

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1109

Reversed
Disqualification

PROCEDURAL HISTORY: On October 4, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93810). Claimant filed a timely request for hearing. On November 13, 2018, ALJ Shoemake conducted a hearing, and on November 16, 2018, issued Order No. 18-UI-119822, concluding the employer discharged claimant, but not for misconduct. On December 3, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a written argument. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, we considered only information received into evidence at the hearing, and the employer's argument to the extent it was based on the hearing record, when reaching this decision.

FINDINGS OF FACT: (1) The Essential Oil Company employed claimant as its office manager from November 1, 1999 to August 7, 2018.

(2) The employer expected its employees to be honest regarding work related matters. Claimant understood the employer's expectation as a matter of common sense.

(3) As one of its long-term employees, the employer had authorized claimant to take each year 225 paid vacation hours, 45 paid sick hours and 54 paid holiday hours.

(4) From the start of her employment until May 2018, claimant was responsible for keeping track of her own and the other employees' work hours, vacation hours, sick hours and holiday hours. For a period of several years, until July 2018, the employer had used the company, ADP, for its payroll services. Each month, claimant entered into the employer's "ADP payroll book," in her own handwriting, each employee's work hours, sick hours and holiday hours used that month. Audio Record ~ 20:00 to 23:00. Claimant maintained a separate document, also completed by hand, to keep track of the vacation hours each employee used during a given month. That document was kept in and with the payroll book. At the end of each month, claimant would contact the employer's ADP administrator and provide the administrator with the monthly work, vacation, sick and holiday hours for each employee contained in the ADP book. After verifying the hours with claimant, the administrator would then compute the employer's total payroll cost for the month and prepare the employer's payroll checks. ADP did not keep a running total of the vacation, sick and holiday hours used by each employee.

(5) In May 2018, the employer's chief operating officer (COO) told claimant that the employer was switching to a new payroll company, Paylocity, effective the end of June 2018, and that the COO would be taking over the payroll duties. To become familiar with the process, with claimant's help, the COO performed the payroll duties relating to the ADP process for the months of May and June 2018. At one point during that time, when questions regarding vacation hours came up and the COO mentioned that she would examine the records in the payroll book, claimant remarked, "the vacation hours had gone missing from there," which "seemed odd" to the COO, but did not cause her to look into it further. Audio Record ~ 16:00 to 18:00.

(6) During the last week of July 2018, while claimant was on vacation and after the transition to Paylocity had occurred, more than one employee told the COO that their remaining vacation hours, which the new system apparently kept track of, "did not seem correct." Audio Record ~ 11:30 to 13:30. The COO then examined the monthly reports from ADP for the years 2015, 2016 and 2017, which showed the paid vacation and sick time for each employee during those months. The COO discovered that the vacation and sick time hours for every employee other than claimant were correct. However, the reports showed that claimant had authorized checks to herself that included 252 paid vacation hours and 171 paid sick hours in 2015, 189 paid vacation hours and 117 paid sick hours in 2016, and 324 paid vacation hours and 9 paid sick hours in 2017. From that information, the employer concluded that claimant had intentionally overpaid herself, without any employer authorization, substantial sums of money. The employer considered claimant's overpayments to be theft.

(7) On August 7, 2018, the day that claimant returned from her vacation, the employer discharged claimant for "fraudulent use of vacation time and improper payments she made to herself without authorization." Audio Record ~ 11:00 to 11:30

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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 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 amounted to a willful or wantonly negligent disregard of an employer's interest.

In Order No. 18-UI-119822, the ALJ concluded that the employer discharged claimant, but not for misconduct, reasoning:

The employer discovered several incidents in which claimant took and was paid for excessive vacation hours. Claimant credibly testified that she believed that the bookkeeper was acting as a “double check” to ensure accuracy and that there were instances in which the president would grant additional leave time. The employer witness testified that the bookkeeper only performed data entry duties and did nothing else with payroll but was unable to show that claimant was aware of that fact. While it is clear that claimant was paid more leave time than she was initially allocated, the employer did not show that it was fraud or that the discrepancies were the result of any willful or wantonly negligent conduct. Therefore, the employer did not establish misconduct.

Order No. 18-UI-119822 at 2. We disagree.

To begin, claimant did not “credibly testify” that “there were instances in which the president would grant [her] additional leave time.” When the ALJ specifically asked claimant, “Aside from the five weeks paid vacation, had the president ever allowed you to take any additional paid time off?”, claimant responded, “No.” Audio Record ~ 48:30 to 49:15. And the fact that claimant may have believed that the employer’s bookkeeper was a “checks and balance person” over claimant’s payroll entries for paid vacation and sick time was immaterial unless claimant’s explanation for her apparently numerous improper payroll entries in favor of herself alone over a three year period was that they were all innocent mistakes, which is implausible.

The employer had the right to expect claimant to be honest in carrying out her payroll duties as office manager which included keeping track of authorized leave time utilized by each employee, including herself, to ensure that it was not improperly exceeded. Viewing the record as a whole, claimant violated that expectation when it came to maintaining sufficient records to ensure that her own authorized vacation and sick leave was not exceeded. Claimant did not dispute that she was the only employee that kept track of the employees’ utilized vacation time and sick time in the ADP payroll book by hand for later processing by ADP during the years 2015, 2016 and 2017. Nor did she dispute or even respond to the employer’s evidence that she was the only employee that received either hundreds or thousands of dollars in unauthorized vacation and sick time wages during each of the years in question. Although claimant initially asserted that a coworker sometimes helped her prepare payroll by entering some data into the employer’s system, she later clarified that she “was the one that entered payroll into the business [system].” Audio Record ~ 57:30 to 58:15. Finally, claimant did not respond to the employer’s evidence that only when the COO mentioned at the time of the transition that she intended to examine claimant’s handwritten vacation records in the ADP payroll book did claimant mention that “the vacation hours had gone missing from there.” More likely than not, during 2015, 2016 and 2017, claimant willfully authorized ADP to issue payroll checks to her that included funds for vacation and sick hours knowing that she had already exceeded her employer authorized amounts for such hours during each of the years in question.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant’s conduct was not isolated. Claimant consciously violated the employer’s expectation that she be honest regarding payroll matters each time she authorized and then accepted

payroll checks for herself that included funds for vacation and sick time over and above her employer authorized amounts over the three year period in question. Moreover, claimant's conduct was tantamount to theft in the first degree or second degree¹ and, under OAR 471-030-0038(1)(d)(D), acts which that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that she sincerely believed, or had a factual basis for believing, that the employer would tolerate dishonest conduct in authorizing improper payroll checks to herself.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-119822 is set aside, as outlined above.

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

DATE of Service: December 28, 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

¹ Exhibit 1 shows that in 2015, claimant received 477 hours of paid leave for vacation, sick and holiday pay combined instead of the allotted 324 hours. $477 - 324 = 153 \text{ hrs.} \times (\$19.25)$ (her hourly rate [Exhibit 1]) = \$2945.25. In 2016, claimant received 360 hours of paid leave for vacation, sick and holiday pay combined instead of the allotted 324 hours. $360 - 324 = 36 \text{ hrs.} \times (\$19.25)$ (her hourly rate) = \$693. In 2017, claimant received 387 hours of paid leave for vacation, sick and holiday pay combined instead of the allotted 324 hours. $387 - 324 = 63 \text{ hrs.} \times (\$19.25)$ (her hourly rate) = \$1,212.75.

ORS 164.015 defines theft, in relevant part, as follows:

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...

A person commits the crime of theft in the first degree if the person commits theft as defined in ORS 164.015 and the total value of the property in a single or aggregate transaction is \$1,000 or greater. ORS 164.055(1)(a). Theft in the first degree is a Class C felony. ORS 164.055(3). A person commits the crime of theft in the second degree if the person commits theft as defined in ORS 164.015 and the total value of the property in a single or aggregate transaction is \$100 or more and less than \$1,000. ORS 164.045(1). Theft in the second degree is a Class A misdemeanor. ORS 164.045(2).

'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 ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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