

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0266

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, and disqualified claimant from the receipt of unemployment insurance benefits effective January 5, 2020 (decision # 121334). Claimant filed a timely request for hearing. On March 13, 2020, ALJ Monroe conducted a hearing, and on March 19, 2020, issued Order No. 20-UI-146591, concluding the employer discharged claimant, but not for misconduct, and that he was not disqualified from receiving benefits. On March 26, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Jasper Engine Exchange, Inc., employed claimant as a salaried, outside sales representative (OSR) from April 23, 2018 until January 7, 2020.

(2) The employer provided claimant a copy of the associate handbook and OSR work instructions, which addressed company policies and expectations. The employer also conveyed its expectations to claimant during his interview process and during his orientation and training. The employer's expectations included that claimant would report to his first sales call, in a pre-determined geographic region, before 8:00 a.m., and that he would then conduct his remaining 10-12 sales calls throughout the day without allowing large gaps of time in between the calls, concluding his final sales call after 5:00 p.m. In addition, the employer's policy prohibited claimant from conducting personal activities during the workday.

(3) Claimant's initial understanding of the employer's expectations was that as long as he reported to his first sales call before 8:00 a.m., the employer "really didn't care how you completed [the remaining] ... calls you had for the day," as long as they were completed. Transcript at 17. When claimant would make sales calls with his sales manager, the sales manager would offer to take claimant to breakfast after the first sales call and the two would check e-mail and discuss their business for the day while at breakfast.

Based on these experiences, claimant believed there was no policy prohibiting him from conducting personal activities during the workday, as long as he completed his 10-12 sales calls during the day.

(4) Claimant would perform his sales calls in geographical territories divided into sections called "T groups". Transcript at 37. OSRs would typically work one T group in their geographical territory per week. Claimant's routine was to conduct his initial sales call before 8:00 a.m. near his home base in Portland. Claimant's second sales call in any given day would routinely require him to travel up to 100 miles from his first sales call (depending on the locations), and the time gap between the first two calls could be anywhere from 30 to 90 minutes. After his second sales call, claimant's remaining sales calls in a given day "were closer together on a route that worked ... myself in a direction back towards my home office physically." Transcript at 21. Claimant's sales manager reviewed claimant's T group configuration on an ongoing basis and the sales manager never instructed claimant on how he should organize his T group.

(5) In November 2018, the employer verbally counseled claimant about his failure(s) to make his first daily sales call by 8:00 a.m.

(6) On February 5, 2019, the employer counseled claimant in writing about five instances of late first calls occurring in the month of January 2019. The written counseling statement, which claimant signed, stated that claimant "will hold himself accountable to [the employer's] known standards and be sure to follow the set schedule of 8:00AM start time" and that claimant's failure to immediately meet this expectation "can lead to further disciplinary actions including separation." Exhibit 1, February 4, 2019 counseling statement. Claimant had no other issues during his employment with respect to making his first sales call by 8:00 a.m.

(7) During the 2019 calendar year, the employer imposed additional job requirements on all OSRs including providing customers a meal three times per week, and preparing a daily call planner for each of the OSRs daily sales calls. Claimant modified his daily travel routine so that he would stop for the meals, and prepare his daily call planners, during the period between his first and second sales calls. Between the drive time, the daily call planner preparation, unpredictable weather/traffic, and stopping for meals, claimant's time gap between his first sales call and his second sales call was approximately one to two hours.

(8) On December 20, 2019, claimant's sales manager conducted a performance review with claimant. The sales manager's performance review of claimant was positive and the sales manager noted no major issues with claimant's performance.

(9) On January 2, 2020, claimant's sales manager had a conversation with claimant to address "a pattern on the call transaction file from December 2019 where [claimant] would make a first call and then there would be a gap from 1-2 hours until his second call." Exhibit 1, spreadsheet. Claimant indicated that during the first and second sales calls he would "grab coffee/breakfast and write up call plans and take care of personal errands during that time." Exhibit 1, spreadsheet. The sales manager told claimant that this pattern of behavior needed to immediately stop; that these things needed to be done either before or after the workday, or during lunch (if he was not eating with a customer), and that claimant needed to change his working process to eliminate the one to two hour gap. Prior to the discussion, claimant was not aware that the time gaps between his first and second sales calls were violating the employer's

expectations. Claimant told the sales manager he would change his behavior. Claimant believed that he would need to reorganize his sales territory in order to meet these time requirements, which would take some time.

(10) After the January 2, 2020 conversation, claimant attempted to shorten the drive time between his first and second sales calls by choosing “a destination that was closer,” and by not making personal stops. Audio Record at 54:25.

(11) On January 3, 2020, the time gap between claimant’s first and second sales call was one to two hours.

(12) On January 7, 2020, the employer discharged claimant based on the one to two hour time gap that had occurred between claimant’s first and second sales calls on a daily basis.

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 demonstrate misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer failed to meet its burden in establishing that claimant was discharged for misconduct. The record demonstrates that until January 2, 2020, claimant reasonably believed that his travelling approach between his first and second sales calls not only met the employer’s expectations, but also was consistent with those expectations. During the time gap between the first two sales calls of the day, claimant would routinely travel a distance of up to 100 miles and the travel time could take anywhere from 30 to 90 minutes. In that time window, claimant would also address two additional employer expectations; that claimant bring a meal to his customers three times per week and that claimant prepare call planners for all of his daily sales calls. Claimant would also occasionally conduct personal activities during this time window due to his understanding that the employer did not prohibit such activities as long as claimant completed the required 10-12 daily sales calls. Claimant’s sales manager reinforced the validity of claimant’s approach to the time between claimant’s first and second sales calls in multiple ways, including: (1) by taking claimant to breakfast after their first sales call to eat and discuss the day’s business, during the early part of claimant’s employment; (2) by never taking issue with claimant’s T group arrangement, nor how claimant organized his travel between sales calls; and (3) by providing claimant a positive performance review on December 20, 2019, where the sales manager identified no issues with claimant’s performance.

On January 2, 2020, the employer informed claimant that his traveling/time approach between the first and second sales calls would have to immediately change to eliminate the one to two hour gap. The record reflects that claimant made immediate attempts to modify his behavior between the first and second sales calls by choosing second sales call destinations that were closer, and by eliminating stops related to personal activities. Although claimant's January 3, 2020, time gap between his first and second sales call was one to two hours, and although this time gap violated the employer's expectations, claimant's actions were not misconduct under the totality of the circumstances. Rather, the preponderance of the evidence shows that after the January 2, 2020, meeting, claimant understood that he would need to make immediate changes to his travel approach and that, consistent with his past history of proactively implementing changes the employer required, claimant made immediate efforts to reduce the time gap between his first and second sales call. The record also demonstrates, however, that more travel reorganization of his sales territory, and more time to make this travel reorganization, would be necessary. Claimant's immediate efforts to institute changes to his travel approach reflect concern, not indifference, to the standards of behavior the employer expected. His failure to immediately achieve the employer's desired results therefore was not the result of willful or wantonly negligent conduct by claimant.

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

DECISION: Order No. 20-UI-146591 is affirmed.

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

DATE of Service: April 24, 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 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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