

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0163

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115450). Claimant filed a timely request for hearing. On January 26, 2018, ALJ Janzen conducted a hearing, and on January 29, 2018 issued Hearing Decision 18-UI-101902, concluding the employer discharged claimant, but not for misconduct. On February 15, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

On February 15 and 20, 2018, the employer submitted written argument and new information to EAB, but failed to certify that it provided copies to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument or new information when reaching this decision.

FINDINGS OF FACT: (1) MOA Rifles LLC employed claimant from December 2013 until October 20, 2017 as a gunsmith.

(2) Before 2016, the employer expressly permitted claimant to use his personal lathe and mill at home to work on rifles belonging to the employer. Since 2016, when the employer purchased a mill and a lathe for claimant to use at work, the employer expected claimant to refrain from taking the employer's inventory home to work on it.

(3) After the employer purchased the lathe and mill in 2016, claimant still took the employer's parts home on occasion to work on them if the employer's lathe was being used for another rifle. On approximately October 4, 2017, claimant removed three rifle actions and other rifle parts from the employer's building to complete repairs on them at home. Claimant did not intend to keep any of the rifle parts or actions that he removed from the employer's building.

(4) On approximately October 6, 2017, the employer's owner noticed that several rifle parts and pieces were missing from the employer's building, including a rifle action. The employer contacted the police and, on approximately October 13, 2017, reviewed security videotape from the employer's building with them. They saw videotape of claimant entering the employer's building outside of business hours and removing gun cases and rifle parts from the building.

(5) The employer had not previously warned claimant for taking the employer's inventory off the premises or any other issue. As of October 20, 2017, claimant had not been charged with a crime associated with removing the rifle parts from the employer's building.

(6) On October 20, 2017, the employer's owner discharged claimant for the alleged theft of rifle parts from the employer's building.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the 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 is conscious of his conduct and knew or should have known that his conduct would probably violate a standard of behavior the employer had the right to expect of him. A claimant's good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for theft because he took rifle parts from the employer's premises. The employer expected claimant to refrain from taking the employer's inventory home. Although claimant understood as a matter of common sense that he was prohibited from stealing the employer's inventory, claimant testified that he did not understand that the employer prohibited him from taking rifle parts home to complete work on those parts. Transcript at 17-18, 27, 39-40. Claimant asserted that the controller gave him permission to take parts home to work on them when the employer's lathe was occupied with other rifle parts. Transcript at 39-40. However, although the controller did not specifically deny having told claimant he could take parts home to work on them, the controller testified that the employer expected claimant to leave the employer's inventory at work. Transcript at 35. The employer alleged at hearing that claimant had stolen the parts because he did not log the rifle actions he took in the employer's Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) log book when he removed them from the premises, and he knew or should have known that federal law would require him to log the parts in the log book each time he removed them. Transcript at 35. However, claimant testified persuasively that he believed he was able to remove the rifle actions without logging them into the ATF book if he was performing work on them as an employee, regardless of where that work was performed. Transcript at 19, 31. Regardless of the accuracy of claimant's understanding of federal gun laws, the employer failed to show that claimant knew or should have known from training, a license,

prior warnings or otherwise that the employer expected him to refrain from taking the parts home to work on them. Rather, the preponderance of the evidence shows that claimant sincerely believed based on the employer's statements to him, complacency and past practices that he had permission to take the rifle parts, including the actions, home to work on them. Moreover, the employer failed to show that claimant took the rifle parts home for any other purpose than to work on them. Even though claimant was mistaken in his understanding of the employer's policy regarding removing the rifle parts from work, claimant's actions were at worst a good faith error as to the policy, and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 18-UI-101902 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: March 14, 2018

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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