

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1044

Reversed
Disqualification

PROCEDURAL HISTORY: On September 17, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and that claimant was disqualified from receiving unemployment insurance benefits effective August 29, 2021 (decision # 111216). Claimant filed a timely request for hearing. On November 10, 2021, ALJ Scott conducted a hearing, and on November 12, 2021 issued Order No. 21-UI-179604, reversing decision # 111216 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from receiving benefits based on the work separation. On December 2, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Columbia State Bank employed claimant as a branch manager from April 1, 2013 to September 1, 2021. Prior to April 1, 2013, claimant was employed as a branch manager by a predecessor bank, which the employer subsequently acquired. Claimant began working with the predecessor bank on June 25, 2001.

(2) Due to the "highly regulated" nature of the banking industry, the employer maintained a policy requiring that any hand-written changes to a loan application document include, in the vicinity of the hand-written change, the initials of the applicant or, at the very least, the initials of the bank manager who made the change. Transcript at 8. The employer also required their bank managers to comply with "[R]egulation B," a Federal legal requirement that "loans be submitted [to the loan department] within three days of receipt for . . . decisioning (sic)." Transcript at 7. A failure to comply with "Regulation B" requirements requires the employer to report the violation to regulators and could subject the employer to a fine. Claimant was aware of and understood both of these expectations.

(3) On April 23, 2021, claimant received via email an application for a home equity line of credit (HELOC) from a customer of the bank. The customer's HELOC application included five locations where the customer signed the application documents next to a "4/23" designation reflecting the date of their signature. Transcript at 6. The customer included a copy of their property tax statement and their income tax returns from 2019 and 2020 with their HELOC application.

(4) On April 27, 2021, claimant sent an email to the customer which acknowledged receipt of the HELOC application and advised the customer that claimant would "get [the application] submitted [to the loan department] today!" Exhibit 1 at 4. Claimant did not submit the customer's HELOC application to the loan department on April 27, 2021.

(5) Sometime between April 28, 2021 and May 7, 2021, claimant printed the customer's HELOC application and then "change[d] the [customer's signature] date" from "4/23" to "4/28" in five separate locations on the application document. Transcript at 6, 14. Claimant made these date changes by modifying the digit "3" in the date so that it looked like an "8". Claimant did not place his initials on any of the five date changes, nor did he contact the customer for purposes of obtaining their initials by the five date changes on the HELOC application.

(6) On May 7, 2021, claimant submitted the HELOC application to the loan department for review. At the time of claimant's submission, the HELOC application was in violation of the three-day "Regulation B" requirement. Claimant had previously violated the three-day submission requirement with prior HELOC applications, but avoided discipline in each instance because the applications were missing required paperwork the customer was required to submit in order to make them complete.

(7) On August 18, 2021, the employer became aware of the changes made to the dates on the HELOC application when the customer contacted the employer due to their inability to obtain information about the application's status from claimant.

(8) On August 30, 2021, the employer placed claimant on administrative leave while they investigated the circumstances surrounding the changes that claimant had made to the customer's HELOC application and claimant's delay in submitting the application to the loan department for review. As part of the investigation, the employer asked claimant whether he had changed the signature dates on the HELOC application. Claimant first responded by stating that "he would never change a date," and then later responded that "he must have changed it to clarify the date." Transcript at 6. The employer determined that the date changes claimant had made on the application constituted a deliberate "forge[ry]" and a "fraud" and, consistent with regulatory requirements, reported the incident, along with the "Regulation B" violation, to regulatory authorities. Transcript at 9–10.

(9) On September 1, 2021, the employer discharged claimant for improperly changing the signature dates on the customer's HELOC application and for violating "Regulation B" by delaying submission of the application to the loan department.

CONCLUSIONS AND REASONS: The employer discharged claimant 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 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).

The order under review concluded that claimant had testified credibly that although he was aware of the employer’s expectations, the date change he made on the HELOC application was a “mistake” and not willful, which therefore did not amount to misconduct connected with work. Order No. 21-UI-179604 at 4. In making this credibility determination, the order under review found it persuasive that claimant “had [nothing] to gain” by purposely changing the date on the application because even with the changed “4/28” date the application would have still been in violation of the “Regulation B” requirements as it was not submitted to the loan department until May 7, 2021. Order No. 21-UI-179604 at 4. The order under review also concluded that even if claimant’s actions were deemed willful, he still would not have been disqualified from benefits because his actions in changing the application date met the definition of an isolated instance of poor judgment and his failure to meet the “Regulation B” timeline amounted to a good faith error. Order No. 21-UI-179604 at 4. The record does not support these conclusions.

The record shows that claimant's actions in altering the date on the HELOC application were the result of a willful violation of the standards of behavior which the employer had the right to expect. At the time claimant made the date alterations, claimant had been a bank manager for nearly 20 years and understood that any hand-written changes to a customer's loan documents needed to be initialed by the customer or the bank manager. Claimant also understood that he was required to submit any loan application to the loan department within three days of receipt. Contrary to the order under review's findings, the record shows that claimant *did* have something to gain by changing the customer's application signature date from April 23 to April 28. By making this date change prior to submitting the application to the loan department on May 7, 2021, claimant more likely than not believed he could mitigate the impact of his "Regulation B" timeliness violation based on the view that it would be a less egregious violation of the rule to submit the application on May 7, 2021, if the application was dated April 28, 2021 instead of April 23, 2021.

The record suggests that claimant more likely than not took this view based on prior experiences he testified to where the employer had not disciplined claimant for submitting loan applications outside of the three-day requirement. Transcript at 16. However, the record demonstrates that in those prior occasions, claimant *could not* timely submit the loan applications to the loan department because he was "waiting for additional documentation from the client," thereby distinguishing those situations with the circumstances in this case. Transcript at 16. Here, although claimant testified that he could not submit the loan documents until May 7, 2021 because he was waiting for the customer's "tax statement or the property statement," the record shows that claimant never mentioned the need for either of these statements when interviewed by the employer during their investigation. Transcript at 19–20. The record shows that the customer *actually provided* these statements with their HELOC application on April 23, 2021. Exhibit 1 at 2.

Furthermore, additional record evidence weighs against the conclusion that claimant's action in changing the date was the result of a "mistake" rather than deliberate action. Claimant testified that he made the changes on the application in an attempt to "emphasize or make the document more clear." Transcript at 14. However, this was not a situation where claimant changed only one date on the HELOC application. Rather, claimant changed *five* dates, making it more likely than not that his conduct was not the result of a mistake because of the unlikelihood that the date would need to be "clarified" in five different places on the application. Furthermore, when presented on cross-examination with a copy of the customer's original application with the "4/23" date, claimant acknowledged that the date on that copy was indeed "4/23", but asserted that the copy he printed from the customer's email did not reflect the "4/23" date as clearly. Transcript at 21. Yet, when faced with an unclear copy of the application in April 2021, and despite his years of experience and knowledge of the employer's expectations, claimant neither cross-referenced the unclear printed version of the application with the emailed version nor contacted the customer to confirm the actual date of signature. Instead, claimant made the unilateral decision to change the date to "4/28" in multiple locations and submit the altered document to the loan department for review. In light of these circumstances, the preponderance of the evidence shows that claimant willfully disregarded the employer's expectations when he changed the signature dates on the application document.

Claimant's conduct cannot be excused as an isolated instance of poor judgment because it exceeded mere poor judgment. Claimant understood the regulatory significance of following the employer's expectations with respect to making hand-written changes to loan documents and complying with the

three-day “Regulation B” requirement. However, because of claimant’s violation of both of these requirements, the employer was required to report the infractions to regulatory authorities. The employer testified that they viewed their only available option as discharge. Transcript at 10. The record supports this conclusion, as claimant’s conduct created an irreparable breach of trust in the employment relationship and made a continued employment relationship impossible. Likewise, because the preponderance of the evidence shows that claimant willfully committed this misconduct in order to minimize the impact of his untimely submission of the HELOC application to the loan department, claimant’s actions cannot be excused as a good faith error.

For the above reasons, claimant was discharged for misconduct, and is disqualified from receiving unemployment insurance benefits effective August 29, 2021.

DECISION: Order No. 21-UI-179604 is set aside, as outlined above.

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

DATE of Service: January 12, 2022

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 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

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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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