

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1659

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131237). The employer filed a timely request for hearing. On October 15, 2014, ALJ Kirkwood conducted a hearing at which claimant did not appear and issued Hearing Decision 14-UI-26977, affirming the Department's decision. On October 17, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) C & K Market, Inc. employed claimant as a cashier from May 26, 2011 until August 1, 2014.

(2) The employer expected claimant to refrain from removing merchandise from the store before paying for it, and to keep a sales receipt for the merchandise with her so long as she had the merchandise in her possession on the store premises. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On January 23, 2013 and February 21, 2014, the employer gave claimant warnings for the manner in which she provided customer service.

(4) In July 2014, the store manager observed claimant bringing some consumable items into the store that were identical to items sold in the store. The manager told claimant that to protect herself against accusations of theft from the store, she should not to bring such items into the store or, if she did, to place the items in her own home storage containers.

(5) Sometime in approximately mid to late July 2014, the store manager saw claimant in the store on her day off. He observed claimant take a pack of cigarettes and, without paying for it, go to the break room and then upstairs to the bathroom. Claimant paid for the cigarettes before leaving the store. The store manager did not comment to claimant about this behavior.

(6) On August 1, 2014, claimant removed a pack of cigarettes from the store's shelves and, before leaving the store premise to take a break, told the cashier on duty that she would pay for the cigarettes later. Claimant took the unpaid cigarettes with her when she went outside the store and smoked some of them. Sometime later that day, claimant paid for the cigarettes.

(7) On August 1, 2014, the employer discharged claimant for taking store merchandise, the cigarettes, outside the store before paying for it.

**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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Assuming *arguendo* that claimant's behavior in removing the cigarettes from the store without paying for them on August 1, 2014 was at least a wantonly negligent violation of the employer's expectations, it was excused from constituting misconduct as an isolated instance of poor judgment. 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. OAR 471-030-0038(1)(d)(A). It is also an act that does not violate the law or does not exceed "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, the employer did not present sufficient facts about claimant's behavior before August 1, 2014 to demonstrate that the behavior that gave rise to claimant's past warnings was willful or wantonly negligent. As such, claimant's wantonly negligent behavior on August 1, 2014 was isolated and is excusable as an isolated instance of poor judgment if the requirements of OAR 471-030-0038(1)(d)(D) are met. Since claimant told the other cashier before leaving the store on August 1, 2014 that she was going to pay later for the pack of cigarettes and then did so of her own volition, claimant did not evidence the intention to deprive the employer of the value of the cigarettes that is necessary to establish that her behavior constituted the crime of theft or was tantamount to theft. *See* ORS 164.015. Claimant's acknowledgment to the cashier of what she was doing also evidenced that she was not engaging in subterfuge or deceit and, although she should have been reasonably aware that she was violating the employer's standards by taking the pack of unpaid cigarettes from the store, when she did so it was most likely a lapse of judgment and not done with the intention to benefit herself at the expense of the employer. On these facts, based on claimant's very minor transgression on August 1, 2014, an employer would not objectively conclude that it could not trust claimant in the future around its merchandise or that her behavior made a continued employment relationship impossible. Claimant's behavior on August 1, 2014, did not exceed mere poor judgment and, because it was isolated, it is properly excused 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-26977 is affirmed.

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

**DATE of Service:** December 3, 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 [court.oregon.gov](http://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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