

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1247

Reversed
Disqualification

PROCEDURAL HISTORY: On September 14, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged for misconduct and therefore was disqualified from receiving unemployment insurance benefits effective July 9, 2023 (decision # 144704). Claimant filed a timely request for hearing. On October 17, 2023, ALJ Blam conducted a hearing, and on October 25, 2023, issued Order No. 23-UI-239500, reversing decision # 144704 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On November 10, 2023, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant’s argument contained information that was not part of the hearing record and did not show that factors or circumstances beyond claimant’s reasonable control prevented him 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 claimant’s argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Lowes Home Centers, LLC employed claimant as a sales specialist from approximately December 15, 2007, until July 13, 2023. Claimant worked in the employer’s cabinetry department, designing and selling cabinets.

(2) The employer maintained a policy that required employees not to “hide, alter, falsify, or disguise the true nature of any transaction or accounting activity”, or “falsify or misrepresent information at any time while working for [the employer.]” Exhibit 1 at 6, 10.

(3) The employer required their sales employees to encourage customers to apply for the employer’s store credit card. In particular, the store’s management required their sales employees to obtain one credit card application per week. Claimant found this requirement difficult to meet because the cabinetry department operated on a low-volume, high-dollar-value basis. For instance, in the week before he was discharged, claimant only had one customer the entire week, although that customer’s order was worth

approximately \$50,000. Members of the store's management team had told claimant that if he did not meet the credit card application quota, they would "find somebody that does." Transcript at 18.

(4) Claimant was concerned that he would be unable to meet the employer's credit card application quota, and that he faced discharge if he failed to do so. As a result, in or around January 2022, claimant began falsifying credit card applications, using fabricated names and addresses, and submitting them to the employer under the guise of legitimate applications. Claimant did so to meet the employer's quota and retain his employment. Claimant engaged in this conduct for approximately 18 months.

(5) In or around June 2023, the employer noticed that the credit card applications claimant had submitted included suspicious details, and, as a result, investigated them. The employer subsequently determined that in the preceding 12 months, claimant had submitted approximately 150 false credit card applications in lieu of applications legitimately completed by claimant's customers.

(6) On July 10, 2023, the store's senior asset protection manager met with claimant about the matter, and claimant confessed to having submitted falsified credit card applications.

(7) On July 13, 2023, the employer discharged claimant due to his having falsified customer credit card applications, conduct which they believed violated their employee policies. Other than this conduct, claimant had not previously engaged in conduct which the employer believed to be a violation of their policies.

CONCLUSIONS AND REASONS: Claimant was discharged 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).

Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). The following standards apply to determine whether an "isolated instance of poor judgment" occurred:

(A) The act must be isolated. The exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

OAR 471-030-0038(1)(d).

The employer discharged claimant because he falsified customer credit card applications. The order under review concluded that this conduct constituted, at worst, an isolated instance of poor judgment, which is not misconduct. Order No. 23-UI-239500 at 3. The record does not support this conclusion.

As a preliminary matter, while it is clear that claimant's conduct in submitting the falsified applications was a violation of the employer's policies regarding falsifying information, the record does not definitively show that claimant was actually aware of those policies. At hearing, the employer's witness testified that the employer had no record of claimant having received or acknowledged receipt of the policies. Transcript at 14. Similarly, claimant testified that he did not recall having been given a copy of the policies, but "assume[d]" that he had been. Transcript at 16–17. Regardless of whether claimant actually knew the relevant employer's policy, he had reason to know that the employer would not tolerate his repeated falsification of credit card applications because as a matter of common sense, no reasonable employer would tolerate such behavior. Therefore, claimant violated the employer's policies with at least wanton negligence.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. The order under review suggested that claimant's multiple violations of the same policies was "part of the same series of events which can be considered poor judgment," and that claimant's conduct was therefore isolated. Order No. 23-UI-239500 at 3. In so suggesting, the order under review misconstrues the applicable case law on this point. In *Perez v. Employment Dept.*, 164 Or. App. 356, 992 P.2d 460 (1999), the Court of Appeals found that a claimant's multiple violations of the employer's expectations over two days was a single occurrence when considered within the context of an otherwise impeccable 13-year employment relationship. The Court also considered a claimant's three separate abusive answering machine messages to his supervisor during one evening, about a single subject matter, to be a single occurrence in the employment relationship. *Waters v. Employment Division*, 125 Or. App. 61, 865 P.2d 368 (1993). Arguing with a supervisor for 15 to 20 minutes, despite the supervisor's instruction to "shut up," was also deemed a single occurrence in the employment relationship. *Goodwin v. Employment Division*, 35 Or. App. 299, 581 P.2d 115 (1978).

Claimant's circumstances are readily distinguished from those in the above-cited cases. Here, claimant engaged in essentially the same action, and towards the same end, on at least 150 occasions over the course of 18 months. Notably, all those cases involved repeated and related acts which occurred over a short period of time. It cannot reasonably be said that repeating the same action, week after week, over the course of a year and a half, is a single occurrence. Rather, it is an example of a "repeated act or pattern of other willful or wantonly negligent behavior," which OAR 471-030-0038(1)(d)(A) explicitly excepts from the definition of an isolated instance of poor judgment. Therefore, claimant's conduct was not isolated.

Further, under OAR 471-030-0038(1)(d)(D), acts which create irreparable breaches of trust in the employment relationship are not isolated instances of poor judgment. Here, claimant repeatedly engaged in conduct which he knew to be dishonest for the purpose of evading the employer's credit card application requirement and saving his own job. Under such circumstances, where claimant had submitted approximately 150 false credit card applications and did so over the course of 18 months, the employer could not reasonably trust claimant to act truthfully. Because claimant's repeated falsification of credit card applications constituted repeated acts that amounted to an irreparable breach of trust in the employment relationship, claimant's conduct was not an isolated instance of poor judgment.

Claimant's repeated violations were not due to a good faith error. The record does not contain evidence to show that claimant had a reasonable basis to believe that the employer would find it acceptable for claimant to falsify credit card applications.

For the above reasons, claimant was discharged for misconduct and is disqualified from receiving unemployment insurance benefits effective July 9, 2023.

DECISION: Order No. 23-UI-239500 is set aside, as outlined above.

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

DATE of Service: December 22, 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
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