

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0410

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2022, 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 December 26, 2021 (decision # 104929). Claimant filed a timely request for hearing. On March 21, 2022, ALJ Ramey conducted a hearing, and on March 22, 2022 issued Order No. 22-UI-189378, reversing decision # 104929 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On March 26, 2022, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bear Prints employed claimant as a graphic design artist from August 11, 2021 until December 31, 2021.

(2) The employer expected employees not to take money out of the cash register to use as “petty cash.” Transcript at 7. However, the employer did not have a written policy regarding whether employees could take money out of the cash register to use as petty cash, and “there had never been any mention to [claimant] about petty cash one way or another.” Transcript at 23. The employer had never allowed employees to use the cash in the cash register for personal purposes. However, on one occasion, the employer had allowed claimant, with prior approval, to take cash out of the register to buy a keyboard for the office.

(3) The employer expected that employees would not clock in and out the timecards of other employees. However, the employer did not have a written policy prohibiting employees from clocking in and out the timecards other employees, and “[t]here was never any written or verbal communication of that policy” to claimant. Transcript at 26.

(4) The employer expected that if an employee worked more than six hours in a day, that the employee take a one-hour unpaid lunch. However, the employer did not have a written policy regarding this expectation, although the employer posted notices in the employee break room of state law that required

employers to provide a 30-minute or longer lunch for every six hours an employee worked. Claimant “was never told one way or another with regards to lunch,” and would work through lunch if there was work that needed to be done. Transcript at 27. There often was work that needed to be done because claimant was the employer’s only graphic design artist and no other employee was available to relieve him.

(5) On October 8, 2021, November 8, 2021, November 9, 2021, December 15, 2021, December 17, 2021, December 20, 2021, December 22, 2021, December 23, 2021, and December 28, 2021, claimant worked nine or ten-hour days and did not take a lunch break.

(6) On December 27, 2021, claimant was working with a coworker who was senior to claimant and had assumed a role akin to a manager. The coworker suggested taking \$25 out of the employer’s cash register as petty cash, giving it to another coworker, and having that individual buy coffee for the senior coworker and claimant. The senior coworker suggested that she and claimant return \$25 to the till when they had an opportunity to do so. The coworker’s suggestion “made sense” to claimant because he had had previous jobs where petty cash existed, and he and the coworker “were going to put the money back when one of [them] had cash.” Transcript at 24. Claimant did not have log-in credentials for the cash register to access the cash. The senior coworker used her log-in credentials to open the cash register, and then took out the \$25 and gave the money to the third coworker. Shortly thereafter, the third coworker returned with the coffee and claimant drank some of it.

(7) On December 29, 2021, claimant clocked the senior coworker’s timecard in and out. The senior coworker had asked claimant to clock her in and out that day because she was making deliveries for the employer in the town where she lived—Bend, Oregon—and did not want to first drive to the employer’s office in Redmond, Oregon to clock in before making the deliveries.

(8) On December 31, 2021, the employer’s owner learned that the senior coworker and claimant had used \$25 from the cash register to buy coffee on December 27, 2021, that claimant had clocked in and out the timecard of the senior coworker on December 29, 2021, and that claimant had failed to take a lunch break on multiple occasions. The owner considered these to be three different forms of theft, each of which was “fireable,” with the “biggest one” being using \$25 from the cash register to buy coffee. Transcript at 5. The employer discharged claimant on December 31, 2021.

(9) Claimant had not received any warnings or discipline for violating any employer policy or expectation prior to his discharge.

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 on December 31, 2021 after learning of claimant’s breach of three different employer expectations—that the senior coworker and claimant had used \$25 from the cash register to buy coffee on December 27, 2021, that claimant had clocked in and out the timecard of the senior coworker on December 29, 2021, and that claimant had failed to take a lunch break on multiple occasions. At hearing, the employer’s witness testified that using money from the cash register to buy coffee on December 27, 2021 was the “biggest” violation. Transcript at 5. Therefore the use of money from the cash register was more likely than not the proximate cause of the discharge because it was the incident without which the discharge would not have occurred. *See e.g. Appeals Board Decision 12-AB-0434*, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision 09-AB-1767*, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did).

The employer failed to meet their burden to prove that claimant violated a known employer expectation regarding the December 27, 2021 incident. The record shows that the employer did not have a written policy regarding whether employees could take money out of the cash register to use as petty cash. Claimant testified that the employer had not informed him verbally that taking money out of the cash register to use as petty cash was prohibited, that he and the senior coworker intended to return the money when they had cash, and that claimant had had previous jobs where “there was such a thing as petty cash.” Transcript at 23, 24, 25. While the employer had never allowed employees to use the cash in the cash register for personal purposes, they had previously authorized claimant, with prior approval, to use cash from the till to buy a keyboard for the office. Although on December 27, 2021, claimant and the senior coworker used the money to buy coffee without prior approval, claimant explained that he did not believe he was required to do so because he “wasn’t in charge of taking the cash out for the coffees.” Transcript 32. This explanation is credible because claimant lacked the necessary log-in credentials to access the cash, and the senior coworker, who had assumed a role akin to a manager, used her log-in credentials to take out the money. Therefore, the record fails to show that claimant knew or should have known that using the \$25 as petty cash to buy coffee with the intent to return the money violated the employer’s expectations. Accordingly, the employer did not establish that claimant’s conduct on December 27, 2021 was a willful or wantonly negligent violation of the employer’s expectations.

To the extent claimant’s clocking in and out of the timecard of the senior coworker on December 29, 2021 and his failure to take a lunch on multiple occasions contributed to his discharge, the employer similarly failed to establish that claimant’s conduct constituted willful or wantonly negligent violations of known employer expectations. The record shows that the employer lacked a written policy regarding either of these expectations, and claimant testified that the employer had not made him aware of them verbally. Transcript at 26, 27. It is credible that claimant was unaware of the expectation against clocking in and out the senior coworker’s timecard, given that he did so at her request so that she could conveniently make work deliveries in the town where she lived without first driving to the office to clock in. Since the added convenience to the senior coworker may plausibly have produced efficiency gains for the employer, it was not contrary to common sense for claimant to be unaware that clocking her in and out in that context violated an employer expectation. Therefore, the record fails to show that

claimant knew or should have known that clocking in and out the timecard of the senior coworker on December 29, 2021 violated the employer's expectations. Accordingly, the employer did not establish that claimant's conduct on December 29, 2021 was a willful or wantonly negligent violation of the employer's expectations.

Similarly, claimant's conduct relating to working through lunch when there was work to be done was reasonable given that no other employee was available to relieve him and consistent with claimant's testimony that he had never been advised of the expectation that he take a one-hour lunch break. Although the employer posted notices in the employee break room of state law that required employers to provide a 30-minute or longer lunch for every six hours an employee worked, these notices were not sufficient to put claimant on notice of the lunch break expectation. This is because the notices merely advised of the employer's legal responsibilities under state law, not what the employer expected of claimant in the workplace. Therefore, the record fails to show that claimant knew or should have known that that failing to take a lunch break was a violation of the employer's expectations. As such, the employer did not establish that claimant's violations in this regard were willful or wantonly negligent violations of the employer's expectations.

For these reasons, claimant was discharged but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 22-UI-189378 is affirmed.

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

DATE of Service: June 14, 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

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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