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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0651

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 16, 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 August 4, 2024 (decision # L0005865292). Claimant filed a timely request for hearing. On September 3, 2024, and continued to September 6, 2024, ALJ Rackstraw conducted a hearing, and on September 11, 2024, issued Order No. 24-UI-265678, reversing decision # L0005865292 by concluding that the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving benefits based on the work separation. On September 13, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: On October 3, 2024, the employer submitted a written argument. The employer's written argument contained an argument portion and a portion requesting EAB consider as additional evidence a two-page document attached to the argument. On October 8, 2024, claimant submitted an objection to EAB considering the employer's additional evidence. EAB considered the argument portion of the employer's October 3, 2024, written argument in reaching this decision. The employer's request for EAB to consider the additional evidence attached to the written argument is denied.

Under OAR 471-041-0090(1)(b) (May 13, 2019), "Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that: (A) The additional evidence is relevant and material to EAB's determination, and (B) Factors or circumstances beyond the party's reasonable control prevented the party from offering the additional evidence into the hearing record."
In the argument, the employer asserted that the document in question can help establish that claimant had discussed the associate director's treatment of the client with the coworker and to rule out the

possibility that the coworker had not discussed the matter with claimant, but knew about the treatment of the client because he overheard claimant making a report to the designated abuse hotline. Employer's Written Argument at 2. The employer failed to show under OAR 471-041-0090(1)(b)(B) that factors or circumstances beyond their reasonable control prevented them from offering this additional evidence into the record at hearing.

At hearing, the burden was on the employer to establish misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). It was reasonably foreseeable that the assistant program manager's hearsay statement that the coworker told her that claimant "had said that management took away [the] client's birthday and that [the associate director] was in . . . the client's face" would be a key factual issue at hearing, and that it would behoove the employer to offer any pertinent documentary evidence that might bolster their position as to that issue. September 6, 2024, Transcript at 27.

The employer had ample opportunity to offer documents into evidence at the hearing in this case. When it was discovered, after the September 3, 2024, session of the hearing began, that the Office of Administrative Hearings (OAH) had not received the documents the employer wished to offer into evidence, the ALJ continued the matter to September 6, 2024, to enable the employer to submit the documents and effectuate service on claimant. *See* September 3, 2024, Transcript at 12-18. When the hearing resumed on September 6, 2024, the employer offered 28 pages of documents. Audio Record at 1:40 to 2:33. All the documents the employer offered were admitted into evidence. Audio Record at 3:54 to 4:08. As the employer did not assert or show in the written argument that the document was not available to them on September 6, 2024, there is no reason to believe that anything prevented the employer from including the document attached to their written argument with one of these submissions made to OAH. Furthermore, on September 6, 2024, the ALJ permitted four witnesses to testify on the employer's behalf, in a hearing session that lasted nearly two hours. Nothing prevented the employer from eliciting testimony as to the substance of the document through examination of one of their witnesses.

For these reasons, the employer failed to establish that circumstances beyond their reasonable control prevented them from offering the document attached to their written argument into evidence at hearing, and the employer's request for EAB to consider additional evidence is therefore denied.

FINDINGS OF FACT: (1) Supported Independence Services of Oregon, LLC, employed claimant as a caregiver for adults with developmental disabilities from July 3, 2023, until August 5, 2024.

(2) The employer prohibited their employees from engaging in gossip, harassment, or creating a toxic work environment. The employer's employee manual did not contain any policies on gossip or the creation of a toxic work environment, and the manual's policies against harassment focused on prohibiting unlawful harassment or hostility based on a person's status as a member of a protected class. The manual also prohibited employees from causing "a disruption of any kind during working hours on Company property." Exhibit 3 at 2. The employer did not define what constituted gossip. However, claimant had received disciplinary write-ups on February 6, 2024, April 22, 2024, and July 23, 2024, for, respectively, allegedly speculating about a coworker's involvement in another coworker's separation from the employer, complaining about the employer's associate director, and sharing details

in a client care log that were critical of the conduct of other staff. Exhibit 2 at 5-8. The employer regarded the conduct that was the subject of these disciplinary actions as amounting to gossip.

(3) The employer also expected employees who suspected clients of being subjected to abuse or neglect to make a report by calling the designated abuse hotline or by informing management. However, employees were not to discuss the matter with coworkers. Claimant understood this expectation.

(4) On August 4, 2024, claimant was at one of the employer's group homes caregiving for a client whose birthday was that day. That morning, when the group home's supervisor arrived, claimant expressed to the supervisor disagreement with being assigned to mandatory overtime for the next day because she had a cardiologist appointment for that day. Claimant had this discussion with the supervisor in the presence of the client for whom she was providing care.

(5) Claimant's client became agitated about his birthday dinner, and accused the employer of canceling his birthday. The group home supervisor believed the client's behavior had escalated. The group home supervisor called the employer's associate director and asked her to help de-escalate the situation.

(6) Soon thereafter, the associate director arrived at the home and attempted to address the client's behavior. Claimant observed the associate director's treatment of the client and believed the associate director used improper techniques to address the situation, including "corner[ing]" the client into a bathroom and initially preventing the client from going outside to calm down. September 6, 2024, Transcript at 61. The client pushed past the associate director, went outside the home, and eventually calmed down.

(7) After the client calmed down, in the early afternoon of August 4, 2024, the employer's associate director held a meeting with claimant, the assistant program manager, and another manager. The associate director, who was not present during the discussion between claimant and the group home supervisor that morning, believed claimant's complaint to the manager in the presence of the client constituted gossip and had contributed to the client becoming agitated. The associate director told claimant that if she were to gossip again, the employer would discharge her.

(8) During the meeting, the associate director also told claimant that if she called out late or sick from work again, the employer would discharge her because claimant had exhausted her protected leave time. Claimant informed the associate director that she had a cardiologist appointment the next day, and planned to call out sick. The associate director advised that claimant could trade shifts with a coworker but that if claimant was scheduled to work and called out on August 5, 2023, the employer would discharge her.

(9) Following the meeting, the associate director and assistant program manager departed the home, while claimant continued working, and a coworker arrived to help care for the client. That afternoon, from a non-private staff office in the home, claimant called the designated abuse and neglect hotline and reported the associate director's treatment of the client that had occurred that morning.[1]

[1] The appropriate authorities subsequently conducted a brief investigation and determined that the associate director's treatment of the client did not constitute abuse or neglect.

(10) In the late afternoon of August 4, 2024, the coworker called the assistant program manager because the client had once again become agitated. The coworker used a disrespectful tone when speaking to the assistant program manager because he understood the associate director had been "in . . . the client's face" and had "t[aken] away the client's birthday." September 6, 2024, Transcript at 28. The assistant program manager explained that she believed the associate director had acted appropriately and the coworker "calmed down his tone." September 6, 2024, Transcript at 30, 31-32. The two spoke again around midnight on August 5, 2024, and shortly after the second call, the assistant program director came to the home to help address the client's behavior.

(11) The assistant program manager understood from her communications with the coworker that claimant had told the coworker about the associate director's treatment of the client, and considered this to be gossip. On the morning of August 5, 2024, the assistant program manager called the associate director and advised that claimant had gossiped to the coworker about the associate director's treatment of the client. The associate director discussed the matter with the employer's director and the two decided that the employer should discharge claimant.

(12) On August 5, 2024, before the start of claimant's shift that day, the employer discharged claimant based on the employer's understanding that claimant had discussed the associate director's treatment of the client with the coworker, which the employer considered to be gossip.

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 employer discharged claimant due to the associate director's understanding, based on hearsay, that claimant had discussed the associate director's treatment of the client with the coworker, which the associate director characterized as violations of employee manual policies against "gossip, and harassment, and creating . . . a toxic work environment."[2] September 3, 2024, Transcript at 8. The

[2] Claimant asserted that the reason the employer discharged her was because she had notified the associate director during the August 4, 2024, meeting that she would be absent from work the next day due to a cardiologist appointment. September 6, 2024, Transcript at 56-58, 70; Exhibit 1 at 11. The record shows that claimant had mentioned during the August 4, 2024, meeting that she would be absent from work on August 5, 2024, due to a cardiologist appointment, and the associate director acknowledged at hearing that she stated in the meeting that if claimant, who had exhausted her leave time, was scheduled to work and called out on August 5, 2023, the employer would discharge her. September 6, 2024, Transcript at 74. Multiple employer witnesses stated the discharge was due to their belief that claimant had gossiped to the coworker about the associate director's treatment of the client. September 6, 2024, Transcript at 6, 25, 49. This decision proceeds with the premise that this was the employer's reason for discharging claimant.

employer did not prove that claimant violated any policies found in the employee manual on these subjects. Excerpts from the employee manual in the record do not contain any policies prohibiting gossip or the creation of a toxic work environment, as such. The policies against harassment are couched in terms of prohibiting unlawful harassment or hostility toward individuals who are members of protected classes of persons, forms of harassment not applicable to claimant's conduct. *See* Exhibit 2 at 3-4.

Otherwise, the manual prohibited causing "a disruption of any kind during working hours on Company property," but it is not evident that claimant's alleged discussion of the associate director's treatment of the client with the coworker was disruptive. Exhibit 3 at 2. First, as discussed below, the employer did not meet their burden to prove that claimant had actually discussed the matter with the coworker. Second, while the coworker's understanding of the associate director's treatment of the client caused him to initially take a disrespectful tone during his first call to the assistant program manager on August 4, 2024, it is not evident that the coworker's tone was so severe as to cause a disruption of any workplace processes and, in any event, the assistant program manager testified that the coworker's tone "calmed down" after they discussed the matter. September 6, 2024, Transcript at 30.

The associate director orally conveyed an expectation to claimant that gossip was prohibited during the meeting that occurred in the early afternoon of August 4, 2024. The associate director advised in the meeting that claimant's complaint to the morning group home supervisor in the presence of the client, which the associate director was not present at the home to observe, constituted gossip. September 6, 2024, Transcript at 37. However, this complaint related to claimant being assigned to mandatory overtime, and the associate director conceded at hearing that it was not improper for claimant to raise that matter with the supervisor, but that she should not have done so in the presence of the client. September 6, 2024, Transcript at 42-43. It is not clear that characterizing claimant's conduct of making a complaint to the morning supervisor in the presence of the client as gossip was sufficient to put claimant on notice that if she discussed an instance of suspected abuse with a coworker, the latter would also be considered gossip. This is so because discussing an instance of suspected abuse with a coworker does not involve sharing information in the presence of a client.

The record suggests that as of August 4, 2024, claimant likely knew that speculating about a coworker's involvement in another coworker's separation from the employer or sharing details in a client care log that were critical of the conduct of other staff was prohibited gossip, given that claimant had received disciplinary write-ups on those grounds on February 6, 2024, and July 23, 2024, respectively. Exhibit 2 at 5, 7-8. Again, however, it is not evident that speaking with a coworker about suspected client abuse, as the associate director believed claimant had done, would amount to conduct claimant knew or should have known was prohibited gossip based on the discipline claimant received on February 6, 2024, and July 23, 2024. The February 6, 2024, and July 23, 2024, disciplinary write-ups involved conduct that was too dissimilar from the conduct at hand.

In any event, at hearing, the associate director and the assistant program manager each testified that due to confidentiality, and as a mandatory reporter, a report of suspected abuse or neglect of a client by claimant must be reported to the designated abuse hotline or management and could not be discussed with coworkers. September 6, 2024, Transcript at 43-44, 35-36. At hearing, claimant acknowledged this expectation, testifying that she called the abuse and neglect hotline to report the associate director's conduct and characterizing that as something she was "supposed" to do. September 6, 2024, Transcript

at 62. Thus, the employer might have been able to establish a violation of a known employer expectation if the record showed that claimant had spoken to the coworker about the associate director's treatment of the client.

However, the employer failed to meet their burden to show that claimant spoke to the coworker about the associate director's treatment of the client. The employer's understanding that claimant had spoken to the coworker about the associate director's treatment of the client was based on hearsay. The assistant program manager testified that the coworker, who did not testify, had said during their August 4, 2024, call that claimant "had said that management took away [the] client's birthday and that [the associate director] was in . . . the client's face[.]" September 6, 2024, Transcript at 27. By contrast, claimant testified that after she observed the associate director's treatment of the client, she reported it to the abuse and neglect hotline. September 6, 2024, Transcript at 62. Claimant further testified that she did not recall discussing the matter with the coworker and that she made the hotline call from a non-private staff office from which she may have been overheard. September 6, 2024, Transcript at 62-63.

The assistant program manager's account is afforded less weight than claimant's firsthand account because it is based on hearsay. While it is clear that the coworker was aware during his August 4, 2024, call with the assistant program manager that an encounter between the associate director and the client had occurred, the employer did not prove by a preponderance of the evidence that the coworker gained that knowledge because claimant had spoken about the matter with the coworker. It is equally likely that the coworker learned of the matter by overhearing claimant make her hotline report in the non-private staff office. Given these factors—that the employer has the burden of proof, the assistant program manager's account is based on hearsay, and the equal likelihood that the coworker learned of the encounter between the associate director and the client by overhearing claimant's hotline report—the employer did not establish that claimant discussed the associate director's treatment of the client with the coworker, and therefore did not establish that claimant violated a known employer expectation based on such conduct.

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-265678 is affirmed.

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

DATE of Service: <u>October 11, 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 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.

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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