

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0547

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 28, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective March 3, 2024 (decision # L0003368263). Claimant filed a timely request for hearing. On June 25, 2024, ALJ Christon conducted a hearing, and on July 2, 2024, issued Order No. 24-UI-257958, modifying decision # L0003368263 by concluding that claimant was discharged for misconduct and disqualified from receiving benefits effective February 4, 2024.¹ On July 19, 2024, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Young's Market Company of Oregon, LLC employed claimant as a district manager from February 2004 until February 9, 2024. Claimant's job involved the sale of wine to supermarkets and other stores, and supervising the placement of product within the stores.

(2) The employer expected that their employees would not commit or attempt to commit theft from their clients' stores. The employer also expected that their employees would "report observed or suspected theft or misappropriation or misuse of property." Exhibit 1 at 12. Claimant understood the theft policy, and knew or should have known that the employer expected him to report incidences of observed or suspected theft.

¹ Although Order No. 24-UI-257958 stated that it affirmed decision # L0003368263, it modified that decision by changing the effective date of the disqualification from March 3, 2024, to February 4, 2024. Order No. 24-UI-257958 at 5.

(3) On January 22, 2024, claimant was working and supervising other employees in a WinCo supermarket. Claimant was experiencing cold symptoms and took a package of cold medicine from the store shelf and ingested some pills from it. Claimant began walking toward the store checkout to pay for the medicine when he was interrupted by one of the employees that he was supervising, who needed his assistance. Claimant placed the medicine package in his pocket next to his keys so that he would not forget to pay for it before leaving the premises.

(4) Claimant assisted the employee for approximately an hour and then left the store, unaware as he was exiting that he had failed to pay for the medicine. As he neared his car, he felt the medicine package in his pocket and turned to re-enter the store to pay for it. As he turned back toward the store, he “was stopped by” a security guard and stated, “I’m on my way back in to pay for this,” but there was otherwise “no communication” between them. Transcript at 13, 36. The security guard then “disappeared,” and claimant paid for the medicine alone using self-checkout, then left the premises. Transcript at 36.

(5) WinCo later reported this incident, which they considered to be theft, to the employer. As a result, claimant learned that he had been banned from returning to any WinCo store. Upon learning this, claimant reported the incident to his supervisors.

(6) On February 2, 2024, claimant was suspended from work while the employer investigated the incident. During the investigation, claimant admitted exiting the store having unintentionally failed to pay for the medicine, encountering the security guard, then re-entering the store and paying for the medicine.

(7) On February 9, 2024, the employer discharged claimant for “theft” and “failure to report observed or suspected theft,” and made this decision, in part, because his ban from WinCo “would prevent him from performing the full duties of his job[.]” Transcript at 30, 32-33.

CONCLUSIONS AND REASONS: Claimant’s discharge was 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 due to his initial failure to pay for medicine he partially consumed and left the store with, his failure to report this to the employer, and his resulting ban from WinCo. The order under review concluded that claimant’s failure to pay for the medicine before exiting the store and

failure to report the incident were “at least wantonly negligent” violations of the employer’s policies. Order No. 24-UI-257958 at 3. The record does not support this conclusion.

Theft. The employer reasonably expected that their employees would not attempt to, or actually, commit theft from their client’s stores, and claimant was aware of this expectation. The record does not support WinCo’s or the employer’s contentions that claimant committed or attempted to commit theft. Claimant testified that he was on his way to pay for the medicine immediately after taking it from the shelf and consuming some of it, but was interrupted for approximately an hour, during which time he forgot that he needed to pay for it. Transcript at 13. He further testified that after he exited the store, he felt the package in his pocket and was returning to the store to pay for it when he encountered a security guard. Transcript at 13. This portion of claimant’s testimony is consistent with WinCo’s account, in that their report suggested, “[When] they approached him in the parking lot [h]e may have been [] turning around to come back, realizing, himself, when he felt. . . for the keys in his pocket [t]hat he had the medication, at the same time.” Transcript at 27. According to his testimony, claimant then re-entered the store on his own and paid for the medicine at a self-checkout without further incident or contact with store employees. Transcript at 13. In contrast, WinCo reported that “[t]hey brought him back into the store [and he] paid for the medication.” Transcript at 27.

Claimant’s testimony constituted the only first-hand account of the incident, and where it differed from the hearsay evidence of one or more WinCo employees who witnessed it, claimant’s account has been afforded greater weight, and the facts found accordingly. The evidence does not establish that claimant’s failure to pay for the medication prior to leaving the store was a conscious act, which would be required to constitute theft or attempted theft under Oregon law.² Claimant’s actions in opening and consuming the medicine, then allowing himself to become distracted and forgetting to make payment, were matters of ordinary negligence. Accordingly, willful or wantonly negligent misconduct has not been shown with regard to the employer’s theft policy.

Failure to report. The employer reasonably expected that their employees would “report observed or suspected theft or misappropriation or misuse of property.” Exhibit 1 at 12. The record shows that claimant knew or should have known of the employer’s written policy in this regard, as he acknowledged being presented with it on several occasions, most recently in 2021. Transcript at 37. Though claimant nonetheless denied having been aware of this specific policy prior to his suspension, he agreed that he had been aware that he was required to report “any . . . issues at any stores” to management. Transcript at 17.

The record shows that claimant did not report the WinCo incident immediately after it occurred, and did not discuss the matter with his supervisors until after he learned that WinCo had reported the incident to the employer as a theft. As claimant had not committed or observed a theft, and had no reason to suspect that a theft had occurred, the employer has not shown that claimant violated that written policy. To the extent that the employer’s expectation regarding what needed to be reported extended to “any issues. . . at any stores,” the events that claimant described would not reasonably have alerted him that WinCo considered his actions an “issue,” as they allowed him to continue on his way back into the store and pay

² See ORS 164.015, which provides, in relevant part: “A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person [t]akes, appropriates, obtains or withholds such property from an owner thereof[.]” ORS 164.015(1).

for the medicine without further supervision, detention, questioning, or admonishment. Therefore, the employer failed to show that claimant made a conscious decision not to report an incident that he knew or should have known he was expected to report. Accordingly, the employer has not proven a willful or wantonly negligent violation of their reporting policy.

WinCo ban. While claimant's actions on this occasion led WinCo to ban him from their stores, thus interfering with or preventing him from continuing to perform his work, the employer has not met their burden of showing that the ban resulted from claimant's willful or wantonly negligent violation of a reasonable employer policy. Thus, claimant was discharged for reasons other than 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. 24-UI-257958 is set aside, as outlined above.

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

DATE of Service: August 1, 2024

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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.

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