

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0261

Reversed
Disqualification

PROCEDURAL HISTORY: On November 14, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and therefore was not disqualified from receiving benefits based on the work separation (decision # 72204). The employer filed a timely request for hearing. On December 29, 2023, ALJ Blam conducted a hearing at which claimant failed to appear, and on January 3, 2024, issued Order No. 24-UI-244669, affirming decision # 72204. On January 23, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Jackson's Food Stores, Inc. employed claimant as a customer service representative from October 18, 2019, until January 30, 2023.

(2) At the end of each shift, any employee on cash-register duty was required to count down their register drawer, fill out of a form showing how the drawer balances out, and leave that form on the store manager's desk.

(3) In addition to the above procedure, the employer's cash-handling policy required that employees notify the store's manager if their register drawer is short by more than \$20 at the end of their shift. If the manager is unavailable at the time, employees were required to leave a note for the manager to review upon the manager's return. Claimant was given a copy of the employee handbook, which included this policy, at hire, and signed an acknowledgement that he had received it. Claimant also signed an acknowledgment of having received the employer's updated employee handbook on October 20, 2022. The cash-handling policy itself has not changed since 2017.

(4) In November 2019 and again in April 2022, claimant accepted counterfeit bills from customers, which led to cash shortages in his drawer during each of those instances. The employer disciplined

claimant shortly after each of these shortages. Following the April 2022 shortage, the employer warned claimant that any additional violations of their cash-handling policy could result in him being discharged.

(5) In January 2023, claimant had three separate cash shortages during his shifts. On January 14, 2023, claimant's drawer was short by \$122.81. On January 25, 2023, claimant's drawer was short by \$21.95. On January 29, 2023, claimant's drawer was short by \$28.13. Claimant's manager was out of town for most or all of this period of time. Claimant did not report these shortages to the manager as required by the employer's cash-handling policy.

(6) On January 30, 2023, claimant's manager returned to work, and at that time discovered claimant's cash shortage from the previous day. The manager subsequently audited claimant's other recent drawers and uncovered the two additional shortages from earlier in the month. That same day, the employer discharged claimant due to both the cash shortages themselves and claimant's failure to report them to the manager.

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 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 claimant's manager discovered a series of three cash shortages in January 2023 that claimant had failed to report to the manager. The record contains no evidence to explain what caused the cash shortages in each of those three instances. In the absence of such evidence, it is reasonable to infer that they were caused simply by claimant's having made unconscious errors in cash-handling. While this may have amounted to ordinary negligence, the record is insufficient to show that these errors were the result of claimant's having willfully, or with wanton negligence, violated the employer's standards of behavior.

However, claimant's failures to report these shortages were willful or wantonly negligent violations of the employer's standards of behavior. As part of the employer's cash-handling procedure, claimant was required to count down his register drawer at the end of every shift, fill out a form showing how the drawer balanced out, and leave that form on the store manager's desk. There is no indication in the record that claimant failed to perform this step during each of the three shortage instances in January 2023. Given that claimant had been performing this work for over four years at that point, it is more likely than not that he did perform this step as required. As a result, in each instance, claimant knew or should have known that his drawer was short by more than \$20.

Further, the record shows that claimant likely understood the requirement that he report to the manager any shortages over \$20, should have known that his failure to do so probably violated the employer's expectations. Claimant had been given a copy of the handbook containing the cash-handling policy at least twice, most recently just a few months prior to January 2023, and had worked for the employer for over four years. Additionally, while the record shows that claimant had been disciplined for other cash shortages (relating to having accepted counterfeit bills) on two prior occasions, the record does not show that he failed to properly report those shortages as required by the cash-handling policy. It is therefore reasonable to conclude that claimant *did* report those prior shortages correctly, and, as such, more likely than not knew that he was required to do so. Because claimant more likely than not knew that he was required to report his cash shortages for each of the instances in January 2023, his failure to do so on each occasion constituted a willful or wantonly negligent disregard of the employer's standards of behavior.

Finally, claimant's conduct cannot be excused as an isolated instance of poor judgment. The order under review concluded otherwise, stating that the three cash shortages in January 2023 were "a series of closely related incidents that were not discovered or discussed until the store manager returned from a vacation." Order No. 24-UI-244669 at 3. The record does not support this conclusion. In fact, while the three separate instances of cash shortages were all the same type of violation, the record does not show that they were otherwise related in any way. Given that claimant was required to separately count down

his drawer at the end of each shift, therefore essentially starting anew each shift, it is difficult to conceive of how the three separate shortages *could* be related. Instead, they are properly viewed as three separate and repeated acts of willful or wantonly negligent behavior, and therefore not isolated. Because those three separate acts were not isolated, none of them can be considered an isolated instance of poor judgment.

Because claimant was discharged for misconduct, and not an isolated instance of poor judgment, he is disqualified from receiving unemployment insurance benefits effective January 29, 2023.

DECISION: Order No. 24-UI-244669 is set aside, as outlined above.

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

DATE of Service: March 19, 2024

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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