

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-0653

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 124806). The employer filed a timely request for hearing. On May 19, 2023, ALJ Buckley conducted a hearing, and on May 23, 2023 issued Order No. 23-UI-225744, affirming decision # 124806. On June 7, 2023, 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) Landmark Ford Inc. employed claimant as a finance manager at their car dealership from May 20, 2022 until February 1, 2023.

(2) Claimant's job duties included meeting with customers who were interested in buying a vehicle and contacting financing companies to offer the customer a loan on the vehicle in order to determine the vehicle's payment structure and complete the transaction. Claimant was also tasked with attempting to persuade the customer to buy additional products from the dealership, such as gap insurance or a maintenance plan, as part of the transaction.

(3) As part of this process, the employer prohibited employees from making a favorable interest rate on a loan offered by a lender dependent upon the customer buying additional products from the dealership. This prohibited practice was known as tying. Transcript at 5. However, "buy[ing] down," or merely using one's relationship with a lender to obtain a favorable interest rate for a customer without conditioning the rate on the purchase of products, was an acceptable practice. Transcript at 13. The

employer believed tying violated consumer protection laws and that engaging in the practice could harm their reputation and subject them to fines.

(4) On January 28, 2023, two customers, a married couple, arrived at the employer's dealership to complete the purchase of a car they had pre-ordered. The customers initially met with a sales manager on the showroom floor and at that time, the sales manager informed the customers that he estimated they would receive a 6.29% interest rate on the loan for the car. While with the sales manager, the customers agreed to buy a vehicle service plan, but declined gap insurance and a maintenance plan. The sales manager then handed the customers off to claimant.

(5) After receiving the customers, claimant advised that he would "try to buy down" the interest rate from 6.29% and asked if the customers would be interested in the gap insurance and maintenance plan in the event he could find a lower interest rate and thereby make the vehicle loan more affordable. Transcript at 24. Claimant and the customers discussed that obtaining a lower interest rate would not make up for the cost of the additional products, and that the products would be cancellable if purchased, and the customers stated they would "take a look" at additional products. Transcript at 25.

(6) Claimant called Chase Bank, a financial institution he had a longstanding relationship with, and they approved the customers for a loan with a 5.54% interest rate. Thereafter, the parties reached the signing portion of the transaction. Claimant printed a presentation document that included, for comparison, both the 5.54% rate and the 6.29% rate that the sales manager had estimated. The customers decided to buy five or six additional products, including gap insurance and the maintenance plan, while also rejecting some additional products that were offered. The 5.54% interest rate was not dependent on the purchase of the additional products.

(7) On February 1, 2023, the customers met again with the sales manager and picked up their vehicle from the dealership. Later that day, the customers emailed the sales manager and advised that claimant would not "give the best loan offer he found unless [the customers] bought the GAP insurance and maintenance plan," and "[y]es, he told us he could buy down the interest rate with the bank if we bought those items." Exhibit 1 at 3, 2. The employer reviewed the customer's emails and documentation from the transaction and concluded that claimant had violated their prohibition on tying.

(8) On February 1, 2023, the employer discharged claimant for the alleged violation.

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).

At hearing, the accounts of the parties differed. Based on her review of the transaction documents, the employer's witness testified that claimant showed the customers a presentation document with payment plans structured at both a 5.54% interest rate and a 6.29% rate, and offered to give the lower rate if the customers bought additional products. Transcript at 9, 10; Exhibit 1 at 5. The employer's witness then referenced a final presentation document that showed only the 5.54% interest rate with several additional products listed as accepted, all of which products were listed and not crossed out in the initial presentation document. Transcript at 11; Exhibit 1 at 4. Based on this, as well as the customers' email communications stating that claimant would not "give the best loan offer he found unless [the customers] bought the GAP insurance and maintenance plan," and "[y]es, he told us he could buy down the interest rate with the bank if we bought those items," the employer's witness concluded that claimant tied the 5.54% interest rate to their purchase of the additional products. Transcript at 6; Exhibit 1 at 3, 2.

In contrast, claimant testified that the sales manager had initially estimated the customers' interest rate at 6.29% and at that time, on the showroom floor, the customers agreed to a service plan but declined gap insurance and a maintenance plan, which are the three additional products typically pitched to customers before they are handed off to a finance manager. Transcript at 17-19. After receiving the customers, claimant told them that he "was going to try to buy down the [interest] rate" and then asked if the customers would be interested in the gap insurance and maintenance plan in the event he could find a lower interest rate and thereby make the vehicle loan more affordable. Transcript at 24. The customers asked whether the difference in the interest rate would make up for the cost of the products, claimant advised it would not because the maintenance plan was expensive. Transcript at 25. The customers also asked whether the maintenance plan was cancellable, and claimant stated that it was but did not recommend cancelling it because of "how nice of a program it is." Transcript at 26. The customers stated they would "take a look" at additional products. Transcript at 25. Claimant testified that he called Chase Bank, with whom he had a longstanding relationship, and facilitated the customers getting approved for a 5.54% interest rate. Transcript at 21. Claimant stated that he and the customers then reached the signing portion of the transaction at which time claimant printed a presentation document that included, for comparison, both the 5.54% rate and the 6.29% rate they had been shown by the sales manager. Transcript at 27. At that time, the customers decided to buy five or six additional products, including gap insurance and the maintenance plan, while also rejecting some additional products that were offered. Transcript at 28. Claimant testified that the 5.54% interest rate was "absolutely not" dependent on the purchase of additional products. Transcript at 33.¹

¹ Claimant testified that he was "shocked" the customers would state in their email communications that claimant told them "they could not have one without the other." Transcript at 33. Claimant posited that the customers, in their email communications, described receiving the 5.54% rate as dependent upon buying the gap insurance and maintenance plan because they had been influenced to describe the transaction as an improper tying by the sales manager, who met the customers in person the morning before they sent the emails. Transcript at 22-23. Claimant believed the sales manager had an interest in claimant being discharged because the sales manager was romantically involved with another finance manager, who competed with claimant for commissions, and that claimant's departure benefited the other finance manager because claimant's discharge meant claimant no longer took a share of commissions. Transcript at 23-24. The employer's witness denied that claimant's discharge had anything to do with the romantic relationship between the sales manager and the other finance manager, and testified that the employer almost immediately hired a new finance manager to replace claimant. Transcript at 42-43.

Thus, the parties presented conflicting evidence on the key issue of whether claimant engaged in conditioning the 5.54% interest rate on the purchase of additional products. The evidence of the employer is based on inferences drawn from the transaction documents, as well as hearsay accounts contained in the customers' email communications. Claimant's account, on the other hand, is based on firsthand testimony, which is entitled to more weight than inferential evidence or hearsay. Accordingly, on the disputed issue of whether claimant improperly tied the favorable interest rate to purchase of additional products, the weight of the evidence favors claimant's evidence. This decision therefore accepts claimant's evidence regarding this disputed issue, as reflected in the findings of fact above.

The employer did not meet their burden to prove that claimant violated their prohibition on tying. Although claimant mentioned both the prospect of finding a lower interest rate for the customers and the purchase of gap insurance and the maintenance plan, based on claimant's account, the record does not show that the lower interest rate was dependent upon the customers buying the additional products. Rather, the weight of the evidence supports that claimant engaged in the acceptable practice of using his relationship with Chase Bank to obtain a favorable interest rate for the customers without conditioning the rate on the purchase of anything else. Then, during the signing portion of the transaction, the customers opted to buy some additional products, but did not do so as a condition of having received the 5.54% interest rate. Therefore, on this record, the employer did not establish that claimant violated their expectations, or that he did so willfully or with wanton negligence.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-225744 is affirmed.

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

DATE of Service: July 19, 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 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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