

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0440

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and disqualifying claimant from receiving unemployment insurance benefits effective March 15, 2020 (decision # 55632). Claimant filed a timely request for hearing. On May 18, 2020, ALJ McGorin conducted a hearing and issued Order No. 20-UI-149939, affirming the Department's decision. On June 2, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision to the extent it was based on the record in this case.

FINDINGS OF FACT: (1) Coca Cola Bottling Co. employed claimant from June 29, 2017 until March 16, 2020. Claimant began as a merchandiser, and became an account manager in January 2018.

(2) The employer expected account managers to follow its "waste and break" policy, which was to remove any outdated product from vendor account shelves to ensure that no outdated product was available for customers to purchase. Transcript at 7. All the employer's products contained expiration dates. Account managers were required to send outdated product back to the employer for disposal. The employer set a monthly budget for how much product would be returned from each account manager's account stores, and expected that each account manager would not exceed its monthly budget for returned product. If an account manager returned the product before it became outdated, it did not count against the account manager's budget. Claimant understood the employer's expectations.

(3) On March 3, 2019, the employer gave claimant a verbal coaching for failing to follow its waste and break policy in January 2019. On March 15, 2019, the employer gave claimant a written coaching for failing to follow the waste-and-break policy that month. The two March 2019 warnings were due to claimant exceeding his monthly budget for returned product in January and February 2019. The warning

was given to all the members of claimant's account manager team. Claimant did not receive additional warnings after March 2019 for exceeding his monthly budget.

(4) During December 2019, the employer hired some new merchandisers to work in the stores where claimant had accounts. One of the merchandizers' duties was to rotate product so the oldest product was in front on the shelves.

(5) On December 2, 2019, claimant called his supervisor and reported that he was removing product from a vendor's shelves that expired that day. On January 14, 2020, claimant's supervisor gave claimant a final written coaching for failing to remove the product from the store before its December 2, 2019 expiration date. The warning stated that the employer expected claimant to follow the employer's waste and break policy. The coaching stated that another violation of the waste and break policy could result in the employer discharging claimant.

(6) After the January 14, 2020 warning, claimant "tried to come up with different plans [to remove all outdated product]," and tried "to do everything that [he] possibly could" to look through all the product. Transcript at 28. After his initial rounds to his account stores, claimant returned to stores and looked again at "problem areas" where he had missed outdated product in the past, and removed product that was close to its expiration dates. Transcript at 29. In larger stores, claimant spent two to three hours checking for outdated product. Claimant reviewed "thousands" of expiration labels on his rounds to his account stores. Transcript at 32. Claimant tried to check every product in his account stores, and believed that he had done so.

(7) On March 4, 2020, claimant's supervisor found one bag of the employer's coffee with a February 3, 2020 expiration date on a store shelf at one of claimant's account stores.

(8) On March 6, 2020, claimant's supervisor received a "merchandiser's recap" of stores' product that needed to be returned for credit. The report showed that one of claimant's account stores had product to return that expired December 23, 2019.

(9) On March 10, 2020, claimant's supervisor conducted a random audit of the employer's product in stores to make sure account managers were removing outdated product from those stores. Claimant's supervisor found five four-packs of outdated bottles of the employer's soda with a February 2020 expiration date on a store shelf in one of claimant's account stores. Following the supervisor's discovery of the outdated product on March 10, the supervisor decided to discharge claimant.

(10) On March 16, 2020, the employer discharged claimant for failing to follow its waste and break policy on March 4, 6 and 10, 2020.

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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Order No. 20-UI-149939 concluded that the employer discharged claimant for misconduct, reasoning that claimant’s three violations of the employer’s waste and break policy in March 2020 were a wantonly negligent violation of the employer’s policy.¹ The order reasoned that, as claimant had testified, “nothing prevented claimant from removing the expired product,” and claimant, “simply overlooked the expired products.”² The order further reasoned that claimant’s conduct could not be excused as an isolated instance of poor judgment because it was a repeated act.³ However, the record does not support the order’s conclusions and reasoning.

It was undisputed in the record that claimant violated the employer’s waste and break policy by failing to remove five four-packs of soda, one bag of coffee, and additional product in one other vendor’s store in March 2020. For claimant’s violation to be considered misconduct for the purpose of disqualifying him from receiving unemployment insurance, however, the violation must have been done willfully or with wanton negligence. Claimant’s violation was not willful; he intended to remove all of the outdated product from the stores with which he had accounts. He did not intentionally fail to see any outdated product because he believed that he had checked every product in all the stores where he had accounts. Claimant’s violation was also not wantonly negligent because wanton negligence requires an exercise of conscious indifference to the consequences of his conduct. Claimant knew that the employer expected him to remove all outdated product, and testified that “he did everything in his power” to remove the outdated product. Transcript at 29. Claimant did not disregard the employer’s interest. Rather, claimant tried to develop a plan to check all of the thousands of products for outdated products, and returned to the stores that were “problem areas” to double-check the products there. Claimant’s job also became more difficult when the employer hired new merchandisers who were still learning to rotate the product properly.

Because claimant’s March 2020 violations of the employer’s waste and break policy were not willful or wantonly negligent, the conduct that resulted in claimant’s discharge was not misconduct. Therefore, claimant is not disqualified from receiving unemployment insurance benefits based on his work separation.

DECISION: Order No. 20-UI-149939 is set aside, as outlined above.

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

¹ Order No. 20-UI-149939 at 4.

² Order No. 20-UI-149939 at 4.

³ Order No. 20-UI-149939 at 4.

DATE of Service: July 9, 2020

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveygizmo.com/s3/5552642/EAB-Customer-Service-Survey>. You can access the survey using a computer, tablet, or smartphone. If you are unable to complete the survey online and need a paper copy of the survey, please contact our office.



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 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

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 الاستئناف 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.

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

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.