EO: Intrastate
BYE: 09-Aug-2025

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

544
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0759

Reversed
Disqualification

PROCEDURAL HISTORY: On August 29, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was therefore not disqualified from receiving unemployment insurance benefits as a result of the work separation (decision # L0005815443). The employer filed a timely request for hearing. On October 9, 2024, ALJ Parnell conducted a hearing at which claimant failed to appear, and on October 15, 2024, issued Order No. 24-UI-269359, affirming decision # L0005815443. On October 28, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of the documents the employer submitted for consideration prior to the hearing that were also provided to claimant with the notice of hearing as part of the employer's request for hearing. These documents have been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting EAB Exhibit 1 must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(2). Unless such objection is received and sustained, the exhibit will remain in the record.

WRITTEN ARGUMENT: EAB considered the employer's argument in reaching this decision.

FINDINGS OF FACT: (1) Hope Church of the Assemblies of God employed claimant as a daycare teacher from November 2023 until August 9, 2024.

(2) The employer expected that their teachers would not yell at the two-year-old children under her care. Claimant understood this expectation.

(3) In approximately late June 2024, claimant was observed yelling at two-year-old children on more than one occasion. On a different occasion, claimant inadvertently left a child under her care alone in a classroom for 27 minutes while the rest of the class went out for recess.

(4) On July 2, 2024, the employer presented claimant with a written performance improvement plan (PIP) for having yelled at children and having inadvertently left one student alone. Claimant agreed to the PIP.

(5) On August 6, 2024, claimant gave the employer written notice of her intent to resign on September 5, 2024. The employer requested that claimant change the effective date to August 28, 2024, and claimant agreed to do so.

(6) On August 8, 2024, claimant yelled at a two-year-old child. Another employee witnessed this and alerted claimant's supervisor, who reviewed video-only surveillance footage of the incident, and believed that it supported the employee's account. Additionally, while reviewing the footage, claimant's supervisor saw that claimant "nudged" a two-year-old child face-first onto a mat in a manner that the supervisor felt was inappropriate, though the child did not appear upset or injured by this. Audio Record at 20:30. The supervisor was legally mandated to report any instances of suspected child abuse to the state. The supervisor consulted others who also had this reporting obligation and showed them the video. None concluded that claimant's actions were reportable as suspected child abuse. Claimant's actions were not reported to the state.

(7) On August 9, 2024, the employer notified claimant that she was discharged with immediate effect for having yelled at a student and having nudged a student onto a mat the previous day. Claimant sent a text message to the employer stating, in part, "I understand my tone of voice with [the children] went against our plan." EAB Exhibit 1 at 1. Claimant did not work for the employer thereafter. Claimant had been willing to continue working for the employer after August 9, 2024.

CONCLUSIONS AND REASONS: Claimant was discharged for misconduct.

Nature of the work separation. If an 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 an 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).

On August 6, 2024, claimant gave notice of her intent to resign effective September 5, 2024. Claimant and the employer then agreed to change the effective date to August 28, 2024. The record therefore shows that claimant was willing to continue working for the employer for a period of time after August 9, 2024. The employer did not allow claimant to continue working after that date because of her conduct on August 8, 2024, and thereby discharged her. Different provisions apply to the determination of a work separation when an employee is discharged within 15 days of a planned voluntary leaving.[1]

[1] ORS 657.176(8) states, "For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that: (a) The voluntary leaving would be for reasons that do not constitute good cause; (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date."

However, because claimant was discharged on August 9, 2024, more than 15 days before her planned voluntary leaving, the standard analysis under OAR 471-030-0038(2) applies. Accordingly, the work separation was a discharge.

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 prove 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 discharged claimant because she yelled at a student and nudged a student face-first onto a mat. The order under review concluded, "At worst, this was an isolated instance of poor judgment." Order No. 24-UI-269359 at 3. The record does not support this conclusion.

The employer reasonably expected that their teachers would not yell at two-year-olds. It can reasonably be inferred that claimant understood this commonsense expectation. Additionally, claimant was placed on a PIP on July 2, 2024, with a term of that plan being that claimant not yell at children at work.

Claimant's supervisor testified that another employee present in claimant's classroom on August 8, 2024, told him that she observed claimant yelling at a two-year-old student. Audio Record at 20:30. The supervisor further testified that he reviewed video footage of the incident and, while the video had no sound, it was consistent with the employee's account. Audio Record at 21:09. Claimant wrote in response to her discharge, which she was told was based in part on this evidence of yelling, "I understand my tone of voice with [the children] went against our plan." EAB Exhibit 1 at 1. Therefore, more likely than not, claimant yelled at a child on August 8, 2024. Claimant did not rebut the reasonable inferences that she was conscious of her actions and demonstrated indifference to the consequences of them, knowing that they were likely to result in a violation of the employer's expectations. Accordingly, claimant acted with at least wanton negligence in yelling at the child on this occasion.[2]

Further, claimant's actions cannot be excused as an isolated instance of poor judgment. OAR 471-030-0038(3)(b)(A) requires that the final incident not be part of a pattern of other willful or wantonly negligent behavior. Claimant's supervisor testified without rebuttal that claimant was "consistently observed" yelling at children, including in late June 2024, for which she was placed on a PIP on July 2, 2024. Audio Record at 30:41. As with the August 8, 2024, incident, claimant did not rebut the reasonable inferences that she was conscious of her actions on these prior occasions and demonstrated indifference to the consequences of them, knowing that they were likely to result in a violation of the employer's expectations. Accordingly, claimant's conduct on August 8, 2024, was not isolated, but part of a pattern of other wantonly negligent behavior, and therefore was not an isolated instance of poor judgment.

For these reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective August 4, 2024.

DECISION: Order No. 24-UI-269359 is set aside, as outlined above.

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

DATE of Service: <u>November 27, 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 stated above**. *See* ORS 657.282. For forms and information, visit https://www.courts.oregon.gov/courts/appellate/forms/Pages/appeal.aspx and choose the appropriate form under "File a Petition for Judicial Review." You may also contact the Court of Appeals by telephone at (503) 986-5555, by fax at (503) 986-5560, or by mail at 1163 State Street, Salem, Oregon 97301.

[2] Because the employer showed by a preponderance of the evidence that claimant was discharged for a wantonly negligent policy violation regarding yelling, the issue of whether claimant nudging the child onto the mat also violated a reasonable employer policy is not addressed in this decision.

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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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