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

EMPLOYMENT APPEALS BOARD DECISION
2025-EAB-0202

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2025, 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 # L0008981071). The employer filed a timely request for hearing. On March 11, 2025, ALJ Honea conducted a hearing, and on March 19, 2025 issued Order No. 25-UI-286507, affirming decision # L0008981071. On March 31, 2025, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing. EAB considered the parts of claimant's argument that were based on the hearing record.

FINDINGS OF FACT: (1) TTEC Services Corporation employed claimant as a team leader from January 18, 2019 to December 13, 2024.

(2) The employer expected their employees to "treat other employees and conduct [themselves] in a manner consistent with" the employer's "core values and with common standards of personal and business conduct." Exhibit 1 at 4. Claimant took annual code of conduct and workplace ethics trainings; had access to an internal tool, "Mosaic," that housed the employer's policies, including policies on being unbiased in one's communications; and as a team leader, was responsible for enforcing the employer's policies on employees who reported to him. Transcript at 16. Claimant did not know of a distinct employer policy against racially offensive conduct but was aware generally that racial discrimination was prohibited.

(3) On October 29, 2024, claimant had a call with a subordinate colleague in which, among other topics, the two discussed the sadness of losing a pet and the colleague's inability to have children, something

the colleague had shared with claimant previously. In the course of the discussion, claimant suggested adoption as an idea to consider, which the colleague noted was expensive. Claimant suggested adopting a child from abroad, mentioning the Philippines or Mexico, believing it to be less expensive to adopt a child from abroad than adoption in the U.S. Claimant suggested naming the adopted child "Alejandro", if the child was a boy, and a different name if the child was a girl. Transcript at 24.

(4) Claimant's subordinate colleague reported aspects of the October 29, 2024 call to claimant's supervisor. In the colleague's report to the supervisor, the colleague stated that she mentioned to claimant that a mutual colleague's dog had died and that if her dog had died, she "would be a mess" because she "was unable to have kids" and her dog was her "baby." Exhibit 1 at 8. The colleague reported that claimant stated, "I can fix that easily and get you a Taiwanese kid," to which the colleague stated, "Adoption is so expensive in the United States." Exhibit 1 at 8. The colleague reported that claimant then stated, "I can get one for free, and her name would be Alejandro." Exhibit 1 at 8.

(5) On October 30, 2024, in response to the colleague's report, the employer's human resources (HR) department began an investigation into claimant's conduct. Claimant was unaware that he was under investigation. Much of the employer's investigation focused on complaints about aspects of claimant's management style. However, the investigation came to focus on the alleged "Taiwanese kid" comment. The investigation also focused on claimant's posting of a "GIF" that the employer considered to be "racially charged", and claimant's alleged use of a "black accent" when verbally conveying to a colleague something another employee, who was African American, had written in a workplace chat. Transcript at 5-6, 11.

(6) On or soon after November 1, 2024, while the investigation of claimant was ongoing, claimant had a meeting with a peer colleague in which one of the topics discussed was claimant's frustration with the chat posting habits of an African American employee who reported to the colleague. The employee was a subject matter expert, which meant that she communicated with workers through Slack, a communications platform, to troubleshoot their problems. The employee invariably began her troubleshooting Slack chats with the greeting, "Hey Friend! Let me take a quick peep to see what we got here", and claimant conveyed to the colleague that workers had started complaining that the greeting delayed the employee from addressing their problems. Exhibit 1 at 73. The colleague believed that when claimant read the employee's Slack chat greeting to her, he did so using an accent stereotypically associated with African American individuals, a so-called "black accent." Exhibit 1 at 74. However, claimant did not use any kind of accent during the meeting.

(7) On November 13, 2024, while the investigation of claimant was ongoing, claimant posted a "GIF" or meme on a Microsoft Teams channel that he and several other employees used. *See* Exhibit 1 at 59. The GIF depicted "Peter Griffin," a middle-aged white male character from the adult animated comedy series, "Family Guy." Transcript at 7. The GIF showed the character at a receptionist's workstation cradling a phone between his ear and shoulder while blowing on his fingernails. The character's fingernails were long and curved in an exaggerated fashion. At the bottom of the GIF read the caption, "Hey, LaRhonda. No, I got four people on hold, but I can talk." Exhibit 1 at 59.

(8) Claimant posted the GIF in response to a subordinate colleague's post that she had received delivery of a new headset that would enable her to take customer calls, a responsibility that had recently been assigned to that employee. The employee who had received the headset was not African American, and

claimant posted the GIF intending it to be a "funny satire" relating to "uh-oh, somebody's taking calls, but not really taking calls." Transcript at 28. Claimant did not perceive the GIF as having any "racial context" and had previously used the GIF over a dozen times in workplace meetings during his employment without any correction or discipline. Transcript at 28. Claimant had not regularly watched Family Guy, having viewed "maybe 10 minutes" of the show in his life, and did not know the context of the scene or episode the GIF was based upon. Transcript at 29.

(9) Within minutes of claimant posting the GIF, the employee who had received the headset gave the GIF a "shocked" emoji, and claimant's supervisor direct messaged claimant to delete the GIF. Exhibit 1 at 58. Claimant immediately did as the supervisor requested, but, at the time, had "no understanding of why [he] had to take it down." Transcript at 29. A few days later, claimant had a weekly one-on-one session with the supervisor. In that meeting, claimant, unprompted, raised the matter of the GIF and the instruction to delete it because he "wanted to understand what [he] had done that needed to have the GIF brought down." Transcript at 38. The supervisor explained the scene or episode in question and advised that she thought it had racial implications.

(10) On December 9, 2024, the HR representative conducting the investigation of claimant and claimant's supervisor met with claimant. In the meeting, the HR representative disclosed that claimant was under investigation and asked him about the alleged "Taiwanese kid" comment and his posting of the GIF. At the conclusion of the meeting, the HR representative advised that there were matters she still needed to review. On that date, the employer placed claimant on paid suspension pending the conclusion of the investigation.

(11) On December 11, 2024, the HR representative conducting the investigation learned of claimant's alleged use of a "black accent" while speaking with the peer colleague in November.

(12) On December 13, 2024, the employer discharged claimant. On that date, the employer's HR representative and claimant's supervisor met with claimant. Reading from a prepared script, the HR representative advised as follows:

> [The employer] will be terminating your employment effective immediately due to your conduct, behavior and comments regarding adopting a Taiwanese kid, posting of a certain Family Guy gif that your colleagues found offensive, and imitating speech patterns and accents. These behaviors are in violation of [the employer's] code of conduct and are not in alignment with [the employer's] leadership values.

Exhibit 1 at 77.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The proximate cause of claimant's discharge was claimant's alleged "Taiwanese kid" comment, claimant's posting of the GIF, and claimant's alleged use of a "black accent" when speaking with the peer colleague. This is so because all three were the focus of the employer's investigation, and each item was cited by the employer when they discharged claimant. Therefore, the discharge analysis requires an assessment of each. *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).

First, as to the alleged "Taiwanese kid" comment, at hearing, the employer's witness, who was claimant's supervisor, testified from the employer's investigative materials about the alleged comment. Transcript at 6. This testimony reflected the complaint lodged by claimant's colleague, which is what initiated the employer's investigation of claimant. Exhibit 1 at 8. According to the colleague's complaint, the colleague mentioned to claimant that a mutual colleague's dog had died and that if her dog had died, the colleague "would be a mess" because she "was unable to have kids" and her dog was her "baby." Exhibit 1 at 8. The colleague reported that claimant stated, "I can fix that easily and get you a Taiwanese kid," to which the colleague stated, "Adoption is so expensive in the United States." Exhibit 1 at 8. The colleague reported that claimant stated, "I can get one for free, and her name would be Alejandro." Exhibit 1 at 8.

The testimony claimant offered at hearing about this matter differed to a degree and cast claimant's comments in a more innocuous light. Transcript at 22-25. In claimant's telling, the discussion with the colleague was a "dual conversation" that, in the beginning, was about the sadness of losing a pet and then turned to the colleague's inability to have children, which the colleague had shared with claimant previously. Transcript at 22. Claimant stated he raised adoption as an idea, and the colleague responded that "adoption in the U.S. is expensive." Transcript at 23. Claimant stated that he asked, "I don't know what the cost would be or if they're any better . . . [b]ut have you thought about adopting overseas?" Transcript at 23. Claimant testified that he then suggested adopting a child from the Philippines or Mexico, not Taiwan, because he knew people who adopted a child from the Philippines and those two nations were front of mind due to the employer having call centers located there. Transcript at 23-24. Claimant testified he then offered "Alejandro" as a name for a boy and a different name that he could not recall, if the child was a girl. Transcript at 24.

Because claimant's account was based on his personal knowledge and participation in the conversation, whereas the employer's account was based on the colleague's complaint, which was hearsay, the weight of the evidence supports claimant's version of events where the two accounts conflict. The facts of this decision have been found accordingly. Analyzing claimant's comments during the October 29, 2024 conversation with the subordinate colleague, it is evident that claimant raised delicate topics that are

prudent to avoid in a workplace setting. Further, the comments could be perceived as offensive, even when viewed in the light presented by claimant, given that the colleague was a subordinate and the issue under discussion was the sensitive matter of a person's inability to have children. However, the employer did not establish by a preponderance of the evidence that the comments claimant made were willful or wantonly negligent violations of "common standards of personal and business conduct" or the employer's prohibition against racial discrimination, expectations that the record shows claimant was aware governed his conduct. Claimant did not know of a distinct employer policy against racially offensive conduct, and to the extent his comments relating to adoption of a child from the Philippines or Mexico and offering the name Alejandro were offensive, racially or otherwise, the employer did not offer clear expectations that such behavior was prohibited. Accordingly, the employer did not meet their burden to prove misconduct as to the comments claimant made during the October 29, 2024 conversation with the subordinate colleague.

Next, as to claimant's posting of the GIF, the employer likewise failed to show that claimant violated their expectations willfully or with wanton negligence. Although it is possible to perceive the GIF as merely a parody of a receptionist lacking in diligence, aspects of the depiction, such as the fingernails of an exaggerated length and the name stated in the GIF's caption, have racially insensitive implications. Therefore, the act of posting the GIF arguably constituted a violation of the employer's expectation that claimant act consistent with common standards of personal and business conduct.

However, the employer failed to prove by a preponderance of the evidence that in posting the GIF, claimant acted with the required willful or wantonly negligent mental state. Claimant posted the GIF as a joke in response to the post of a subordinate colleague, who was not African American, when that colleague advised that she had received a headset that would enable her to take calls. Claimant did not perceive the GIF as having any racial context and, having rarely watched Family Guy, was unaware of the context of the scene or episode the GIF was based upon. These facts are sufficient to show that claimant did not act with the intent to violate the employer's expectations and, thus, any violation that occurred as a result of posting the GIF was not willful.

Claimant's conduct of posting the GIF also was not wantonly negligent. Claimant had used the GIF over a dozen times in workplace meetings without incident and immediately deleted it when asked to do so by his supervisor. Claimant also raised the issue on his own accord in a subsequent one-on-one meeting with his supervisor because he wished to understand what was objectionable about posting the GIF. A conclusion of wanton negligence requires a showing that the claimant knew or should have known their conduct probably violated the employer's expectations, and acted with indifference to the consequences of their actions. Given that claimant had used the GIF over a dozen times without incident and genuinely inquired of his supervisor what was objectionable about the GIF, the record fails to show that claimant knew or should have known that his conduct probably violated the employer's expectations. Further, because claimant took the immediate remedial action of deleting the GIF, along with the fact that he had used the GIF in the past many times without being corrected or disciplined, the record does not show that claimant's conduct was the result of indifference to the consequences of his actions, and not a good faith error in his understanding of the employer's expectations. The record therefore fails to establish that claimant's posting of the GIF was wantonly negligent, and not the result of a good faith error. Good faith errors are not misconduct.

Finally, with regard to claimant's alleged use of a "black accent" when conversing with a colleague, that matter was also disputed by the parties. At hearing, the employer's witness testified, based on the investigative materials, that a peer colleague reported claimant to have used a "black accent" when he spoke with her about a chat posted by another employee, who was African American. Transcript at 11-12. The investigative materials reflect that the colleague, who was the employee's supervisor, initially stated to HR that claimant had posted complaints about the way the employee talked on Slack. Exhibit 1 at 54. The colleague then clarified to HR that claimant had read to her from a chat that *the employee* posted in Slack, an opening greeting that the employee always posts, and while claimant did so, claimant read the chat using a so-called "black accent." Exhibit 1 at 72-76.

In contrast, claimant testified at hearing that he did not know what a "black accent" sounds like and that he had heard the employee in question speak, and she had no accent as far as he could tell. Transcript at 30. Claimant acknowledged meeting with the colleague to complain about the employee's chats. Transcript at 30. However, claimant explained that the employee's role was a subject matter expert, and she would communicate with workers through Slack to troubleshoot their problems. Transcript at 30. Claimant testified that the nature of his complaint was that the employee would invariably begin her troubleshooting Slack posts with a lengthy greeting, and some workers had started to complain that the greeting delayed the employee from addressing their problems. Transcript at 30-31. Claimant denied using any kind of accent during the meeting. Transcript at 31.

As with the matter of claimant's alleged "Taiwanese kid" comment discussed above, because claimant's account regarding the discussion with the peer colleague was based on his personal knowledge and participation in the conversation, whereas the employer's account was based on hearsay (with details that changed slightly over the course of the investigation), the weight of the evidence supports claimant's version of events. The facts of this decision have therefore been found in accordance with claimant's testimony. Thus, the record fails to show that claimant spoke with any kind of accent during his meeting with the peer colleague. The employer therefore failed to prove that claimant violated their expectations based on the matter of his alleged use of an accent stereotypically associated with African American individuals.

For the reasons outlined above, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 25-UI-286507 is affirmed.

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

DATE of Service: <u>May 9, 2025</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.

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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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