

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0835

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #101449). Claimant filed a timely request for hearing. On May 6, 2014, ALJ Lohr conducted a hearing, and on May 8, 2014 issued Hearing Decision 14-UI-17146, concluding the employer discharged claimant, not for misconduct. On May 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Emerald Valley Auto Parts, Inc. employed claimant from June 29, 2013 to March 17, 2014 as a counter salesperson.

(2) The employer gave product discounts to employees of certain “large fleet” business partners. Transcript at 5. The employer expected claimant to verify the employee identification if claimant did not recognize the customer as an employee of one of those businesses. Claimant’s manager told him he should not ask to verify employee identification if it would cause a delay in service. Claimant’s manager instructed claimant to give discounts to the manager’s friends and told claimant he could give his own friends and family discounts on occasion. The manager told claimant he was permitted to reduce the percentage “mark up” for resale products if the price seemed high, or to gain a customer’s patronage.

(3) The employer expected claimant to note on customer invoices what type of account and discount was given to each customer. Claimant’s manager told claimant to record sales to friends as sales to the accounts corresponding to the discounts given to the customers. Claimant usually recorded sales to employees’ friends as sales to the employer’s business partners.

(4) In January 2014, the owner noticed claimant’s sales and profit percentages were lower than the percentages for the employer’s other salespeople. In January 2014, the owner gave claimant a verbal counseling when claimant applied too large of a discount to a retail customer’s purchase of resale

products. The owner told claimant to use the sales price generated by the computer for resale transactions unless he had permission from a manager to charge a different price.

(5) After January 2014, claimant's sales and profit percentages continued to be lower, and showed a higher volume of sales recorded to business partners, than those of other counter salespeople. The owner suspected claimant was giving many discounts to his friends and recording them as business partner sales.

(6) Claimant gave discounts to his friends twice. He often gave discounts to managers' friends. He often gave discounts to business partner employees without verifying employee identification.

(7) On March 17, 2014, the employer discharged claimant for allegedly falsifying company documents by recording discounted sales to friends as if they were discounts given to business partners.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly falsifying sales invoices by recording discounted sales to friends as sales to business partners. However, claimant made only two discounted sales to his own friends. Claimant's uncontroverted testimony was that his manager gave him permission to occasionally give discounts to his friends. The record shows claimant recorded discounted sales to the managers' friends and other patrons as sales to business partners, and that he often did not verify employee identification for sales to business partner employees. However, although claimant understood after the January 2014 counselling that he was not permitted to discount resale transactions without a manager's permission, his manager gave discounts to friends, and told claimant to do the same, and to record those sales in an account that corresponded to the percentage discount applied to the sale. The manager also told claimant that he should not check business partner employees' identification if it was busy in the store and might cause a delay in service. The record fails to show claimant knew or should have known that recording non-business partner sales to business partners' accounts violated the employer's expectations. Similarly, the record does not show claimant knew or should have known the employer expected him to always verify employee identification for business partners' employee sales. Absent such showings, the record fails to establish misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-17146 is affirmed.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: June 25, 2014

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 website at court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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