

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0480

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85917). Claimant filed a timely request for hearing. On May 1, 2019, ALJ Seideman conducted a hearing, and on May 3, 2019 issued Order No. 19-UI-129296, concluding the employer discharged claimant, but not for misconduct. On May 22, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. However, the employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Eagle Charter School employed claimant, last as the office manager, from October 16, 2015 to February 12, 2019.

(2) The employer expected claimant, as the acting office manager, to maintain its financial records, pay the employer's invoices and make cash deposits in a timely manner, and prepare financial reports as required for the Eagle School Board. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On or about November 22, 2018, the employer had a book fair that took in \$552.17 in cash for books provided by Scholastic, an outside company, purchased at the fair. Claimant regularly took employer deposits with her at the end of the day to deposit them at the employer's bank, which had a branch down the street from her residence. On Friday, November 30, 2018, claimant took with her cash for three deposits she intended to make that day for the employer. Before stopping at the bank, claimant went to a doctor's appointment for a pregnancy checkup, and was instructed then and there by her medical provider to go directly to the hospital to have her labor induced and her child delivered. Claimant did so and forgot about three deposits she intended to make, which remained in her bag. Claimant's child was

delivered and she went on a 12-week maternity leave which began on Monday, December 3, 2018, and later was scheduled to end on February 25, 2019.

(4) During claimant's maternity leave, the acting office manager (AOM) took over claimant's duties and discovered a number of inconsistencies within the employer's financial records which, when brought to the employer's attention, raised its concern. Among those inconsistencies, the AOM discovered that claimant had paid herself overtime without written approval from her supervisor or the employer's board. The AOM also discovered that the employer's cash flow appeared to decrease during the time claimant worked as the office manager when no tracking system appeared to be in place. The AOM also discovered that some cash deposits were missing, some employer invoices had been paid late resulting in late fees, and some questionable purchases from Amazon had been made using the employer's credit card and later delivered to claimant's residence. Finally, an employee agreement prepared by claimant and giving her a \$5,000 raise, which had not been formally approved by the board, was discovered, as was a music account called Spotify paid for by the employer. These inconsistencies within the employer's financial records were collected and sent to the Oregon State Police and the employer's accounting firm for analysis.

(5) In January, 2019, while claimant was on maternity leave, the employer's principal emailed claimant and requested information regarding the whereabouts of the book fair deposit, which was not reflected in the employer's bank records, and the date her leave would end. Claimant initially responded that the book fair funds had been deposited and reported that her maternity leave would end on February 25, 2019, after the expiration of 12 weeks of leave. When later told there was no record of the deposit, claimant responded on February 6, 2019 that she had forgotten she had failed to make that deposit, which she had taken with her on her last day at work. Later that day, she emailed the employer copies of three deposit slips showing that three deposits, including the book fair deposit of \$552.17, had been made that day.

(6) Between February 6, 2019 and February 12, 2019, in response to the employer's request that she come in to discuss these issues, claimant responded that she would speak to them after the end of her maternity leave on February 25, 2019.

(7) On February 12, 2019, rather than wait for a discussion with claimant, the employer discharged her by letter, which contained the following explanation:

“Your employment is terminated because a substantial portion of your work with EAGLE was to maintain the financial records, make deposits, and provide reports. Upon review, we have found the financial records were in disarray, various payments and deposits were made months late, and we have not received financial reports to the EAGLE School Board in several months. This has broken the trust required for your employment in this position.”

Exhibit 2.

(8) On February 19, 2019, the employer's accounting firm prepared a report for the employer regarding the “discrepancies and anomalies” it found concerning claimant's work while reorganizing the employer's financial system: Exhibit 5.

One of the “discrepancies and anomalies” concerned a check to claimant for \$2,531 which the report stated duplicated a payroll check to claimant for the same amount. However, claimant’s payroll check had been voided and the second check authorized by the school board chair for that reason. Transcript (May 1, 2019, 1:30 hearing) at 30.

Another concerned a \$600 check made out to claimant for petty cash. However, the check had been endorsed by the board chair so that the office would have petty cash. It was cashed by claimant and the money placed in the cash drawer at work. Transcript (May 1, 2019, 1:30 hearing) at 30-32.

Another concerned payroll emailed to claimant’s home on several occasions. However, claimant had been given permission by her supervisor to prepare payroll checks at home during school breaks using employer computers it gave her permission to take to her home. Transcript (May 1, 2019, 1:30 hearing) at 32; Exhibit 2.

Another concerned extra payroll amounts claimant paid herself for overtime over a 14-month period when she was considered an exempt employee not eligible for overtime. However, claimant had been granted permission by two different supervisors to pay herself for that overtime. Transcript (May 1, 2019, 1:30 hearing) at 32-33.

Another concerned Amazon purchases for curtains and curtain rods, school supplies and various other items on the employer’s business account and delivered to claimant’s home. However, those items were requested by staff members for the school and sent to her home before she brought them to the school to be distributed to the staff members. Transcript (May 1, 2019, 1:30 hearing) at 33-34.

Another concerned the late payment of school invoices for lease payments on the employer’s copy machine. However, the invoices had been mistakenly emailed by the leaseholder to the prior office manager’s email account at the employer until claimant corrected the mistake. Transcript (May 1, 2019, 1:30 hearing) at 34.

Another concerned what appeared to be missing cash from three book fairs between late 2016 and the middle of 2018. The cash had been placed in a drawer that other employees had access to once given the key by claimant or another employee. Transcript (May 1, 2019, 1:30 hearing) at 34.

Another concerned checks from parents that had been deposited, but not in a timely manner. Claimant had no recollection of late deposited checks. Transcript (May 1, 2019, 1:30 hearing) at 34.

Another concerned two cash deposits that were missing from the employer’s bank account. Those two deposits were two of the three deposits made by claimant on February 6, 2019, thirteen days before the accountant’s report. The employer was unsure of the source of the third deposit of \$500 made that day. However, the \$500 deposit had been described by claimant in an employer spreadsheet. Transcript (May 1, 2019, 1:30 hearing) at 35.

Another concerned an “Employee Agreement” prepared by claimant and giving her a \$5,000 pay raise for the 2016-2017 school year, which the school board reportedly had not authorized. However, claimant prepared such agreements for every employee, her supervisor granted it to claimant at a review, reportedly after speaking to the board chair, and signed it before it was placed in her file. Transcript (May 1, 2019, 1:30 hearing) at 35.

Another concerned an IRS Form 1099 for 2017 that claimant did not prepare for her partner after he had earned \$1,050 during that year performing contracting work for the employer. However, claimant did not prepare it because she mistakenly believed at that time that the threshold amount for a 1099 was \$5,000. Transcript (May 1, 2019, 1:30 hearing) at 35.

Another concerned claimant’s payment of \$9.99 per month for 21 months for a “Spotify Premium Account,” a music application for phones and computers, which claimant occasionally logged into. However, the account existed long before claimant began her employment and often was used by staff members when they were in the classroom. Transcript (May 1, 2019, 1:30 hearing) at 35-36.

Another was the discovery during a 2017 audit that there was no system in place for student lunch deposits, which the auditors told claimant needed to be changed. However, claimant did not attempt to create one because she had not been directed to do so by the employer. Transcript (May 1, 2019, 3:30 hearing) at 5.

(9) The February 19, 2019 report was sent by the employer to the Oregon State Police for review, which later concluded the information it had reviewed contained “empty allegations” rather than “proof” sufficient to pursue a case against claimant. Transcript (May 1, 2019, 3:30 hearing) at 20.

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 connected with work. “As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer’s interest is misconduct.” OAR 471-030-0038(3)(a) (December 23, 2018). “[W]antonly negligent’ means 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.” OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, claimant’s firsthand testimony about the facts that led to her discharge substantially differed from the testimony of the employer’s witnesses, which was based largely on hearsay, including the employer’s documentary evidence. Neither claimant’s two supervisors during the period in question, nor the board chair, all of whom were referenced by claimant during her testimony,

testified at hearing. In the absence of evidence demonstrating that claimant was not a reliable witness, her firsthand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. Consequently, on factual matters in dispute, we based our findings on claimant's testimony.

On February 12, 2019, the employer discharged claimant because its financial records "were in disarray," "various payments and deposits had been made months late," and it "[had] not received financial reports to the EAGLE School Board in several months." Although the record shows that claimant may have violated the employer's expectations in those regards, viewing the record as a whole, the evidence that she did so willfully or with conscious indifference to the consequences of her actions for the employer, especially considering how and when her maternity leave began, was no more than equally balanced.

The Oregon State Police reviewed the employer's evidence and concluded it was insufficient to establish the intent necessary for it to pursue a case against her. The employer essentially agreed when it stated at the end of the second hearing that the evidence that claimant's actions were the result of conscious conduct rather than simple negligence or lack of education and training was no more than equally balanced. In this regard, its principal testified:

"Ms. Schwartz, either through negligence, or a lack of education on what an office manager and those responsible for finance are supposed to do, or through intention, and I don't know which one of those is the case here, but through those things, did financially benefit from the financial mismanagement at Eagle...And so, based on all of these things, the Board determined she was not a fit person to be the office manager and to be in charge of finances, which is what she was hired for, and for those reasons she was dismissed."

Transcript (May 1, 2019, 3:30 hearing) at 22.

Although the employer may have had sufficient reason for it to discharge claimant from her employment, the record as a whole shows that it did not meet its burden to show that claimant's discharge was for willful or wantonly negligent behavior, and not ordinary negligence and/or mere inefficiency resulting from lack of job skills or experience. Accordingly, the employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation from the employer.

DECISION: Order No. 19-UI-129296 is affirmed.

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

DATE of Service: June 28, 2019

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 desisyong ito.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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