

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0757

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 19, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant not for misconduct (decision # 61843). The employer filed a timely request for hearing. On November 16, 2020, ALJ Murdock conducted a hearing, and on November 23, 2020 issued Order No. 20-UI-156815, affirming the Department's decision. On December 3, 2020, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) Lowes Home Centers LLC employed claimant from November 28, 2012 until January 13, 2020 as a store asset protection manager (APM).

(2) The employer's policy for handling legal matters provided that an in-store APM had to first obtain the approval of the district APM, regional director of asset protection, or vice president of asset protection before the store manager could "call a law enforcement office for any reason as it relates to pursuing the arrest or prosecution of customers or associates." Exhibit 1 at 7. The employer expected in-store APMs to compile data regarding an alleged criminal incident, give that information to a higher level APM to decide if the employer would grant permission to contact the police regarding the incident, and, if permission was granted, contact the police about the incident. The only exception to the policy was when there was an immediate danger present, in which case the in-store APM was permitted to dial 911. Claimant was aware of the employer's policy for handling legal matters.

(3) Claimant had a "strong, working relationship" with the local police department where he worked. Transcript at 16. Police officers patrolled the store parking lot daily. At times, claimant contacted the police for assistance while he was investigating incidents that occurred at the store.

The police would sometimes locate suspects in those incidents and arrest them “on their own accord.” Transcript at 17. When claimant told the district APM about those incidents, he did not instruct claimant to do anything to stop the police from pursuing the cases.

(4) On one occasion, claimant called the district APM and asked him if he should call the police about some individuals in the store who were suspected of engaging in credit card fraud in some of the employer’s other locations in the area. The district APM asked claimant how anybody would know if claimant contacted the police. Claimant understood from the district APM’s response that even if claimant’s conduct might violate the employer’s policy for handling legal matters, claimant contacting the police was permitted as long as the district APM “could be left out of it.” Transcript at 18.

(5) On another occasion, the president of asset protection told claimant that he was permitted to contact the police without prior approval on the rare occasion where the police would be able to catch an individual in the act of committing a crime. On August 16, 2018, claimant saw an individual taking recyclable cans from a trailer behind the store and contacted the police. The police arrived and arrested the individual while they were in the act of taking the cans.

(6) On February 22, 2019, May 27, 2019, and June 4, 2019, claimant had empty merchandise packages in his office and allowed police officers to record the serial numbers from the packages as stolen property. Claimant did not consider the act of reporting serial numbers as stolen property as tantamount to contacting the police to prosecute a particular individual. The regional vice president of asset protection had once asked claimant about the empty packages, and when claimant told him that the police took the serial numbers from the packages to record them as stolen, the regional vice president of asset protection did not tell claimant he was not permitted to allow the officers to record the serial numbers.

(7) In January 2020, the senior in-store APM, who worked with claimant, asked claimant for information about a customer. Claimant told the senior APM that there were prior “filings” regarding that customer. Transcript at 4. The senior in-store APM relayed this to the district APM, who then searched the employer’s records and found no prior approval from a higher-level APM to pursue prosecution against the customer. As a result, the district APM contacted the local police department for police reports pertaining to the store where claimant worked, and found multiple police reports in response to information provided by claimant regarding the store where he worked. However, the employer’s records did not show that a higher-level APM had given prior approval for any of those police contacts.

(8) On January 10, 2020, the district APM discussed with claimant multiple police reports that he obtained from local police where the employer did not have a record of giving prior approval for police contact. The police reports included a report from the August 16, 2018 arrest of the individual allegedly stealing cans from behind the store, and a report regarding a police response to an alleged shoplifting attempt on January 30, 2019. Claimant had contacted the police about those incidents, but never submitted information about those incidents to the employer.

(9) The other police reports the district APM discussed with claimant on January 10, 2020 included reports generated on February 22, 2019, May 27, 2019, and June 4, 2019 based on serial numbers the

police recorded from empty merchandise packages in claimant's office. Claimant submitted "known theft reports" regarding these three incidents to the district APM, but stated on the "known theft reports" that he was not seeking prosecution for those incidents. Exhibit 1 at 5.

(10) Prior to January 10, 2020, claimant had never been disciplined, warned, or otherwise given notice that he was not acting in accordance with the employer's policy for handling legal matters.

(11) On January 13, 2020, the employer discharged claimant for violating its policy for handling legal matters by contacting law enforcement without prior approval from the employer's district APM, regional director of asset protection, or vice president of asset protection.

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) (September 22, 2020). "[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). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because on multiple occasions, he did not obtain permission before he gave the police information about alleged criminal incidents at the store where he worked. The employer's expectation that claimant obtain permission before contacting the police, except in the case of immediate danger, was reasonable. Claimant understood that he was supposed to obtain permission before he called the police to pursue the arrest or prosecution of customers or associates. It is undisputed that claimant violated that expectation on multiple occasions because he gave the police information that generated police reports without first contacting a supervisory APM.

However, although claimant violated the employer's expectations when he allowed police to record serial numbers from empty merchandise packages in his office, the record shows that claimant did not understand that such conduct violated the employer's policy for handling legal matters. Claimant testified, "I didn't see any issues with this because there's no prosecution of anybody for these. They're entering serial numbers into a data base as . . . being stolen." Transcript at 21. Because claimant did not consider reporting serial numbers as stolen property to be contacting the police to prosecute a particular individual, he mistakenly believed that the employer would not require him to obtain permission before allowing the police to record the serial numbers. Moreover, because claimant had told the regional vice president of asset protection about reporting the serial numbers to the police, and the regional vice president did not tell claimant to discontinue the practice, claimant had a reasonable, albeit erroneous, basis to believe that he was complying with the employer's expectations.

On other occasions, such as when he believed individuals were engaged in credit card fraud or stealing recyclable cans, claimant contacted the police without filing the proper paperwork with a supervisory APM also based on a good faith error. On those occasions, claimant mistakenly believed that the district APM permitted him to contact the police if the individual was in the act of committing a crime, or if claimant reported an incident without involving the employer in the report. Claimant's mistaken belief that the employer would condone his act of reporting the alleged crimes to police was based in part on the district APM's comment that claimant could contact the police without explicit permission if he were to leave the district APM "out of it." Claimant testified that the district APM told him, "something to the extent of how would anybody know if you contacted police," and that claimant understood the comment to mean that "it was okay if [the district APM] was able to look the other way." Transcript at 18.

Although claimant's failure to obtain the employer's permission before he contacted the police violated the employer's expectations, the record shows that claimant did so with the sincere belief that he was complying with the employer's expectation. Under OAR 471-030-0038(3)(b), claimant's conduct was a good faith error, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 20-UI-156815 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: January 8, 2021

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 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 ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄຳຕັດສິນນີ້.

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.

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