

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0640

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 10, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and was therefore disqualified from receiving unemployment insurance benefits effective January 22, 2023 (decision # 140004). Claimant filed a timely request for hearing. On May 17, 2023, ALJ Buckley conducted a hearing and issued Order No. 23-UI-225185, reversing decision # 140004 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 June 5, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB did not consider the employer's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party as required by OAR 471-041-0080(2)(a) (May 13, 2019). The employer asserted that the hearing proceedings were unfair due to the admission of Exhibit 2. The employer was given a period of five days after the hearing in which to object to the admission of Exhibit 2. Transcript at 29-30. The employer did not file any objections during that time. Exhibit 2 was properly admitted as relevant to the issues under consideration and with an opportunity for the employer to review the exhibit during and after the hearing and object to its admission. EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a parts specialist from September 22, 2022 until January 27, 2023.

(2) On June 23, 2016, the United States District Court for the District of Oregon issued a warrant for claimant's arrest on felony charges pursuant to an indictment related to distribution of heroin. Both the indictment and warrant were sealed until claimant was arrested. Claimant was subsequently convicted on one or more charges and placed on probation. During these proceedings, claimant was provided a

copy of the arrest warrant, which was stamped “SEALED” by the court. Exhibit 2 at 2. This, along with being instructed by the court and its officers not to talk about the case, caused claimant to believe that the entirety of the criminal case, including his conviction, had been “sealed.” Transcript at 17-18. Claimant had also been convicted of an unrelated misdemeanor in an Oregon state court in 2012.

(3) The employer expected that their employees would truthfully answer questions posed to them on applications for employment and promotions. Claimant was aware of this expectation as the initial application for employment stated that, “[A]ny falsifications or willful omissions will be grounds for refusal of employment or immediate termination, regardless of when such falsification may be discovered.” EAB Exhibit 1 at 39.

(4) On September 19, 2022, claimant applied for work with the employer by filling out an electronic application. The application asked claimant to list any misdemeanor or felony convictions unless they were “sealed, dismissed, [or] expunged[.]” Exhibit 1 at 29. Prior to submitting the application, claimant spoke with a store manager to whom he disclosed both convictions. The manager told claimant that “we would submit the information to corporate and let them make their decision when they run their background check.” Transcript at 34. Neither conviction appeared on the employer’s copy of the submitted application.

(5) On September 20, 2022, claimant submitted an amended application listing both the federal and state convictions. When listing the federal conviction, he checked a box that the conviction “is a sealed case.” Transcript at 13. Because claimant checked that box, the electronic form automatically omitted the federal conviction from the completed application received by the employer. The state court misdemeanor conviction appeared on the employer’s version of the completed application.

(6) On September 22, 2022, a background check was completed by the employer which purported to have searched federal and Oregon court records, but did not turn up any record of claimant being convicted of a crime. The employer hired claimant that day.

(7) On January 27, 2023, claimant applied for a promotion to a “key holder” position, which required an updated background check. Claimant completed an application for this promotion and disclosed the federal and state convictions in it. The application form did not set forth any exceptions from reporting certain convictions.

(8) On January 27, 2023, after reviewing claimant’s application for promotion and discovering the federal conviction disclosed therein, the employer discharged claimant because they believed he was required to disclose the federal conviction on his original employment applications and failed to do so.

CONCLUSIONS AND REASONS: Claimant was discharged, 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 because they believed he willfully omitted the federal conviction from his initial application for employment. Claimant’s manager testified that when claimant came to the store to apply for work, claimant disclosed the federal and state convictions to him, and he was aware that claimant was on federal probation. Transcript at 34. The record does not show why neither of claimant’s convictions appeared on the employer’s copy of his September 19, 2022 application. It is possible claimant did not attempt to list them on the application. However, claimant’s description of the application process whereby the application automatically omitted listed convictions from the employer’s copy if certain boxes were checked, relating to applicable exceptions from reporting them, suggests an alternate explanation. In either case, claimant’s amendment of the application the following day, prior to completion of the background check and a job offer being made, established that claimant attempted to list both convictions on his application prior to being hired. The record shows that claimant listed the federal conviction on the September 20, 2022 application, but that the conviction was omitted from the employer’s copy because claimant checked a box stating that the conviction had been sealed. Claimant’s checking of that box is therefore determinative of whether claimant willfully caused the conviction to be omitted from the application.

The record shows that claimant believed that the record of his conviction in the federal case had been sealed. Claimant submitted Exhibit 2 into evidence, which shows a copy of the arrest warrant bearing a “sealed” designation. Exhibit 2 at 2. While that document does not establish that the record of claimant’s conviction was, in fact, sealed, it supports claimant’s contention that he believed it to be sealed.¹ When asked at hearing why he believed the conviction to be sealed, claimant testified, “I’m not supposed to talk to it – to anybody about it. And it says on the paperwork that I have here at home that it’s a sealed case.” Transcript at 17-18. He elaborated, “It was a pretty big case and there was a lot of people in it. And I don’t really know the – to why it’s a sealed case. I just know it’s a sealed case. The FBI did a big investigation and I was a part of that. [] I’m still on probation and I – I have to have that [paperwork submitted as Exhibit 2 at 2] in case any other law enforcement tries to question me about stuff from the case.” Transcript at 20. Even though the record does not show that claimant’s judgment of conviction in the federal case was sealed, and it likely was not sealed, claimant believed that it was sealed. Claimant’s checking of the box on the application to indicate that it was sealed was therefore not a *willful* omission or falsification, and thus, not a willful violation of the employer’s expectations.

There is no evidence that claimant has had formal legal training, and it was therefore understandable that he inferred, from the limited court documents he was given and instructions from the judge or court officers, that all or portions of the case were “sealed.” As claimant verbally disclosed the convictions to

¹ Federal Rules of Criminal Procedure Rule 6(e)(4) provides, “Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment’s existence except as necessary to issue or execute a warrant or summons.” Claimant’s possession of a copy of the warrant therefore indicates that the indictment and warrant were subsequently unsealed after claimant was arrested. The temporary sealing of the indictment and warrant does not suggest that any other document in the case, particularly the judgment of conviction, was ever sealed.

the store manager in the course of applying for the job, the record does not show that claimant acted with indifference to the consequences of indicating on the application that the conviction was sealed. Instead, it shows that claimant made every effort to report the facts of the conviction to the employer as he understood them, even if he ultimately may have been mistaken about them. As such, the employer has not established that claimant acted with wanton negligence in reporting the conviction as sealed. Accordingly, claimant did not willfully or with wanton negligence violate the standards of behavior which the employer had the right to expect of him, and was not discharged for misconduct.

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. 23-UI-225185 is affirmed.

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

DATE of Service: July 14, 2023

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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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