

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1683

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 131452). The employer filed a timely request for hearing. On September 30, 2014, ALJ S. Lee conducted a hearing, and on October 3, 2014 issued Hearing Decision 14-UI-26410, affirming the Department's decision. On October 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

FINDINGS OF FACT: (1) Fred Meyer Inc./Kroger employed claimant from May 28, 1993 to June 19, 2014.

(2) The employer had a written conflicts of interest policy stating that employees should avoid situations in which there was, or seemed to be, a conflict between the personal interests of the employee and the interests of the employer. The policy defined "conflict of interest" as any circumstance that could cast doubt on an employee's ability to act with total objectivity regarding the company's interests. The policy provided examples of potential conflicts, including accepting payments, services or loans from, or having a romantic relationship with, persons or concerns dealing with the employer. The policy further stated that employees involved in any situation that could be, or might reasonably be perceived as, a conflict of interest must disclose the potential conflict of interest to their direct supervisor, department head, or human resources representative. Claimant was aware of the employer's conflicts of interest policy.

(3) The employer also had a written gifts and entertainment policy providing that gifts received by employees must not influence or appear to influence decisions about how the employer conducted

business, that employees could not benefit personally from company business with suppliers or others or derive personal gain from transactions made on behalf of the employer, and that expenditures by suppliers should be limited. Claimant was aware of the employer's gifts and entertainment policy.

(4) In 2006, the employer began requiring employees to complete an annual survey in which they were required to state whether they received anything valued at more than \$100 from any person or business doing business with the employer, or had any other interest or relationship that conflicted with the interests of the employer. In 2013, the employer began requiring employees to state whether they received anything valued at more than \$50 from any person or business doing business with the employer. Claimant completed the annual surveys from 2006 through 2014.

(5) In 1998, claimant met and became friends with one of the owners of two of the employer's vendors. In 2003, claimant became a decision-maker in awarding contracts for work performed by the vendors. Claimant reported his friendship with the vendors' owner to his supervisor.

(6) On several occasions from 2003 through 2013, claimant received a bottle of wine from the vendors, the value of which was less than \$50. Claimant did not report the gifts to the employer or in the annual survey.

(7) On one occasion prior to 2013, the vendors' owner gave claimant a bottle of wine for claimant's wedding anniversary, the value of which was between \$50 and \$100. When opening the wine, claimant determined that it was "spoiled" or "tainted." Transcript 43. A few years later, the owner was moving and informed claimant that he was going to discard his remaining bottles of the wine because they also were spoiled or tainted. Claimant took the remaining bottles of wine for "nostalgic value" because the vintage year was the same year claimant was married. Transcript at 43. Claimant did not report the gift to the employer or in the annual survey because he believed the spoiled or tainted wine had no monetary value.

(8) In 2009, claimant purchased a vehicle from the vendors' owner for \$16,000. Claimant offered \$16,000 for the vehicle after the owner showed him documentation indicating that the "trade-in" value for the vehicle was \$13,000 to \$14,000. Transcript at 46. Claimant reported the transaction to his supervisor. Claimant did not report the transaction in the employer's annual survey because he did believe purchasing the vehicle constituted the receipt of a gift in excess of \$100.

(9) Also in 2009, claimant became concerned that the vendors' owner was attempting to use their friendship to influence decisions affecting the vendors. To avoid any potential conflict of interest, claimant began delegating decisions affecting the vendors to a subordinate employee. Claimant informed his supervisor that he had done so.

(10) The employer discharged claimant for violating its expectations regarding conflicts of interest and gifts.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. 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 employer discharged claimant for violating its expectations regarding conflicts of interest and gifts. However, the record shows that claimant complied with the employer's conflicts of interest policy by reporting his friendship with the vendors' owner to his supervisor, informing his supervisor that he purchased the vehicle from the owner, delegating decisions affecting the vendors to a subordinate employee to avoid a potential conflict of interest, and informing his supervisor that he had done so. The record fails to show the employer expected claimant to disclose receiving the individual bottles of wine from the vendors and their owner, let alone that claimant knew or should have known he was expected to do so. Nor does the record show that claimant knew or should have known that the employer expected him to disclose receiving the additional tainted or spoiled bottles of wine from the owner, which he believed had no monetary value. Nor does the record show that claimant knew or should have known the employer would consider purchasing a vehicle from the owner for \$2,000 or \$3,000 over the documented trade-in value the receipt of a gift in excess of \$100 that claimant was required to report in the employer's annual survey. The employer therefore failed to establish that claimant violated its expectations regarding conflicts of interest and gifts willfully or with wanton negligence, and that his conduct was not the result of a good faith error in his understanding of those expectations.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-26410 is affirmed.

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

DATE of Service: December 9, 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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