EO: 200
BYE: 201445

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0438

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 29, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision #134158). The employer filed a timely request for hearing. On February 11, 2014, ALJ Monroe conducted a hearing, and on March 4, 2014 issued Hearing Decision 14-UI-11631, concluding the employer discharged claimant for misconduct. On March 20, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Goodwill Industries of Columbia Willamette employed claimant from April 2, 2012 to November 1, 2013 as a retail store supervisor.

(2) The employer had an employee shopping policy that it reviewed with employees at hire, and provided to them in its employee handbook. The policy prohibited employees from purchasing items in the retail store unless they were available for public purchase on the sales floor. The policy also prohibited employees from purchasing items while on duty. Claimant was aware of the employer's policy and understood those expectations. The employer also expected employees on duty to refrain from having off-duty employees purchase items for them. However, the employer's policy did not explicitly prohibit such conduct, and claimant did not know that such conduct violated the employer's expectations.

(3) Prior to October 19, 2013, claimant asked another employee to purchase an item for her. The employer was unaware of this, and only learned about it sometime after October 19, 2013. As a result, the employer never disciplined claimant for this incident.

(4) On October 19, 2013, claimant authorized the return of a wallet, and put the wallet in a bin under the register counter for merchandise to be returned to the sales floor or sent to an outlet store. The bin was not accessible to the general public. Approximately twenty minutes later, claimant asked a coworker who had finished his shift to purchase the wallet for her. The employer required a supervisor to authorize all purchases by employees. At the time of sale, claimant told a supervisor the wallet was for claimant. The supervisor authorized the sale for the employee, and the employee purchased the wallet for claimant.

(5) On November 1, 2013, the employer discharged claimant for violating its employee shopping policy.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship, or that otherwise make a continued 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)(D).

The employer discharged claimant for violating its employee shopping policy and expectations by purchasing a returned item before it was placed back on the sales floor, and having an off-duty employee purchase the item for claimant while claimant was working. The ALJ concluded that purchasing a returned item before it was placed back on the sales floor was a wantonly negligent violation of the employer's shopping policy.[1] The ALJ further concluded that having an off-duty employee purchase the item for claimant while claimant was working was wantonly negligent because, although the employer's policy did not specifically prohibit such conduct, claimant knew or should have known her behavior probably violated the employer's expectations.[2] The ALJ further concluded that claimant's conduct

[1] Hearing Decision 14-UI-11631 at 4.

[2] *Id*.

during the final incident was not an isolated instance of poor judgment because claimant admitted that on a prior occasion, she had asked an employee to purchase an item for her while claimant was working.[3]

We agree that claimant's act of purchasing an item before it was returned to the sales floor was, at best, a wantonly negligent violation of the employer's employee policy and expectations. Claimant testified at hearing that she knew returned items were to be on the sale floor before an employee purchased them. Transcript at 42. Claimant therefore consciously engaged in conduct she knew probably violated the employer's expectations.

However, we disagree with the ALJ's conclusion that claimant's act of having an off-duty coworker purchase an item for her while she was working was a wantonly negligent violation of the employer's expectations. Claimant's testimony demonstrated that she did not know such conduct probably violated the employer's expectations. Transcript at 30, 34 to 35. Nor does the record show that claimant should have known through prior training, experience or warnings. Nor do we find the employer's expectation so obvious that claimant should have known it as a matter of common sense. Thus, although claimant violated the employer's expectation that she refrain from having an off-duty employee purchase items for her while she was working, the employer failed to establish that the violation was willful or wantonly negligent.

We also disagree with the ALJ's conclusion that claimant's act of purchasing the wallet before it was returned to the sales floor was not an isolated instance of poor judgment. Although the record shows claimant had asked an employee to purchase an item for her on a prior occasion, it does not show that the other employee was on duty, or that the item was not on the sales floor. *See* Transcript at 13; Exhibit 1. Absent such a showing, we again cannot find that claimant knew or should have known that her conduct probably violated the employer's expectations. We therefore cannot conclude that claimant's exercise of poor judgment in purchasing the wallet before it was returned to the sales floor on October 19 was a repeated act or pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Finally, claimant's act of purchasing the wallet before it was placed on the sales floor did not violate the law, and was not tantamount to unlawful conduct. Nor, viewed objectively, was it so egregious that it caused an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. Claimant's conduct therefore did not exceed mere poor judgment.

We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-11631 is set aside, as outlined above.

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

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[3] Hearing Decision 14-UI-11631 at 4.

DATE of Service: April 15, 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.

Note: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.