to report the other bus driver therefore was a wantonly negligent violation of the employer's expectations.

As for the incident in which claimant served the students pizza on the bus, the record shows that claimant was aware that the transportation director had told her not to serve the students food on the bus,

but consciously chose to violate that directive because she had promised the students pizza at the beginning of the academic year. Claimant therefore willfully violated the employer's expectation that she not serve the student's food on the bus.

In sum, claimant engaged in two separate and unrelated incidents of poor judgment on May 28, 2024, that constituted willful or wantonly negligent violations of the employer's expectations. As such, claimant's acts were not isolated, and cannot be excused as isolated instances of poor judgment. Therefore, had the employer discharged claimant, they would have done so for misconduct. Because claimant quit to avoid being discharged for misconduct, she quit without good cause, and is disqualified from receiving benefits effective June 2, 2024.

DECISION: Order No. 24-UI-264890 is set aside, as outlined above.

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

DATE of Service: October 1, 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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