

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1820

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75842). Claimant filed a timely request for hearing. On November 18, 2014, ALJ Shoemake conducted a hearing, and on November 25, 2014 issued Hearing Decision 14-UI-29318, affirming the Department's decision. On November 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Powells Books, Inc. employed claimant from September 21, 2007 to September 5, 2014 as a book seller.

(2) The employer prohibited employees from using personal electronic devices while working on the sales floor, and expected employees to provide friendly service and to serve customers while on duty. The employer provided employees with two ten-minute breaks and a thirty-minute meal period during a shift. On July 2, 2013, claimant read the employer's employee handbook containing the employer's policies.

(3) Claimant sometimes had to use the restroom due to digestive issues from a medical condition. Since hire, claimant's managers had permitted him to take bathroom breaks in addition to his ten-minute rest breaks without requesting permission for bathroom breaks.

(4) On July 8, 2014, the employer gave claimant a five-day unpaid suspension for allegedly falsifying his time records, including taking multiple breaks exceeding ten minutes, and arriving late to work. Claimant filed a grievance regarding the allegations. During the grievance process, claimant told the employer he might need an accommodation because he needed to take bathroom breaks due to a medical condition. The employer did not discuss the possibility of an accommodation with claimant.

(5) On August 23, 2014, a customer complained to the employer that claimant behaved in an unfriendly manner when the customer asked him questions, and replied with one-word answers. The employer reviewed 40 minutes of video of claimant at work on August 23 and noted that claimant did not leave

the register area during the 40 minutes to perform duties he was expected to complete before the store closed.

(6) On August 26, 2014, claimant took a break to use the restroom from 7:20 a.m. until 7:43 a.m., and a rest break from 8:06 a.m. to 8:17 a.m.

(7) On August 26, 2014, claimant used his electronic tablet to listen to the radio while working on the sales floor. Since hire, claimant had often used his laptop computer or tablet to listen to the radio while working on the sales floor. The employer did not tell claimant to stop using his laptop or tablet to listen to the radio, and claimant had not received any prior warnings regarding his personal use of electronics at work. Claimant therefore believed he was allowed to use his laptop or tablet to listen to the radio while working.

(8) On August 27, 2014, claimant took a break to use the restroom from 7:42 a.m. until 7:55 a.m., and a rest break from 8:28 a.m. to 8:42 a.m.

(9) On September 3, 2014, the employer investigated claimant's conduct on August 23, 26 and 27, 2014. On September 5, 2014, the employer discharged claimant for allegedly providing poor customer service, taking excessive breaks, and violating its policy about the personal use of electronic devices on the sales floor.

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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). A conscious decision not to comply with an unreasonable employer policy or expectation is not misconduct. OAR 471-030-0038(1)(d)(C).

The employer discharged claimant, in part, for taking an extra morning break on August 26 and 27, 2014. In Hearing Decision 14-UI-29318, the ALJ concluded that taking the extra breaks was a wantonly negligent disregard of the employer's interests because "claimant was unable to persuasively show" the additional breaks were bathroom breaks, and understood after his July 2014 suspension that he was not permitted to take bathroom breaks in addition to his rest breaks "unless approved for FMLA accommodations."¹

¹ Hearing Decision 14-UI-29318 at 3.

We disagree with the ALJ's assertion that claimant failed to show the additional breaks were bathroom breaks, and knew or should have known from his July 2014 suspension that taking bathroom breaks in addition to rest breaks probably violated the employer's expectations. At hearing, claimant testified that the additional morning breaks he took on August 26 and August 27 were bathroom breaks he needed to take due to his medical condition, and the employer provided no evidence to the contrary. The employer suspended claimant in July 2014 for allegedly falsifying his time records by taking multiple breaks exceeding ten minutes, and not for taking bathroom breaks in addition to rest breaks. Although claimant suggested to the employer that an accommodation due to his medical condition might be necessary, he did not pursue an accommodation further because the employer had always allowed employees to take bathroom breaks, and never stated there was a "maximum" amount of time permitted for bathroom breaks before he needed to seek an accommodation to avoid discipline. Audio Record at 22:28 to 23:02.

To the extent the employer expected claimant to refrain from taking bathroom breaks he needed to take due to his medication condition, the employer's expectation was unreasonable. The employer also failed to show that claimant knew or should have known from his suspension or otherwise that taking the bathroom breaks probably violated the employer's expectations. The employer therefore failed to establish that in taking the bathroom breaks, claimant violated the standards of behavior which an employer has the right to expect of an employee, let alone that he did so willfully or with wanton negligence.

The employer also discharged claimant, in part, for taking rest breaks on August 26 and 27 that exceeded ten minutes. However, claimant returned to work only one minute late on August 26, and only four minutes late on August 27. The record fails to show claimant was conscious of the fact that his breaks exceeded ten minutes, or that he consciously engaged in other conduct he knew or should have known would probably result in his breaks exceeding ten minutes. The employer therefore failed to establish that claimant violated the employer's expectations willfully or with wanton negligence.

The employer also discharged claimant, in part, for allegedly failing to provide satisfactory service on August 23 by being unfriendly to a customer and standing at a register for 40 minutes during his shift without performing any other work duties. However, claimant testified that he was not unfriendly to the customer, and that he already had completed his other duties that day because there were few customers that the store was overstaffed. Audio Record at 23:11 to 25:26. Absent a reason to disbelieve claimant, the claimant's sworn testimony outweighs the hearsay information from the customer, and claimant's explanation regarding the time he spent standing in the register area is plausible in the absence of other evidence from the employer contradicting claimant's testimony. Thus, weighing the evidence as a whole, it is at best equally balanced regarding claimant's alleged failure to provide satisfactory customer service on August 23. The employer therefore failed to establish that claimant violated its customer service expectations, let alone that he did so willfully or with wanton negligence.

The employer also discharged claimant, in part, for violating its policy against the personal use of electronic devices on the sales floor. However, claimant had used his laptop or tablet to listen to the radio while working throughout his employment without being warned to stop or disciplined. Claimant therefore reasonably believed he was permitted to use his tablet to listen to the radio while working.

Although claimant may have violated the employer's policy, the record fails to show claimant knew or should have known through prior training, experience or warnings that his conduct probably violated the employer's expectations. The record instead shows claimant sincerely believed, and had a rational basis for believing, that the employer did not enforce the policy if the electronic device was used to listen to the radio. Claimant's use of his tablet on the sales floor therefore was, at worst, the result of a good faith error in his understanding of the employer's expectations, and not misconduct.

In sum, the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-29318 is set aside, as outlined above.²

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

DATE of Service: January 9, 2015

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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² 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.