

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1073

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct and that benefit rights based on wages earned prior to the date of discharge would not be cancelled (decision # 113037). The employer filed a timely request for hearing. On October 18, 2018, ALJ Snyder conducted a hearing at which claimant failed to appear, and on October 25, 2018, issued Order No. 18-UI-118729, affirming the Department's decision. On November 13, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its 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 failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a merchandiser and cashier in its Junction City, Oregon store from April 27, 2016 to July 25, 2018.

(2) The employer expected its employees to pay for any beverage taken from an employer cooler prior to opening it, and refrain from committing theft of employer property. Claimant was aware of the employer's expectations.

(3) On July 25, 2018, claimant was questioned by an employer manager about a product that reportedly had been sold to a customer for cash with no record of the transaction in the employer's system or any cash discrepancy. The manager suspected that an employee had accepted money for the sale of product and had taken it for the employee's personal use, i.e. the employee had stolen it. The manager questioned claimant about the reported transaction and she denied any knowledge of it. During the interview, however, claimant admitted that "two or three times" she had taken a bottle of water out of an

employer cooler intending to pay for it later, and did so “the next day” although she had been told by a management person on more than one occasion “don’t worry about it.” Exhibit 1 at 30. She also asserted that about a week prior, she “forgot” to pay for a bottle of water taken from an employer cooler. Exhibit 1 at 34.

(4) An employer manager then questioned other managers about whether they had ever told claimant “not to worry about paying for waters.” Exhibit 1 at 34. All managers questioned denied ever making that statement to claimant, although one manager remembered that on two or three occasions, claimant “came to him asking to pay for water that she drank the previous day and ‘forgot to pay for.’” Exhibit 1 at 34.

(5) On July 25, 2018, the employer discharged claimant for “the admitted theft” of a bottle of water. Exhibit 1 at 31, 34. The employer never reported the alleged theft to law enforcement.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) 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. In a discharge case, the employer has the burden to prove 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 of a bottle of “Dasani Water” that reportedly occurred on “7/30/2018,” five days after claimant was discharged. Exhibit 1 at 31. However, even assuming the employer discharged claimant for a presumed theft of a bottle of water that claimant admitted she “forgot to pay for” a week prior to her discharge, the employer failed to meet its burden to establish that claimant had committed theft, the act for which she was discharged. Under Oregon law, the crime of “theft” requires that an individual take or obtain the property of another *with the intent to permanently deprive* the owner of either the property or its value.¹ Here, the employer asserted that claimant was

¹ ORS 164.015 “Theft” described. A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof...

ORS 164.005 Definitions. [U]nless the context requires otherwise:

(1) “Appropriate property of another to oneself or a third person” or “appropriate” means to:

(a) Exercise control over property of another, or to aid a third person to exercise control over property of another, *permanently* or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property...

(2) “Deprive another of property” or “deprive” means to:

(a) Withhold property of another or cause property of another to be withheld from that person *permanently* or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person...(Italics added).

discharged for “the admitted theft” of a bottle of water. However, claimant only admitted that she “forgot” to pay for a bottle of water approximately a week prior to being interviewed on July 25, 2018, which was not an admission that she had intended to permanently deprive the employer of the property in question. And to the extent the employer discharged claimant for previously taking a bottle of water “two or three times” out of an employer cooler intending to pay for it later, which she did “the next day,” the employer similarly failed to establish an intent on claimant’s part to *permanently* deprive the owner of either the property or its value. Claimant’s explanations to the manager on July 25 that claimant had intended to pay for bottles of water she had forgotten to pay for earlier were consistent with another manager’s report that claimant previously “came to him asking to pay for water that she drank the previous day and ‘forgot to pay for.’” Given that report, we find the record fails to show claimant committed theft of water before or during July 2018. Consequently, the employer failed to show by a preponderance of the evidence that claimant engaged in the conduct for which she was discharged. Absent such a showing, we cannot find misconduct under ORS 657.176(2)(a).

The employer discharged claimant, but not for misconduct, and she is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Order No. 18-UI-118729 is affirmed.

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

DATE of Service: December 18, 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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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