

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1239

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 124455). The employer filed a timely request for hearing. On July 9, 2014, ALJ Wyatt conducted a hearing, and on July 16, 2014 issued Hearing Decision 14-UI-21067, affirming the Department's decision. On July 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant as a prep cook in its cafeteria until April 28, 2014.

(2) The employer expected claimant to refrain from taking food items that the employer was selling without first paying for them. The employer also expected claimant to provide honest answers when it was interviewing her about her behavior in the workplace. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On April 19, 2014, the employer was selling boxes of cupcakes to its cafeteria customers. On that day, claimant removed two boxes of cupcakes to purchase them. As she was preparing to leave work and was carrying the cupcakes to pay for them, claimant received an emergency phone call from a doctor at the hospital where her son was a surgical patient. The doctor told claimant that her son had lost consciousness and injured himself in that hospital. The doctor asked claimant to come immediately to that hospital. Without thinking about the cupcakes she was carrying or putting them down, claimant rushed to leave the employer's premises and drove to the hospital to learn her son's condition. Claimant

had not paid for the cupcakes when she left the workplace with them, but was not aware of it. Later, after claimant arrived at her home, she still had the cupcakes with her, but still did not think about the fact that she had not paid for them. Claimant did not subsequently think about the cupcakes or remember that they were not paid for.

(4) On April 24, 2014, claimant's supervisor called her in to a meeting with a representative from the human resources department. Both employer representatives told claimant that they suspected she had taken the cupcakes on April 19, 2014 without paying for them and had intended to steal them. The meeting was a surprise to claimant and the allegation about the cupcakes unsettled her. Transcript at 17. Claimant was embarrassed that she was accused of stealing and afraid that she was going to lose her job. Transcript at 15, 18. Although, after the employer's representatives confronted her about the cupcakes, claimant remembered she had taken them without paying, claimant denied at that time she had left the workplace with the cupcakes. At the conclusion of the meeting, the employer's representatives sent claimant home. After she arrived at home, claimant thought about what she had told her supervisor and the human resources representative about the cupcakes and decided that she needed to tell them the truth. Within an hour of arriving at home, claimant called her supervisor intending to tell him she had inadvertently left the workplace on April 19, 2014 without paying for the cupcakes, but she was unable to reach him and left a message. On April 25, 2014, the supervisor returned claimant's call. Claimant admitted to the supervisor that she had not told him the truth the previous day, and that she had left the workplace with the cupcakes on April 19, 2014.

(5) On April 28, 2014, the employer discharged claimant for taking the cupcakes from the workplace on April 19, 2014 without paying for them and for being initially dishonest with the employer on April 24, 2014 when she denied having done so.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant contended that she was distracted by the emergency phone call about her son and was "not thinking" or aware that she had left the workplace without paying for the cupcakes. Transcript at 14, 15, 17. Between the time that she left the workplace on April 19, 2014 and April 24, 2014, claimant also explained that she did not think about the cupcakes or that she had not paid for them. Transcript at 15. Although the employer contended that claimant's intention to steal the cupcakes was demonstrated by a statement that claimant supposedly made to a coworker on April 19, 2014 that she had a receipt for the

cupcakes, claimant denied that she had made such statement. Transcript at 21, 22, 23, 24. Claimant's first-hand testimony on this issue is entitled to greater weight than the employer's hearsay testimony. More likely than not, claimant did not tell her coworker that she had purchased the cupcakes on April 19, 2014. The only evidence in the record to support the employer's inference that claimant intended to take the cupcakes without paying for them is the fact that claimant left the workplace with the cupcakes when they were not paid for.

To establish claimant's misconduct, EAB has consistently held that the employer must demonstrate that claimant's behavior was a willful or wantonly negligent violation of the employer's standards. *See* OAR 471-030-0038(3)(a). EAB has also consistently held that the employer must present *evidence* that claimant's behavior was conscious in order to meet the threshold for showing that it was willful or wantonly negligent.¹ Here, claimant's explanation that on April 19, 2014 she was so distracted by the emergency phone call about her son that she rushed from the workplace with the cupcakes, without conscious awareness that she had not paid for them, was plausible and was not rebutted by any credible evidence from the employer. Claimant's testimony that after she had the cupcakes at home she did not think about them or that she had not paid for them until the employer brought them up on April 24, 2014 was equally plausible and also unrebutted. On these facts, the employer did not meet its burden to establish that claimant had the requisite conscious mental state to make her failure to pay for the cupcakes willful or wantonly negligent behavior, either when she left the workplace with them on April 19, 2014 or after she had them in her home. The employer did not show that her behavior in failing to pay for the cupcakes was misconduct.

To the extent that claimant's initial dishonesty in denying to the employer that she had taken the cupcakes from the workplace was a cause of her discharge, it was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and it not the type of act that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). Here, although the employer had previously

¹ *See* OAR 471-030-0038(1)(c); *see also* *Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent); *Marina V. Berlachenko* (employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not wantonly negligent); *Paul A. Klinko* (employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence claimant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010) (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).

issued a disciplinary warning to claimant on February 7, 2013, the employer did not present any evidence from which it can be inferred that claimant's behavior underlying that warning was willful or wantonly negligent. Exhibit 1 at 3. Accordingly, claimant's behavior on April 24, 2014 in dishonestly denying that she had taken the cupcakes was isolated within the meaning of OAR 471-030-0038(1)(d)(A). Nor, on these facts, was the very brief period in which claimant tried to deceive the employer the type of behavior that caused an irreparable breach of trust in the employment relationship. From claimant's testimony, she initially denied to the employer that she had taken the cupcakes from the workplace because she was understandably embarrassed about being accused of stealing them and she was fearful of losing her job. The employer did not dispute that within an hour of making the denial, claimant on her own volition tried to contact her supervisor to tell him she had not been truthful and, when she reached him, promptly admitted her deception. Transcript at 15, 18, 19. Claimant's extremely short-lived deception, coupled with her self-reporting of her own deception, demonstrated that her behavior was not the type of recalcitrant or obstinate dishonesty that causes an irreparable breach of trust in the employment relationship. Since it meets all the requirements of OAR 471-030-0038(3)(b), to the extent that claimant's denial that she removed the cupcakes from the employer's premises was a willful or wantonly negligent violation of the employer's standards, it was excused from constituting misconduct as an isolated instance of poor judgment.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-21607 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service:

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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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