

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0197

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 2, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective November 21, 2021 (decision # 133251). Claimant filed a timely request for hearing. On January 12, 2022, ALJ Janzen conducted a hearing, and on January 13, 2022 issued Order No. 22-UI-183938, reversing decision # 133251 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 January 31, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Grand Prix Motors employed claimant as a car salesperson from November 2020 to November 26, 2021.

(2) The employer expected all of their car salespersons to sell ten cars during each calendar month in order to meet individual sales performance standards. Claimant was aware of and understood the employer's expectation.

(3) In September 2021 and October 2021, claimant did not meet the employer's expectation that claimant sell ten cars per month. Claimant and his sales manager met to discuss how claimant could improve his performance to meet the employer's monthly car sale quota. Claimant continued to report to work on time, made required calls and emails to customers, and applied his training to try to sell more cars. Claimant could not control other variables that affected his ability to sell cars, which included whether a prospective purchaser actually wanted to purchase a vehicle, whether the employer's management was willing to negotiate with the purchaser, and market factors affecting car sales.

(4) In November 2021, claimant applied, and later interviewed, for a job with an employer in the aviation industry. Claimant's interactions with the other employer occurred only when claimant was not on duty for Grand Prix Motors, and did not impact his efforts to sell cars. Claimant's job interview with

the other employer occurred during a day when claimant was on approved leave from the employer. Claimant sold two cars in the month of November 2021.

(5) On November 26, 2021, the employer discharged claimant because he only sold two cars during the month of November 2021, and therefore failed to meet the employer's expectations for individual monthly car sales.

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).

The employer discharged claimant for failing to meet the employer's expectation that he sell ten cars during the month of November 2021. The employer's president testified that claimant's November 2021 sales performance was due to claimant's failure to focus on his work duties because he was "looking for other jobs" during work hours. Audio Record at 11:32 to 11:55. To further support that contention, the employer's president testified that other staff members stated they overheard claimant talking to other employers about job opportunities "during work," and that he overheard a telephone conversation wherein claimant discussed "software sales" with the other party on the call. Audio Record at 11:46; 13:06.

However, to the extent claimant's discharge was due to his lack of monthly sales, the record shows that claimant's lack of sales was not due to a lack of effort on claimant's part, but due to variables that were beyond his control. The record shows that claimant reported to work on time every day, called and emailed potential customers, and used his sales training skills to try to sell cars. Claimant could not control other factors such as whether the prospective purchasers wanted to buy vehicles, whether the employer was willing to negotiate with purchasers over terms of sale, or whether market factors operated to suppress sales. As such, the record shows that claimant's inability to meet the employer's monthly car sales expectations was not due to claimant's indifference or a disregard of the employer's interests.

Likewise, the preponderance of the evidence fails to support the conclusion that claimant's failure to meet the employer's monthly sales expectations resulted from a lack of focus because he was seeking other work. Claimant testified that while he did apply and interview for a single job in the aviation industry during the month of November 2021, all of his efforts related to that work search occurred outside of his normal work hours and had no effect on his work performance for the employer. Audio Record at 19:04 to 19:37; 21:51. This firsthand testimony from claimant showing that his work search

activities did not affect his work performance is entitled to more weight than the employer's hearsay testimony that other employees stated they overheard claimant discussing multiple job opportunities during work. Similarly, although the employer's president testified to overhearing a conversation that claimant had involving "software sales," the record fails to show that any such conversation occurred during work hours, if at all,¹ as opposed to during claimant's lunch break.

As such, the preponderance of the evidence shows that claimant's failure to meet the employer's monthly car sales expectation was not the result of willful or wantonly negligent conduct by claimant. The employer therefore did not discharge claimant for misconduct, and claimant is not disqualified from receiving benefits based on the work separation.

DECISION: Order No. 22-UI-183938 is affirmed.

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

DATE of Service: March 31, 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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¹ The preponderance of the evidence shows that claimant only applied and interviewed for one job and it was in the aviation industry, not software sales.



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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