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

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0671

Reversed
Disqualification

PROCEDURAL HISTORY: On June 25, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily quit work without good cause and was therefore disqualified from receiving unemployment insurance benefits effective May 19, 2024 (decision # L0004727956).[1] Claimant filed a timely request for hearing. On September 11, 2024, ALJ Blam conducted a hearing, and on September 19, 2024, issued Order No. 24-UI-266656, reversing decision # L0004727956 by concluding that claimant voluntarily quit work with good cause and was therefore not disqualified from receiving benefits based on the work separation. On September 23, 2024, the employer filed an application for review of Order No. 24-UI-266656 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Douglas County School District No. 4 employed claimant as a high school teacher from 2022 until May 24, 2024. Claimant had previously worked for the employer from 1999 until 2013, when she retired. Due to her status as a retiree, claimant was not entitled to the protections of tenure and worked under a series of one-year contracts. Claimant's contract had been renewed for the 2024-2025 school year prior to May 10, 2024.

(2) The employer expected that their employees would not make "inappropriate" physical contact with a student, which included touching them in a "mean[,] menacing, or harmful way." Transcript at 37. Claimant understood this expectation.

[1] Decision # L0004727956 stated that claimant was denied benefits from May 19, 2024, to May 17, 2025. However, that end date is misleading because ORS 657.176 states that a disqualification from benefits continues until the individual has earned, after the week in which the disqualification began, four times their weekly benefit amount in subject employment. *See* ORS 657.176(2). For this reason, the decision should have stated that claimant was disqualified from receiving benefits beginning May 19, 2024, and until she earned four times her weekly benefit amount in subject employment.

(3) On May 10, 2024, claimant was teaching a class in which a student "had been misbehaving most of the period and was not on task" after repeated attempts by claimant to prompt the student to focus on his work. Exhibit 1 at 7.[2] Claimant placed her hand on the student's neck and in what the student felt was "an aggressive manner" which "startled and scared" the student. Exhibit 1 at 7. The contact left a red mark on the student's neck which was observed and photographed by other students.

(4) Immediately following the incident, the student reported the matter to his mother by phone, and to the assistant principal. The employer, in turn, reported the matter to a police officer, who began an investigation. The state agency overseeing teacher licensure was also informed of the incident. The student's mother immediately came to the school to follow up on her son's report.

(5) Later in the morning of May 10, 2024, claimant was summoned to a meeting with the assistant principal and a union representative to discuss the student's complaint. Claimant admitted during the meeting that "she did place her hand on [the student's] neck region," explained about the student's misbehavior that led up to the physical contact, and stated that she "probably should not have made physical contact with the student." Exhibit 1 at 8. Claimant was told that she was being placed on paid administrative leave, which was not disciplinary, while the employer investigated the matter. Later that day, an appointment was scheduled for Monday, May 13, 2024, at 11:00 a.m. for claimant to return to the school to retrieve her belongings. Claimant was directed not to speak with any school employees or students during the investigation.

(6) On May 11, 2024, claimant spoke on the telephone with a union representative who was assigned to represent her in the investigation. The representative was not the same one that had been present at claimant's initial meeting with the assistant principal. During the call, the representative arranged for a meeting between himself and claimant for Monday, prior to claimant's scheduled appointment to return to the school to collect her belongings. The representative also told claimant, "You're going to get fired or you're going to resign and you need to decide by the meeting that we have on Monday." Transcript at 24.

(7) On May 13, 2024, claimant met with the union representative and he again told claimant, "[Y]ou are not going back to the high school. You're going to be fired. You either resign or get fired[.]" Transcript at 24. Claimant then agreed to resign and signed and submitted a letter of resignation which stated that it would become effective on May 24, 2024. Additionally, the representative informed claimant of the police investigation. The employer ended their investigation based on claimant's resignation without concluding whether or what discipline would have been imposed had she not resigned. Claimant's discharge would have been a potential outcome of the investigation.

(8) In the afternoon of May 13, 2024, claimant came to the school to retrieve her belongings, after the 11:00 a.m. appointment had been cancelled. While retrieving her belongings, claimant offered the assistant principal who was overseeing the retrieval an alternate explanation for having made physical contact with the student. Exhibit 1 at 7. Claimant told the assistant principal that she had been afraid that the student was leaning too far back in his chair and was in danger of tipping over and potentially

[2] Two separate documents in the record were marked as Exhibit 1, apparently in error. Where EAB's decision refers to Exhibit 1, it is referring to the 12-page police report.

worsening an existing head injury, so she rushed to the student and grabbed his neck to steady him. Exhibit 1 at 7.

(9) In the course of the police officer's investigation, he interviewed the assistant principal, who relayed claimant's initial and alternate accounts of her physical contact with the student, as well as the student, his mother, three other student witnesses, and claimant. Ultimately, the student involved requested that his complaint not be forwarded to the District Attorney and the police investigation was closed without action against claimant.

(10) Claimant remained on paid leave through May 24, 2024, and did not work for the employer thereafter. Had claimant not resigned when she did, she would have remained on paid leave until the conclusion of the investigation even if it continued into the next school year. Claimant had not been disciplined for any other suspected policy violations in the year preceding the work separation.

CONCLUSIONS AND REASONS: Claimant voluntarily quit work without 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.

Claimant voluntarily quit work to avoid a potential discharge resulting from the pending investigation into her physical contact with a student. Per OAR 471-030-0038(5)(b)(F), leaving work without good cause includes "[r]esignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct[.]" The order under review concluded that claimant quit work to avoid what she reasonably but mistakenly believed was an imminent and inevitable discharge, and while discharge was a potential outcome of the investigation, the discharge was neither imminent nor inevitable at the time she quit. Order No. 24-UI-26656 at 3. The record supports these conclusions. However, the order failed to analyze whether the potential discharge claimant avoided by quitting work would have been for misconduct, and therefore whether OAR 471-030-0038(5)(b)(F) precludes a finding of good cause.

"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).

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 reasonably expected that their employees would not make "inappropriate" physical contact with a student, to include touching them in a "mean[,] menacing, or harmful way." Transcript at 37. Claimant understood this expectation. While claimant did not dispute that she purposely made physical contact with a student on May 10, 2024, the record contains conflicting evidence as to the nature of the contact and claimant's intent in making it.

Claimant testified that during the incident, the student "was leaning back on his chair which is very unstable. . .. I didn't want his chair to fall over backwards and conk him on the head. So I ran from behind my desk and shoved him forward between his shoulder blades to an upright position. I did not put my hands around his neck." Transcript at 23. Claimant also testified that this was the version of events that she told the assistant principal in her initial meeting with him on the morning of the incident. Transcript at 22-23. This version of events is largely consistent with what claimant told the assistant principal after resigning on May 13, 2024, while picking up her belongings, and what claimant told the police when she was interviewed on May 20, 2024. *See* Exhibit 1 at 8, 10.

In contrast, the investigating police officer reported having interviewed the assistant principal on the day of the incident and that the assistant principal reported that claimant admitted to him that morning that she "did place her hand on [the student's] neck region" and "stated the student had been misbehaving most of the period and was not on task after repeated teacher interventions. [Claimant] stated that she probably should not have made physical contact with the student [and] asked if she was going to be fired for the incident." Exhibit 1 at 7. In a written statement provided immediately following the incident and

again in an interview a short time later, the complaining student reported to police that claimant had warned him several times during class about using his cell phone and being off task, and when he remained off task, claimant "[came] up behind [him] and place[d] her hand in an aggressive manner on the side of his neck squeezing and digging her fingernails in [his] neck for 3-5 seconds [which] startled and scared [him]." Exhibit 1 at 7. That morning, the police officer also interviewed three other students, individually, who had been sitting close to the complaining student during the incident. Two of the three student witnesses described seeing claimant touch the student's neck under the same circumstances and in the same manner as the complaining student had reported. *See* Exhibit 1 at 5-6. The third student witness reported that she "was not paying attention" to the complaining student at the time of the incident and did not see it happen, but that she observed that student's neck "was red and [had] a little mark and that [the student] was touching his neck saying that the neck hurt." Exhibit 1 at 6. One of the student witnesses photographed claimant's neck "approximately 4 to 5 minutes" after the incident. Exhibit 1 at 6. Additionally, the complaining student's mother had also reported to the police officer that claimant had telephoned her immediately following the incident to report that claimant had grabbed his neck, and the student's mother immediately went to the school based on his report.

Generally, first-hand testimony regarding an incident is entitled to greater weight than contrary hearsay accounts. Here, however, due to the relatively short amount of time between when the incident occurred and when the hearsay statements were given, the consistency of the multiple hearsay statements with one another, the consistency between the hearsay statements to the assistant principal and to the police officer, and that the statements were made to a police officer conducting an official investigation, the reliability of the hearsay statements from witnesses to the incident outweigh claimant's testimony and her later statements consistent with that testimony. For similar reasons, the assistant principal's hearsay account of claimant's statements during their initial meeting shortly after the incident occurred, though denied by claimant and inconsistent with her later statements and testimony, are given greater weight than claimant's later statements and testimony. The facts have been found accordingly. Therefore, more likely than not, claimant touched the student's neck in an offensive way to annoy the student because he remained off task after several warnings. The record shows that claimant was conscious of her conduct and knew or should have known that her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Accordingly, claimant's actions constituted misconduct unless excused as an isolated instance of poor judgment.

However, even if claimant's actions in making physical contact with the student were isolated and evinced poor judgment, they cannot be excused under OAR 471-030-0038(3)(b) because they exceeded mere poor judgment. ORS 166.065(1)(a)(A) provides that a person commits the crime of harassment if the person intentionally harasses or annoys another person by subjecting such other person to offensive physical contact. Here, the preponderance of evidence shows that claimant subjected the student to offensive physical contact with the intent to annoy him when she found him to be repeatedly off task and ignoring her warnings. Because claimant's actions were at least tantamount to unlawful activity, they fall outside of the exculpatory provisions of the rule and therefore constitute misconduct. Accordingly, claimant voluntarily quit work to avoid what would otherwise have been a potential discharge for misconduct and therefore, pursuant to OAR 471-030-0038(5)(b)(F), quit without good cause.

For these reasons, claimant voluntarily quit work without good cause and is therefore disqualified from receiving unemployment insurance benefits effective May 19, 2024.

DECISION: Order No. 24-UI-266656 is set aside, as outlined above.

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

DATE of Service: October 18, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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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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