

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0331

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110005). Claimant filed a timely request for hearing. On March 2, 2015, ALJ S. Lee conducted a hearing, and on March 5, 2015 issued Hearing Decision 15-UI-34621, reversing the Department's decision. On March 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The employer's argument also contained information that was not part of the hearing record, and it did not explain why it failed to offer this information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) ISI HR, Inc., an employee leasing agency, employed claimant from approximately July 5, 2013 until December 23, 2014. Claimant was assigned to work as a sales representative for Express Locations, a company that operated retail sales stores for T-Mobile, a cell phone carrier.

(2) The employer expected that while he was assigned to work for Express Locations, claimant would refrain from behavior that caused a conflict of interest with Express Locations, such as selling his personal cell phone to potential customers of Express Locations during his shift. The employer also expected claimant to refrain from giving away the property of Express Locations and allowing unauthorized persons into the backroom at Express Locations. Claimant was aware of the employer's

expectations as a reasonably understood them based on the practices of the Express Locations' store managers and the other employees in the workplace.

(3) Throughout claimant's employment, claimant and his coworkers accommodated customers who intended to purchase cell phone services from T-Mobile, but who wanted to purchase the phone that they would use from a private party, by running a check on the phone's identification number to ensure that it was not locked out from service because it was stolen or because the seller had not paid his or her cell phone bills. After they had checked the phone's identification number, claimant and his coworkers allowed the buyer and seller to exchange the money that consummated the sale transaction in the store. Throughout claimant's employment, claimant and his workers also would receive customer donations of cell phones and cell phone accessories from customers who no longer wanted them. Claimant and his coworkers would sometimes give those donated phones to customers who needed to trade in an old phone to obtain credit against the purchase price of a new phone, but for some reason did not want to give up their existing phone. Sometimes, claimant and his coworkers also gave the donated phones and accessories to needy people or to charitable organizations. Throughout claimant's employment, claimant's manager, claimant and claimant's coworkers allowed their family members, children or girlfriends to accompany them into the backroom at Express Locations stores.

(4) Sometime before October 7, 2014, claimant's girlfriend advertised her personal cell phone for sale on Craigslist. When a potential buyer contacted her about the cell phone and expressed interest in having the cell phone checked to ensure it was operable and in obtaining cell phone service through T-Mobile, claimant's girlfriend arranged to meet the buyer at Express Locations. Transcript at 32. On October 7, 2014, claimant's girlfriend and the buyer came into Express Locations and claimant ran the check on the phone. Then, on the premises at Express Locations, the buyer paid claimant's girlfriend in cash for the cell phone purchase. The buyer then purchased a new cell phone from Express Locations, which would allow her to reduce the termination fees that her existing cell phone carrier charged when she switched her service to T-Mobile. Claimant sold that phone to her. Claimant gave the buyer a phone case from the accessories that had been donated by Express Locations' customers. At the end of the transaction, when claimant was completing the paperwork for the buyer, claimant's girlfriend went into the backroom at Express Locations along with claimant.

(5) Sometime after October 7, 2014, the person who purchased the cell phone from claimant's girlfriend went to a T-Mobile office with some questions about her phone or her T-Mobile Service. Based on her description of the transaction with claimant, the employer conducted an investigation.

(6) On December 23, 2014, the employer discharged claimant for allowing his girlfriend to sell her personal cell phone to the buyer on the premises of Express Locations during claimant's shift, for giving the cell phone case to the buyer and not processing it through Express Locations' inventory control system, and for allowing his girlfriend to enter the backroom of Express Locations.

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. 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. The employer has the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witnesses argued at hearing that claimant violated the letter of the employer's policies without ever demonstrating that claimant was reasonably aware of them. Transcript at 10, 11, 12, 15, 24, 25. Claimant contended that he did not receive the employer's handbook that set out its policies, or the usual orientations and trainings about the policies because he was put to work on the sales floor immediately after hire. Transcript at 28, 29, 30. The employer's witness conceded that this could have been the case, and testified that he did not have access to the employer's records that would allow him to testify with certainty that claimant had received that training. Transcript at 49, 50. Claimant also contended that, although the employer's witnesses testified about policy reminders and policy revisions that were sent to employees on a regular basis, he often did not have access to his email account and could not view them. Transcript at 39, 40. The employer's witnesses also conceded that claimant had voiced his concerns to his manager about his lack of access to his emails. Transcript at 25-26, 47. Based on the employer's failure to present evidence that claimant was reasonably informed of the employer's specific policies, the misconduct analysis is whether claimant violated any of the employer's policies of which he was reasonably aware as a matter of common sense.

With respect to claimant allowing his girlfriend to sell her cell phone to the potential buyer on the employer's premises during claimant's shift, the employer did not rebut claimant's testimony that it was his custom as well as the regular practice of his coworkers to run a check on a phone that a customer wanted to purchase privately from a third party. Transcript at 33, 34. The employer's witnesses also did not specifically rebut claimant's testimony that he was not a part of the sale transaction between his girlfriend and the cell phone buyer, and the girlfriend was not selling the cell phone on claimant's behalf. Transcript at 35. The employer also did not dispute that Express Locations did not prohibit the private sale of all cell phones on its premises, but only those by an employee during the employee's shift and to a customer who was otherwise expected to purchase a cell phone from Express Locations. Transcript at 11. Since claimant's girlfriend was not selling the cell phone for claimant and had arranged for the purchase in advance of the buyer entering the Express Locations' premises, it is difficult to see how this transaction violated the terms of the employer's policy as it was described by the employer's witness. It is also not at all apparent that the girlfriend's private sale of her cell phone diverted any business from the Express Locations, since there was no evidence that the buyer would otherwise have purchased the cell phone from Express Locations and the buyer in fact purchased one new cell phone from Express Locations and cell phone service from T-Mobile. The employer did not meet its burden to show that claimant's allowing his girlfriend to sell her personal cell phone on the Express Locations' premises, during his shift, was a willful or wantonly negligent violation of the employer's standards.

With respect to claimant giving the buyer a cell phone case from the accessories donated to Express Locations, the employer did not specifically dispute claimant's testimony that the cell phone case was a donated item or that donated cell phones and accessories were routinely given to customers to generate goodwill or donated as charity. Transcript at 31, 43. While the employer's witnesses ultimately conceded that donated items were not processed through the employer's point of sales inventory control system when they were given away, as were items sold in the usual course of business, they contended that that when claimant gave away the cell phone case to the buyer he gave away Express Locations' property without authorization. Transcript at 46. However, in light the undisputed practices of claimant

and his coworkers in giving away some of the donated property, it cannot be concluded as a matter of common sense that claimant was reasonably aware that he was prohibited from giving away a donated item to the buyer of his girlfriend's cell phone as a gratuity indicating Express Locations' goodwill toward her for purchasing a second cell phone from Express Locations and cell phone service from T-Mobile. The employer did not meet its burden to show that claimant's giving the cell phone case to the cell phone buyer was a willful or wantonly negligent violation of the employer's standards.

With respect to claimant allowing his girlfriend to enter the backroom of Express Locations, the employer did not dispute claimant's testimony that he thought this was allowed because he had done so before without being sanctioned and he had observed his managers and his coworkers often allowing family members and significant others to do so. Transcript at 35. The absolute prohibition that the employer contended to exist was not so conspicuous a common sense standard that it can be inferred that claimant was aware of it despite the routine practices of his managers and coworkers. The employer did not meet its burden to show that claimant's taking his girlfriend to the backroom was a willful or wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-34621 is affirmed.

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

DATE of Service: May 15, 2015

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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