

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-1093

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 28, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying from receiving unemployment insurance benefits effective April 19, 2020 (decision # 115901). Claimant filed a timely request for hearing. On December 9, 2021, ALJ Scott conducted a hearing, and on December 13, 2021 issued Order No. 21-UI-181751, reversing decision # 115901 by concluding that the employer discharged claimant, but not for misconduct, and that claimant was not disqualified from the receipt of benefits based on the work separation. On December 20, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered the employer's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Baxter Auto Parts Inc., a retail auto parts store, employed claimant as a parts counterman from February 6, 2020 to April 23, 2020.

(2) The employer's business practices included providing retail discounts on purchases to certain categories of people who either did business with the store or worked for the store. To administer these discounts, the employer set up accounts in the employer's computer system, such as employee accounts, employee friends and family accounts, and "car club" accounts. Audio Record at 08:04. Once the account was created, and an authorized purchaser under the account made a purchase, the correct retail discount would automatically appear for the purchase. The employer had no formal orientation program for new employees, but expected their employees to learn their job responsibilities, including the employer's retail discount policies and procedures, "on the fly . . . from the people around you." Audio Record at 10:45.

(3) Prior to February 11, 2020, a former store manager for the employer approved claimant's request, and helped claimant set up, a car club account for claimant's friends who were in a car club. Audio Record at 16:34.

(4) During claimant's employment, his friends in the car club made multiple purchases under the car club account, which resulted in "extremely deep discounts" associated with those purchases. Audio Record at 08:27. For example, on one occasion claimant sold an item under the account for \$50.00 that retailed for \$64.36, and on a second occasion sold an item that retailed for \$407.99 for \$240.00. Claimant recognized that when he applied the car club discount for his eligible friends the discount applied would bring the prices "way down," but he asked the former store manager if "this was right," and the former store manager told him, "yeah . . . it's fine." Audio Record at 16:53 to 17:01. On multiple occasions, claimant manually changed the discounted price initially provided by the system by rounding the discounted price up to the nearest dollar in order to accommodate car club members who paid cash and did not want change.

(5) In Mid-March 2020, the employer placed a new store manager at claimant's store. The new store manager subsequently noticed that the store's "margins were low" and conducted an investigation to determine the cause. Audio Record at 08:19.

(6) On April 23, 2020, the employer discharged claimant for theft after their investigation determined that the store's low margins were the result of claimant's actions in applying deep discounts for multiple purchases made on the car club account, and that the discounts he applied were "above and beyond anything that [was] set in the computer." Audio Record at 08:30.

CONCLUSIONS AND REASON: 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).

The employer failed to establish that it discharged claimant for misconduct. The record shows that the employer discharged claimant for theft because they determined that claimant had, on multiple occasions, provided retail discounts to friends via the car club account claimant established that were "above and beyond anything that [was] set in the computer." However, while the employer's policy prohibiting theft through the fraudulent application of its retail discount program was reasonable, and while claimant knew or should have known of these employer expectations as a matter of common sense, the employer failed to meet their burden to show that claimant violated the employer's expectations willfully or with wanton negligence. Here, the record shows that the employer authorized

car club accounts as a general business practice, and that claimant sought and obtained approval for a car club account from a former store manager who helped claimant set up the account. Furthermore, the record shows that claimant recognized that the discount prices generated by the car club account were “way down,” brought the “way down” price issue to the attention of the former store manager, and was reassured by the former store manager that the “way down” discount prices were “fine.” That tends to show that claimant tried to ensure that he was following the proper retail discount policies and procedures by relying on the “people around [him],” in this case the former store manager, as the employer expected him to do. As such, the record evidence supports the conclusion that claimant was not being indifferent to the consequences of his actions and that he did not disregard the employer’s interest in preventing theft.

The employer’s argument that claimant engaged in theft and, hence, committed misconduct was based on their implicit contention that claimant must have manually manipulated the discount prices initially generated by the system so that an even lower price would be provided to car club members at checkout. However, the only record evidence establishing that claimant engaged in any manual price manipulation was claimant’s testimony indicating that he would, at times, manually round the discount prices *up* to the nearest dollar to accommodate car club members paying cash who did not want change. Audio Record at 26:10. As such, the preponderance of the evidence shows that other than this upward manual manipulation (which arguably benefitted the employer), claimant applied the car club discount prices as generated by the computer system. Therefore, the employer has failed to meet their burden to show that claimant engaged in any other discount price manipulation that was detrimental to the employer. For these reasons, claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Order No. 21-UI-181751 is affirmed.

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

DATE of Service: January 28, 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 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 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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