

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1231

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71328). Claimant filed a timely request for hearing. On September 21, 2015, ALJ Vincent conducted a hearing, and on September 29, 2015 issued Hearing Decision 15-UI-45086, affirming the Department's decision. On October 19, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant provided the name and phone number of an individual named Julie that he said was "my proof that what they did is wrong." That information is new, and not part of the hearing record. For EAB to consider that information, claimant must show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). Because claimant did not make that showing, we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Instrument Sales & Service, Inc. employed claimant as a warehouse lead worker from June 21, 2000 to July 2, 2015.

(2) In approximately 2012, the employer authorized claimant to work with the employer's vice president to sell overstock and other items on an online auction website on the employer's behalf. Claimant sold items for between \$16,000 and \$31,000 and returned the money to the employer. The employer subsequently contracted with a third-party vendor to handle its online auction sales. After that point, the employer stopped allowing employees to sell items on the employer's behalf.

(3) The employer had a bin in its warehouse where it kept scrap parts. Items in the scrap bin had monetary value to the employer. The employer prohibited employees from taking scrap items without permission from their supervisor. The employer never told claimant he was allowed to take scrap items,

or to take and sell them. Claimant understood that the employer sold items from the scrap bin to a recycler.

(4) Claimant took items from the scrap bin without permission, and placed them for sale on an online auction website. Over approximately a year, claimant made approximately \$1,000 from his sales. He did not ask for permission to take or sell the scrap items because he considered them to be garbage. However, he also understood that the items in the scrap bin had monetary value to the employer, and that the employer kept the scrap items in the bin with the intention of selling them for money.

(5) In mid- to late-June 2015, the employer learned that claimant was selling items on an online auction website that were the same as or similar to items in the employer's inventory. On June 26, 2015, the employer's operations manager asked claimant about the items. Claimant denied knowledge. The manager later asked claimant to explain where he got the items, how they got onto the website, if claimant sold the items, and, if so, what claimant did with the money he received for the items he sold. Claimant did not provide the employer with an explanation. In later conversations, claimant told the manager that he had sold the scrap items to make some money for the company. Claimant also said that he had returned the money from the sales to the employer by applying the proceeds of his sales to an invoice.

(6) The employer researched the items claimant had placed for sale on the website by comparing the part numbers to its inventory, and found that the items claimant had placed for sale were of the same type that the employer sold. The employer had noticed variations between its physical inventory and its inventory records indicating that some of the employer's parts were missing, and knew claimant was responsible for monitoring the employer's inventory and reconciling any discrepancies. The employer researched a year's worth of records looking for traces of the money claimant said he had returned to the employer, but could not find any record of it.

(7) On July 2, 2015, the employer discharged claimant for taking the bin items without permission and selling them for personal gain.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant 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).

The employer had the right to expect its employees would not take items that had monetary value for the employer and sell them for personal gain without first having obtained permission from the employer to

do so. Over a period of approximately one year, claimant repeatedly and consciously violated the employer's reasonable expectation by taking items from the scrap bin that had monetary value for the employer, placing the items for sale on an online auction website, and retaining the proceeds from his auction sales. Claimant's conduct involved repeated instances of willful or wantonly negligent misconduct.

Claimant argued at the hearing, in essence, that his conduct should be excused as the result of a good faith error. Claimant argued that he thought he could sell the scrap bin items because they were "garbage" that the employer had discarded. Audio recording at ~ 37:48. However, claimant later admitted that he knew when he took and sold the items that they had monetary value for the employer. Audio recording at ~ 39:20, 40:30, 40:45, 42:45. He also admitted that the employer never authorized him to take those items and sell them. Audio recording at ~ 37:25, 39:35. Claimant next argued that he thought it was permissible to sell the scrap items because he had been authorized by the employer several years prior to 2015 to sell items on the employer's behalf. Audio recording at ~ 35:45. Those circumstances did not form a plausible basis for a good faith belief because they were markedly different from the circumstances of the final incident. Specifically, claimant had worked with the employer's vice president in approximately 2012 and was authorized to sell the items, and he had returned all the money he received from the sales to the employer. Audio recording at ~ 35:45, 41:50. In the final incident, claimant did not ask for or obtain permission from the employer to take the items or make the sales, and the employer's records indicate that he kept the money he received from selling the items. Audio recording at ~ 39:35. Finally, claimant argued that employees regularly took items from the employer's scrap bin for personal use or resale. Audio recording at ~ 36:25. However, while that might be the case, claimant did not claim that he understood those employees' actions to be known to the employer, much less condoned. *Id.* Considering the totality of the evidence, we conclude for those reasons that claimant did not sincerely believe that he was permitted to take and sell items from the employer's scrap bin, and, to any extent he had observed other employees do so without repercussion, he did not sincerely believe that the employer was aware of or condoned those actions.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-45086 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 6, 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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