

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0062

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 17, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant therefore was not disqualified from receiving unemployment insurance benefits (decision # 112547). The employer filed a timely request for hearing. On January 25, 2021, ALJ Frank conducted a hearing, and on January 27, 2021 issued Order No. 21-UI-159886, affirming the Department's decision. On January 29, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Truax Corporation employed claimant as a fuel station attendant from May 20, 2019 until September 13, 2019.

(2) The employer expected fuel attendants to follow the employer's cash handling policies, which were provided to fuel attendants in writing at hire. One of the policies made each fuel attendant solely responsible for their assigned till and required the attendant to ensure that at the end of their shift, their till was balanced with the sales made during their shift in order to minimize accounting discrepancies, such as cash shortages and overages. Another policy required fuel attendants to follow the employer's "drop procedures." Exhibit 1. A "drop" was a periodic deposit of cash from the assigned till into a nearby safe. Transcript at 5-6. The policy forbade the attendant from allowing the attendant's assigned till to contain more than \$300 at any time, and the attendant was expected to frequently "drop" the till money into the nearby safe to avoid exceeding the \$300 limit. Claimant was aware of and understood the employer's cash handling policies that required attendants to maintain a balanced till, and ensure that the till did not contain more than \$300 by making as many money drops into the designated safe as necessary to comply with the policy.

(3) On both June 22, 2019 and June 23, 2019, claimant's assigned till was unbalanced with her sales at the end of her shifts resulting in cash shortages for both shifts. On June 24, 2019 the employer issued a written warning to claimant concerning the shortages. The warning attributed claimant's cash shortages to "carelessness," and stated that any future shortages could result in disciplinary action up to and

including suspension or termination of employment. Exhibit 1 at 5. On June 25, 2019, claimant acknowledged her receipt of the warning and the statement contained therein that she was “responsible to make frequent cash drops to ensure the cash till remains under the till limit of \$300.” Exhibit 1 at 5.

(4) On September 1, 2019, claimant’s assigned till was unbalanced with her sales at the end of her shift, resulting in a cash shortage of \$12.86. Employer records also showed that claimant made three drops of \$300 from her till to the designated safe at 5:08 p.m., which was within an hour of the end of her shift at 6:00 p.m. Exhibit 1 at 4.

(5) On September 3, 2019, claimant completed a questionnaire for the employer concerning the cash shortage of \$12.86. Although claimant reported in the questionnaire that the station was “not really” busy and she “wasn’t that busy” during her shift on September 1, 2019, her answers showed that she was not aware that her till was unbalanced at any time during her shift while receiving and counting money from customers. Exhibit 1 at 3.

(6) The employer concluded that because their records showed that claimant made three successive drops of \$300 beginning at 5:08 p.m. during a shift when she was “not really” busy, claimant had violated its policy prohibiting attendants from allowing their tills to exceed the \$300 limit at any time during a shift. On September 13, 2019, the employer discharged claimant for violating its “drop procedures” policy on September 1, 2019. Although the employer’s termination report stated that claimant had also failed to comply with the employer’s policy “to maintain a balanced till” on September 1, 2019, the employer would not have discharged claimant from employment if that had been claimant’s only policy violation on September 1, 2019. Exhibit 1 at 2; Transcript at 6.

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 are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for violating its “drop procedures” policy on September 1, 2019 by making three successive “drops” of \$300 from her till to the designated safe at 5:08 p.m., within an hour of the end of her shift. The employer reasonably expected claimant to follow the employer’s drop procedures on September 1, 2019 because she acknowledged in writing that she was aware of the policy on June 25, 2019. Exhibit 1 at 5. At hearing, claimant testified that she did not violate the employer’s drop procedures policy that day because she had forgotten about it. Transcript at 22. Rather, she explained, she was unable to comply because she was “was the only one there.” Transcript at 22.

However, later in the hearing, claimant testified that another employee reported to work at around 3:00 p.m., although she was not sure about the time of his arrival. Transcript at 23, 26. When asked to explain the inconsistency between her testimony more than a year after the event, that she was busy on that day, and her responses to the questionnaire two days after the event that she was “not really” busy that day, claimant responded, “I’m not sure.” Transcript at 20. Because claimant testified that she did not forget about the employer’s drop procedures on September 1, 2019 and was inconsistent in her explanations concerning why she was unable to comply with those procedures that day, more likely than not, claimant was conscious of the fact that she was not making her drops as required during her shift on September 1, 2019 and knew or should have known not doing so probably violated the employer’s drop procedures policy. Accordingly, claimant’s September 1, 2019 conduct in violating that procedure was at least a wantonly negligent violation of a standard of behavior the employer had the right to expect of her.

However, claimant’s wantonly negligent conduct on September 1, 2019 in violating the employer’s drop procedures is excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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 employer presented evidence that on June 22, 2019 and June 23, 2019 claimant violated its policy that required attendants to ensure that at the end of their shift their tills were balanced, the employer failed to meet their burden to show that claimant’s violations of that policy on those dates were either willful or wantonly negligent. The employer attributed claimant’s cash shortages on June 22, 2019 and June 23, 2019 to “carelessness,” and the evidence presented regarding claimant’s cash shortage on September 1, 2019 failed to establish that claimant was conscious of the fact that her till was unbalanced at any time during her shift that day. Exhibit 1 at 3 and 5. Moreover, the employer’s witness testified that the employer would not have discharged claimant on September 13, 2019 based only on the

September 1, 2019 cash shortage. Transcript at 6. More likely than not, claimant's September 1, 2019 conduct in violating the employer's drop procedure was no more than an isolated instance of wantonly negligent conduct.

The record also fails to show that claimant's September 1, 2019 drop procedures violation exceeded mere poor judgment by violating a law, being tantamount to a law violation, creating an irreparable breach of trust in the employment relationship, or otherwise making a continued employment relationship impossible. Although the employer viewed claimant's conduct in that regard that day as a terminable offense, viewed objectively, claimant's conduct was not so egregious that it made a continuing employment relationship impossible. Therefore, claimant's September 1, 2019 drop procedures violation did not exceed mere poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Accordingly, claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Order No. 21-UI-159886 is affirmed.

S. Alba and D. P. Hettle.

DATE of Service: March 8, 2021

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 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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