

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0191

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 134953). The employer filed a timely request for hearing. On January 15, 2014, ALJ Logan conducted a hearing, and on January 21, 2014 issued Hearing Decision 14-UI-08846, reversing the Department's decision. On January 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer's Jewelers, Inc. employed claimant as a sales associate from February 9, 2010 until October 5, 2013.

(2) The employer sold and serviced jewelry. The employer provided a guarantee to its customers that it would replace any stones that were lost as a result of falling out of their settings or in other ways. If a customer lost a stone, the employer expected claimant to have management approval before he made arrangements to obtain a replacement stone. Notwithstanding this expectation, claimant thought he had the authority to decide how to obtain replacement stones when the replacement was smaller than one-quarter carat.

(3) On August 16, 2013, the employer issued a written warning to claimant. This warning arose because claimant had placed a watch on the jewelry counter to show a customer and had neglected to return the watch to the display case before he went to lunch.

(4) Sometime in approximately early September 2013, a customer brought in a ring that had been purchased from the employer and wanted to replace the existing center diamond with a blue diamond. The existing center diamond was less than one-quarter carat. An associate other than claimant sent the ring along with the blue diamond to the goldsmith to make the substitution. In approximately mid-September 2013, the goldsmith completed the work and returned the ring and the diamond that had been removed from it to the employer. The diamond was lost on the employer's premises the day after it was

returned. That same day, the assistant manager called the store manager and told her the diamond was missing. Because the employer had lost the diamond, they decided that “we need to find the diamond or replace it.” Transcript at 12. They did not make any decision on how to obtain a replacement diamond. The missing diamond was not found. Management did not tell the sales associates what they should do about the missing diamond when the customer came in to pick-up the customer’s ring and the diamond that had been replaced. The ring remained on the employer’s premises for approximately six days while the managers took no action to obtain a replacement diamond.

(5) On approximately September 16, 2013, the customer and his mother came to the store to pick up the ring and the diamond that had been replaced. Exhibit 1 at 3. Claimant attended to them. They noticed that the replaced diamond was missing and were visibly upset that it was not returned to them. Claimant did not know what to do, but told the customers, “We’re going to make it right because we lost the diamond.” Transcript at 33. Claimant then told them he was going to have the center diamond taken out of a ring in stock that was identical to the ring the customer had initially purchased, and that the employer would give the customer that diamond to replace the missing diamond. The customer agreed to this arrangement. Sometime after dealing with the customer and his mother, claimant sent a text message to the store manager telling her he had taken care of the missing diamond. The manager did not respond to claimant’s message that day. Claimant removed the identical ring from a display case and sent it to the goldsmith to remove its center diamond. Claimant did not obtain the approval of the assistant manager or the store manager before deciding how he would obtain a replacement diamond for the customer. Under the circumstances and because the missing diamond was less than one-quarter carat, claimant thought he had the authority to determine how best to replace the missing diamond for the customer.

(6) Sometime after September 16, 2013, the store manager met with claimant to discuss the manner in which he arranged to obtain a replacement for the missing diamond. The store manager told claimant it was against store policy to remove a diamond from a piece of jewelry in stock to provide a replacement to a customer. Claimant told her that he thought what he had done “was the right thing to do.” Transcript at 19.

(7) On October 5, 2013, the employer discharged claimant for not having the approval of management before he decided to replace the customer’s missing diamond by removing a diamond from an identical ring in stock.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0039(3)(b). The employer carries the burden to establish claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-08846, the ALJ concluded that claimant's "unauthorized removal of company merchandise [to replace the customer's missing diamond] was a wantonly negligent violation of the standard of behavior that employer had a right to expect of him." Hearing Decision 14-UI-08846 at 4. The ALJ further concluded claimant's behavior was not excused from misconduct as a good faith error because he "was aware of and had signed off on a policy that prohibited unauthorized removal of property" from the employer's premises. Hearing Decision 14-UI-08846 at 3. The ALJ also concluded claimant's behavior was not excused from misconduct as an isolated instance of poor judgment because his actions "bypassed management authority and caused economic loss to the employer," which resulted in an irreparable breach of trust in the employment relationship. Hearing Decision 14-UI-08846. We disagree.

The employer did not dispute at hearing that its policies required it to replace the customer's diamond after it went missing. *See* Transcript at 11, 12. The employer did not dispute that its managers were aware that a replacement diamond needed to be located for the customer, but took no actions to obtain one for the approximately one week that elapsed before the customer came to retrieve it. *See* Transcript at 12, 14, 35, 40. The employer did not dispute that during this period its managers did not tell its sales associates, including claimant, how they should address the situation when customer returned to the store and discovered that the diamond was missing. Simply put, the employer's managers did not take reasonable steps to supervise this situation in the ample time that was available to them. It is understandable that claimant was at a loss to know what the employer expected him to do when the customer arrived and wanted a commitment about how the employer intended to replace the missing diamond.

It is significant that the employer's witness did not identify any occasions on which claimant had been told he needed management approval before obtaining a replacement stone for a customer. The employer's witness did not dispute claimant's testimony that on occasions in the past sales associates had taken pieces of jewelry from store inventory and removed stones from them in order to replace missing stones for customers without a manager's approval. Transcript at 26. The employer's witness also did not appear to dispute claimant's testimony that sales associates routinely made decisions on how to replace stones smaller than one-quarter carat, without management approval, and appeared in part of her testimony to concede this issue. Transcript at 26, 44. Based on the record, claimant's testimony that he thought, under the circumstances, that the employer would approve of him taking a replacement stone from a jewelry piece in stock was sincere and believable. Transcript at 26, 36, 37, 38, 40. Although the ALJ focused on claimant's awareness of the employer's policy that prohibited the unauthorized conversion of the employer's property to conclude claimant's behavior was not excused by his good faith belief, such a policy appears inapplicable when, as here, claimant's behavior in altering the employer's property (the piece of jewelry in stock from which the replacement stone was removed) was intentional and was motivated by his understanding of the employer's diamond replacement guarantee. On this record, the preponderance of the evidence shows that when claimant took the actions that he did to obtain the replacement diamond, he sincerely believed the employer would condone those actions. Even though claimant's behavior might have been contrary to the employer's expectations, his good faith error does not constitute misconduct under OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-08846 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating

DATE of Service: March 4, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

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