

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0616

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #132934). Claimant filed a timely request for hearing. On April 2, 2014, ALJ Murdock conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14419, affirming the Department's decision. On April 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Minute Market employed claimant as a replacement manager from July 12, 2010 to December 18, 2013.

(2) The employer prohibited employees from selling alcohol to customers under the age of 21. The employer required employees to check the identification of anyone who wanted to purchase alcohol and looked under 30, and to verify if a person was at least 21 if the person wanted to purchase alcohol. The employer's cash registers were equipped with software to confirm if a customer was 21 years of age. Before completing a sale for alcohol, the employer required cashiers to enter the customer's date of birth into the cash register to determine if the customer was at least 21 years of age. Claimant understood the employer's expectations. Exhibit 1.

(3) On December 9, 2013, the police conducted a secret compliance check in claimant's store to test for sales of alcohol to minors. A customer wanted to purchase alcohol from claimant. Claimant asked him his date of birth. Claimant heard the customer state he was born in 1983. The customer did not appear to claimant to be less than 30 years old. Claimant keyed the date of birth into the cash register, and the cash register warned her that the customer was too young to purchase alcohol. Claimant overrode the date of birth she had entered and entered her own birth date, which was over 21 years. Exhibit 1. Claimant sold the alcohol to the customer, who was a minor.

(4) On December 18, 2013, the employer discharged claimant because she sold alcohol to a minor in its store on December 9, 2013.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-14419, the ALJ concluded claimant's conduct was wantonly negligent when she entered her own date of birth to override the register warning stating the customer was a minor.¹ The ALJ reasoned that claimant knew or should have known not to enter her own date of birth, and that her conduct exceeded an isolated instance of poor judgment because it was "unlawful and dishonest."²

However, the employer's operations manager testified at hearing that the employer discharged claimant because the police cited her for selling alcohol to a minor. Audio Record ~ 5:46 to 6:07. The record does not show the employer discharged claimant because she failed to enter the customer's date of birth into the register a second time after asking his date of birth, which she believed to be in 1983. Thus, the pertinent question is whether claimant knew or should have known that her conduct would probably violate the employer's policy that she refrain from selling alcohol to minors. The record does not show that the customer looked younger than 30, or that the employer prohibited cashiers from overriding a sale with their own birth date if they had confirmed the customer was 21 years of age. Claimant testified that the customer did not look young, and that she "just heard it wrong," when she heard the customer say he was born in 1983. Audio Record ~ 8:05 to 9:01. Based on this information, and knowing that she sometimes activated the register's warning by mistakenly keying in the wrong numbers, claimant overrode the cash register warning "rather than hold him up." Audio Record ~ 8:04 to 8:35. Claimant testified that she did not know the customer was under 21 until a police officer gave her a citation fifteen minutes after the sale. Audio Record ~ 9:21 to 9:36. Absent evidence that claimant knew or should have known the customer was under 21, we cannot find that claimant's conduct was wantonly negligent, or a willful violation of the employer's prohibition against selling alcohol to customers under the age of 21.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14419 is set aside, as outlined above.

¹ Hearing Decision 14-UI-14419 at 3.

² *Id.*

Susan Rossiter and Tony Corcoran;
D. E. Larson and J.S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 20, 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.