

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0080

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 11, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause and was disqualified from receiving benefits effective November 10, 2019 (decision # 103047). Claimant filed a timely request for hearing. On January 22, 2020, ALJ Janzen conducted a hearing, and on January 23, 2020 issued Order No. 20-UI-143223, affirming the Department's decision. On January 27, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Toyota Lift Northwest/CB Toyota Lift employed claimant as a field service mechanic from December 2005 until November 12, 2019.

(2) The employer expected its employees to refrain from stealing from the employer's customers. Claimant was aware of and understood the employer's expectation.

(3) On November 7, 2019, claimant was performing work at a customer's warehouse, and when no one else was present, removed a new shirt with the customer's logo on it when no one else was present, valued by the customer at \$50, and took it with him when he left. At that time, claimant knew that taking customer property without permission "was wrong" and against company policy. Audio Record at 13:00 to 13:30.

(4) On November 11, 2019, the customer notified the employer of claimant's actions and provided it with security footage of the incident. Claimant learned from coworkers that the employer's customer told the employer what claimant had done, and that the employer would probably discharge claimant. That evening, claimant sent an email to his manager in which he offered to personally return the property he had taken from the customer, and also stated he was "too ashamed to wear it. . . . My fault, not yours. Toyota treated me good. Very selfish of me." Audio Record at 24:30 to 25:20.

(5) Upon arriving at work on November 12, 2019, claimant met with his manager and the employer's general manager of sales. Claimant openly admitted that he had taken the shirt without permission and added, "Looks like I got caught on this one. It was foolish." Audio Record at 25:20 to 26:15. When

asked by the employer what he meant by “got caught on this one,” claimant changed the subject. The employer told claimant that the customer had banned claimant from entering any of its facilities. Claimant understood that he probably would be fired and believed that it would be better for him in the future to be able to say that he resigned rather than he was fired. Claimant said to the employer, “Well, if it’s going to look better for me to move on, I can resign.” Audio Record at 10:55 to 11:50. The employer accepted claimant’s resignation that day.

(6) Claimant had not been disciplined by the employer previously for any policy violations.

CONCLUSIONS AND REASONS: Claimant quit work without good cause.

Work Separation. At hearing claimant initially denied that he quit his job with the employer, but later admitted that he offered to resign because he believed it would be better for him in the future to be able to say he resigned than to have to say that he was fired. *Cf.* Audio Record at 10:00 to 11:50, 17:15 to 17:55. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). Claimant believed he would be fired for his theft of a customer’s property but quit before that occurred. Because claimant could have continued to work for the employer for an additional period of time, but chose not to do so, the work separation was a voluntary leaving.

Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). “Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work.” OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for their employer for an additional period of time. An individual who quits work to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct has quit without good cause. OAR 471-030-0038(5)(b)(F). “Misconduct” means, in relevant part, a willful or wantonly negligent violation of the standards of behavior the employer had the right to expect of claimant. ORS 657.176(2)(a); OAR 471-030-0038(3)(a).

Claimant quit work to avoid being discharged for theft of a customer’s property. Claimant knew that taking a customer’s property without permission “was wrong” and would violate the employer’s expectations, but he did so anyway on November 7, 2019. The record shows that claimant admitted to the theft on November 12, 2019 when he met with the employer’s managers. Claimant’s failure to comply with the employer’s expectation that its employees refrain from stealing customer property was a willful violation of a standard of behavior the employer had the right to expect of him.

However, isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). It is therefore necessary to determine if claimant’s act of taking a customer’s property was an isolated instance of poor judgment or a good faith error. The following standards apply to determine whether an “isolated instance of poor judgment” occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

Although the record shows that claimant's violation of the employer's prohibition against customer theft was an isolated policy violation, it was a conscious and willful exercise of poor judgment which was at least tantamount to the unlawful conduct of theft in the third degree¹ because it involved the taking of property with a \$50 value from the employer's customer. Accordingly, claimant's conduct was not excusable as an isolated instance of poor judgment. Nor was claimant's conduct excusable as the result of a good faith error in his understanding of the employer's expectations. At hearing, claimant admitted that on November 7, claimant knew that taking customer property without permission "was wrong" and against company policy.

Because claimant's conduct consisted of a willful violation of an employer expectation, and cannot be excused under the exculpatory provisions of OAR 471-030-0038(3)(b), any discharge or potential discharge based on claimant's conduct would have been for misconduct. Accordingly, under OAR 471-030-038(5)(b)(F), because claimant quit work to avoid a discharge or potential discharge for

¹ ORS 164.015 defines theft:

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 third degree, a Class C misdemeanor, 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 less than \$100. ORS 164.043.

misconduct, he quit work without good cause and is disqualified from receiving unemployment insurance benefits on the basis of his work separation, effective November 10, 2019.

DECISION: Order No. 20-UI-143223 is affirmed.

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

DATE of Service: March 3, 2020

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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الإستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار .

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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