

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0633

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #152629). Claimant filed a timely request for hearing. On March 19, 2014, ALJ Monroe conducted a hearing, and on March 27, 2014 issued Hearing Decision 14-UI-13558, affirming the Department's decision. On April 16, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Powells Books, Inc. employed claimant from November 13, 2000 to January 9, 2014 as a customer service representative.

(2) The employer had a book borrowing policy permitting an employee to borrow a maximum of 20 books. The employer has multiple locations, and permitted an employee to place an order to have a book transferred from one of the employer's locations to the employee's location. When an employee transferred a book to the employee's location for personal loan or purchase, the book was considered a borrowed book until the employee purchased it. An employee was able to purchase a book before it was transferred. The employer gave preference to customer transfer orders over employee transfer orders. The employer required a coworker, and not the employee, to complete an employee's purchase of a transferred book. Claimant understood the employer's book borrowing and transfer policies.

(3) On January 24, 2012, claimant received a warning because he failed to return borrowed books in a timely manner, after having received two notices that the books were overdue.

(4) On December 18, 2013, claimant received books that he had transferred to his location. Claimant processed the books, and completed a sale for purchase for himself. The employer reviewed its book borrowing policy with claimant at that time, and suspended him without pay for five days for violating its policies, including its book borrowing policy.

(5) On approximately January 3, 2014, claimant placed a transfer order for a book from one of the employer's locations to the store where claimant worked. Before that transfer order, claimant knew he

had reached the maximum number of books he was permitted to borrow. Claimant did not purchase the book before requesting the transfer, so the book was considered a borrowed book. Claimant used a friend's name instead of his own to place the transfer order. On January 4, 2014, the book arrived on transfer at claimant's store and claimant purchased the book.

(6) On January 9, 2014, the employer discharged claimant for violating its book borrowing 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer had a right to expect claimant to follow its book borrowing policy. Claimant testified at hearing that he did not violate the borrowed book policy, because the book was not a borrowed book, but, rather, a book he purchased immediately when it arrived at his store. Transcript at 15. However, claimant also testified that he understood all unpurchased books were considered to be borrowed books until purchased, and that he knew before he requested the transfer that he had already borrowed the maximum number of books permitted. Transcript at 21 to 22. Moreover, claimant testified that he placed the transfer order under a false name not only because he knew he had already borrowed the maximum number of books, but also to assume customer priority for the book, because the sending location would believe he was a customer wanting to purchase a book rather than an employee borrowing a book. Transcript at 18. Claimant knew or should have known from the employer's book borrowing and transfer policies that using a false name to request a book would probably violate the employer's expectations regarding its book borrowing policy and the preference the employer intended to give customer transfer orders for purchase. Claimant's conscious decision to use a false name to place a transfer order for a book demonstrated indifference to the consequences of his actions and was, at best, wantonly negligent.

Claimant's conduct was not the result of an isolated instance of poor judgment. To be isolated, 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. OAR 471-030-0038(1)(d)(A). In this case, claimant exercised poor judgment specifically regarding the borrowed book policy on two prior occasions, in January 2012 and December 2013. In January 2012, claimant failed to return borrowed books by the

employer's deadline. In December 2013, claimant failed to have a coworker process his borrowed books, rather than himself. On both occasions, claimant engaged in conduct that he knew or should have known violated the employer's book borrowing expectations. Claimant's conduct in using a false name to request a book transfer in January 2014 was therefore, part of a pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant testified at hearing that he did not know he was prohibited from using a false name to transfer a book, and that using a false name was not explicitly prohibited in the book borrowing policy. Transcript at 17 to 18. However, the policy is an "employee" book borrowing policy, and claimant knew that the policy prohibited employees from borrowing more than 20 books and that using a fake "customer" name would give his transfer request the priority given to customers. Transcript at 33, 18 to 22. The record does not show claimant used a false name based on a misunderstanding that the employer would approve of his conduct, but, rather, shows claimant did so to circumvent the book borrowing limit and the preference given to customer transfer orders. Absent evidence that claimant honestly believed, and had a rational basis for believing, his conduct complied with the employer's expectations, his conduct cannot be excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-13558 is affirmed.

Susan Rossiter and J.S. Cromwell, *pro tempore*;
Tony Corcoran and D. E. Larson, 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>.

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