

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0251

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 25, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #125941). Claimant filed a timely request for hearing. On January 16, 2014, ALJ Triana conducted a hearing, and on January 23, 2014 issued Hearing Decision 14-UI-08954, affirming the Department's decision. On February 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant from September 14, 2003 to October 3, 2013 as a food clerk.

(2) The employer had a loss prevention policy stating it expected claimant to refrain from writing checks to the employer's business when he did not have sufficient funds in his checking account to pay the checks. Claimant understood that policy.

(3) From 2007 to 2010, claimant wrote six checks to the employer's business that were returned for insufficient funds. The employer gave claimant a warning for one of those checks in September 2010.

(4) In approximately July 2013, the employer began to reduce claimant's number of hours per week. Claimant had less money in his checking account.

(5) On July 8, 2013, claimant wrote a check to the employer's business for \$40. He did not have sufficient funds in his account to cover the check. The bank returned the check to the employer's business for insufficient funds, and assessed a fee. The employer suspended claimant for one day and claimant paid the check and fee amounts on that day. On July 23, 2013, the employer gave claimant a written warning regarding the July 8 check. Claimant did not contest the warning. The warning stated that the employer's discipline for another violation of the same type would be "up to and/or termination

of employment.” Transcript at 7. Claimant understood the employer would discharge him if he violated the policy again.

(6) On September 18, 2013, claimant wrote a check to the employer’s pharmacy for \$50. When claimant wrote the check, he knew he did not have sufficient funds in his account to pay the check. He did not put money into the account before the bank processed the check.

(7) On October 3, 2013, the employer discharged claimant for violating its loss prevention policy.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he repeatedly wrote checks with insufficient funds to the employer’s business. The employer had a right to expect claimant not to write checks with insufficient funds to the employer’s business, because it creates a potential financial loss to the employer. Claimant understood that expectation as a matter of common sense and because the employer advised him of the policy at hire and when he received the July 23, 2013 warning for writing a check with insufficient funds on July 8, 2013. He understood the employer would discharge him if he wrote another check to the employer’s business with insufficient funds.

Claimant wrote a check to the employer’s business on September 18, 2013, knowing he did not have sufficient funds in his bank account to pay the check. Claimant testified at hearing that he intended to put money into the account after he wrote the check, but forgot to do so. Transcript at 20. Despite claimant’s plan to put additional funds into his account after he wrote the check, writing a check knowing there were insufficient funds in the account at the time he wrote the check was, at best, a wantonly negligent violation of the owner’s reasonable expectation.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. To qualify to be an isolated instance of poor judgment, the act must be isolated. OAR 471-030-0038(1)(d)(A). “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.” *Id.* In July 2013, claimant knew the funds in his bank account were “tighter” because the employer had reduced his hours. Transcript at 22. Failing to verify that he had sufficient funds in his checking account before he wrote a check to his employer was wantonly negligent. Only two months later, claimant wrote another non-negotiable check to the employer, knowing he had insufficient funds in his account to pay the check. Thus, claimant’s exercise

of poor judgment in writing a check to his employer with insufficient funds cannot be excused as an isolated instance of poor judgment, because it was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct also cannot be excused as a good faith error. Claimant did not show that he had a reasonable good faith belief that the employer approved of him writing checks to the employer's business that were not covered by sufficient funds in his account. The employer specifically warned him on July 23, 2013 that it would discharge him for such conduct.

We conclude that the employer discharged claimant for misconduct. Therefore, claimant is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-08954 is affirmed.

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

DATE of Service: March 10, 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>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.