

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0311

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 11, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141052). Claimant filed a timely request for hearing. On February 6, 2014, ALJ Upite conducted a hearing, and on February 19, 2014 issued Hearing Decision 14-UI-10626, reversing the Department's decision. On February 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The City of Oregon City employed claimant as a head lifeguard and swimming instructor from November 15, 2011 to November 20, 2013.

(2) The employer had a written ethics policy stating that employees were not allowed to benefit from their position or access to the employer's patrons. Claimant was aware of the employer's policy.

(3) In January 2012, claimant collected money and checks written to her from patrons for a group swimsuit order. Claimant placed the order, which qualified for a discount. Claimant also ordered a swimsuit for herself, and received the same discount as the patrons. Claimant's supervisor warned her that in receiving a discount on her swimsuit, she had violated the employer's ethics policy because she had benefitted from her position and access to patrons. Claimant's supervisor prohibited her from accepting money and checks written to her from patrons to order swimsuits on their behalf.

(4) In November 2013, a patron named Geneva Cook assumed responsibility for placing a group swimsuit order. On or about November 12, claimant found in her work inbox a check from a patron written to Ms. Cook to pay for a swimsuit order. Claimant gave the check to Ms. Cook and instructed her to tell patrons that they should pay Ms. Cook directly for their swimsuit orders. From November 12 through 15, claimant found in her inbox more checks written to, and money intended for, Ms. Cook for swimsuit orders. Claimant did not see Ms. Cook until November 15, at which time she gave her the

money and checks, and again instructed her to tell patrons that they should pay Ms. Cook directly. Claimant did not receive any checks or money from November 15 through 19.

(5) On November 20, 2013, a patron gave claimant's supervisor a check written to Ms. Cook to pay for a swimsuit order, and asked the supervisor to give the check to claimant. The supervisor telephoned claimant and asked her to meet with the supervisor to discuss claimant's acceptance of checks and money for swimsuit orders. Claimant asked if she would be fired at the meeting. The supervisor told claimant she would be fired. Claimant asked if she instead could resign at the meeting. The supervisor told claimant she could. When claimant arrived for the meeting, her supervisor already had prepared a resignation letter, which claimant signed.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, not for misconduct.

The first issue in this case is the nature of the work separation. OAR 471-030-0038(2)(a) (August 3, 2011) states that if the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). In the present case, although claimant resigned, it is undisputed that she was willing to continue working for the employer for an additional period of time, but was not allowed to do so by the employer. Because claimant could not have continued working for the employer for an additional period of time, the work separation is a discharge.

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) 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. 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 for allegedly accepting checks and money from patrons for swimsuit orders. However, the patrons had the checks and money placed in claimant's inbox without her knowledge. The checks were written to, and the money intended for, Ms. Cook, and not claimant. Claimant knew she was prohibited from accepting money and checks written to her from patrons to order swimsuits on their behalf. The record fails to show she knew or should have known that accepting checks written to, and money intended for, Ms. Cook and giving them to Ms. Cook violated the employer's expectations. Absent such a showing, we cannot find misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-10626 is affirmed.

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

DATE of Service: March 17, 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.