

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0718

Reversed & Remanded

PROCEDURAL HISTORY: On May 25, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 163208). The employer filed a timely request for hearing. On August 18, 2021, ALJ Ramey conducted a hearing at which claimant failed to appear, and on August 23, 2021 issued Order No. 21-UI-173112, reversing decision # 163208 by concluding that claimant was discharged for misconduct and was disqualified from receiving benefits effective April 18, 2021. On September 2, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ace Cash Express, Inc. employed claimant as a sales associate from October 8, 2018 until April 22, 2021.

(2) The employer maintained a cash-handling policy that required employees to be responsible for the accuracy and security of cash receipts and distributions. Employees were required to complete counts at the start of a shift, throughout the day, and when they closed out their tills. Employees were also required to immediately report to the district manager any discrepancies over \$5.00. The employer also maintained a check-cashing policy that required employees to, among other things, react to “red flags” raised by specific checks. Exhibit 1 at 5. These policies were provided to claimant at the time she began working for the employer.

(3) On January 7, 2021, the employer issued a written warning to claimant for a \$300.00 shortage in her drawer. Claimant told the employer that she believed the discrepancy was the result of her giving too much cash to a customer.

(4) On February 25, 2021, the employer issued claimant a written warning for having cashed three forged checks on February 13 and 15, 2021 which totaled \$3,461.00 after having failed to follow the employer’s check-cashing policy.

(5) On April 10, 2021, claimant was working alone, and the store's safe was balanced at the beginning of the day. At the end of her shift, claimant's cash drawer was short \$100.52. Claimant conducted 35 transactions that day. Claimant did not contact management about the shortage. The following day, the district manager discovered the shortage through an audit. When claimant was asked about the shortage, she did not provide a reason for why the drawer was short or why she did not contact management about it.

(6) On April 22, 2021, the employer discharged claimant because her drawer was short on April 10, 2021.

CONCLUSIONS AND REASONS: Order No. 21-UI-173112 is set aside and this matter remanded for further development of the record.

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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (September 22, 2020).

The employer discharged claimant due to the shortage in her drawer on April 10, 2021. The order under review concluded that claimant "willfully violated the cash handling policy by not contacting her district manager to report the shortage," or at least ". . . demonstrated an indifference to" the employer's policy, and was therefore discharged for misconduct. Order No. 21-UI-173112 at 4. The record as developed does not support this conclusion.

The record supports a conclusion that claimant's unexplained shortage on April 10, 2021 was the result of ordinary negligence on claimant's part. However, further inquiry is needed to determine whether it demonstrated either that claimant willfully violated the employer's standards of behavior or that she acted with indifference to the consequences of her actions. Given the amount of transactions claimant completed each day—she completed 35 on April 10, 2021—it is reasonable to conclude that someone in claimant's position could occasionally make errors in cash-handling, even when reasonable precaution is taken. The record as developed shows that claimant made one other cash-handling error, about three months prior, and that the employer subsequently issued her a written warning with an "expectation/improvement plan" for claimant to follow thereafter. Exhibit 1 at 6. On remand, the record should be developed to show what procedures the employer believed that claimant failed to follow which led to the shortage on April 10, 2021, whether claimant was aware of those procedures, whether

she consciously neglected to follow them, and what efforts to improve, if any, claimant demonstrated after the January 2021 written warning.

Further, even if the record on remand shows that claimant's cash shortage on April 10, 2021 was the result of her willful or wantonly negligent behavior, further inquiry should be made to determine whether the shortage constituted an isolated instance of poor judgment. In addition to the January 2021 cash shortage, claimant was also issued a written warning in February 2021 for failure to follow the employer's check-cashing policy. The record as developed is insufficient to determine whether either of those failures were the result of willful or wantonly negligent behavior, and therefore whether the April 2021 incident was isolated or part of a pattern of behavior.¹ On remand, the record should be so developed. Regarding the January 2021 cash shortage, further inquiry should be made to determine what procedures the employer believed claimant to have failed to follow which led to the shortage, whether claimant was aware of those procedures, and whether she consciously neglected to follow them. Regarding the February 2021 forged check incidents, further inquiry should be made to determine what the employer's specific requirements were regarding "red flags" and how claimant was supposed to respond to them, whether claimant was aware of those requirements, and if so whether she consciously ignored them in regards to the forged checks.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant was discharged for misconduct, Order No. 21-UI-173112 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-173112 is set aside, and this matter remanded for further proceedings consistent with this order.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: October 7, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-173112 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

¹ *See* OAR 471-030-0038(1)(d)(A).



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 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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