

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1877

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 171703). Claimant filed a timely request for hearing. On November 17, 2014, ALJ M. Davis conducted a hearing, and on November 21, 2014 issued Hearing Decision 14-UI-29175, reversing the Department's decision. On December 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to introduce new information not presented at the hearing. The employer did not explain why it did not offer this new information during the hearing, and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-030-0090(2) (October 29, 2006). Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Core-Mark International, Inc. employed claimant as a loader from July 23, 2007 until October 1, 2014. The employer sold packaged food items to customers.

(2) The employer expected claimant to refrain from consuming any returned or damaged food items without prior permission from a supervisor. The employer expected claimant to take returned or damaged items to a "returns pallet" for processing and, if possible, returning them to the vendor to receive a future purchase credit. Sometimes when a damaged food item was returned, the employees did not take it to the returns pallet, but threw it away in the garbage. Claimant was aware of the employer's expectations and the practices of other employees.

(3) On September 30, 2014, claimant was moving a box of packaged brownies. The box was damaged and several brownie packages in it fell out and scattered across the warehouse floor. The protective packaging sealing one of the brownies broke. Without thinking, claimant impulsively picked up the brownie, fully opened its damaged packaging and ate it. Claimant thought that the brownie was going to be discarded in the garbage. A coworker observed claimant eating the brownie and told the warehouse supervisor. The supervisor spoke to claimant and claimant admitted he had eaten the brownie without a supervisor's permission.

(4) On October 1, 2014, the employer discharged claimant for eating the brownie on September 30, 2014.

(5) Before October 1, 2014, claimant had not received any warnings for behavior similar to his consumption of the brownie on September 30, 2014.

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 are not misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant testified that he thought the brownie was going to be thrown away before he ate it, he also stated that he was aware that he was expected to take that brownie, even if its packaging was damaged and its exposed surface had been in contact with the warehouse floor, to the returns pallet. Audio at ~15:18, ~21:02. It can reasonably be inferred that claimant had conscious knowledge of his behavior when he decided to eat the brownie. Because claimant knew or should have known that the employer would not approve of him eating the brownie whatever its condition, he was also reasonably aware that this behavior would probably result in a violation of the employer's standards. OAR 471-030-0038(1)(c). On these facts, claimant violated the employer's standards with wanton negligence.

Although claimant's behavior might have been wantonly negligent, it is excused from constituting misconduct if it was 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). To be excused as an isolated instance of poor judgment, the behavior must also meet, among other things, the further requirements of not being unlawful or tantamount to unlawful conduct and not 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). Here, claimant had not previously received warnings similar to his behavior on September 30, 2014. The employer did not present evidence of any prior occasions on which claimant willfully or with wanton negligence violated the employer's standards. Claimant's behavior on September 30, 2014 meets the first requirement to be excused as an isolated instance of poor judgment because it was a single instance of behavior in willful or wantonly negligent violation of the employer's standards.

Claimant testified that the brownie accidentally fell out of the packing box which contained it, landed on the warehouse floor and its protective packaging broke, apparently exposing at least part of the uncovered brownie to the floor. At the time he ate it, claimant thought that the damaged brownie was "compromised" and "destined for the garbage." Audio at ~15:40, ~15:50. Claimant's testimony was plausible in view of his un rebutted description of the condition of the brownie. We also reasonably infer that, for this reason, claimant thought the brownie was worthless to the employer when he decided to consume it. Because claimant did not intend to deprive the employer of the value of the brownie by his behavior, even if he was mistaken in light of the possibility that the vendor might extend credit to the employer for the return of the damaged brownie, claimant's conduct did not violate Oregon theft statutes, nor was it tantamount to theft. *See* ORS 164.015 (person commits theft when he takes property with the intent to deprive the rightful owner of the property); ORS 164.035(1)(b) (defenses to theft include that the person believed he had a right to acquire and dispose of property as he did); Audio at ~18:48.

Nor did claimant's behavior in eating the brownie cause an irreparable breach of trust or make a continued employment relationship impossible. Claimant's behavior was impulsive but understandable in light of the circumstances of a brownie in a broken package inadvertently landing on the warehouse floor. The employer's witnesses did not challenge claimant's testimony that sometimes the loaders did not take damaged items in broken packaging to the returns pallet, but threw them away. Audio at ~20:20; ~21:02. Claimant's testimony about his belief that the brownie was going to be discarded was appeared sincere. Claimant's agreement at hearing that he should have taken the damaged brownie, regardless of its condition, to the returns pallet showed that he was willing to admit his error. It also gives credence to his explanation that, although he acted impulsively, it was without a dishonest intention. Audio at ~15:18, ~21:02. The employer's rationale for discharging claimant, that it needed to enforce a policy against employee consumption of damaged food items to avoid "sett[ing] ourselves up for a free for all on employees purposely damag[ing] product in order to consume it," does not address the particular circumstances of claimant's case. Employer's Written Argument at 1. At hearing, the employer's witnesses never contended or even suggested that claimant purposely caused the brownie to fall out of its packing box or intentionally damaged the brownie's protective packaging in order to consume it. While the employer's stated position of rigorously and without exception enforcing a company-wide ban against the consumption of damaged food items is relevant in determining whether an objectively reasonable employer would conclude that an irreparable breach of trust in the employment relationship had occurred, it is not dispositive. An objective employer, before concluding that claimant's behavior reasonably caused an irreparable breach of trust, would have assessed what his underlying intention was and whether it could trust *him* (rather than other employees) in the workplace in the future. Given claimant's honest intentions, the apparent sincerity of his explanation and his willingness to admit that he should have behaved otherwise, an objective employer would not have concluded that by eating the brownie on September 30, 2014 he fundamentally ruptured the employment relationship, he could not be trusted in the future to comply with the employer's requirements or made a continued employment relationship impossible. Because it meets all requirements, claimant's behavior on September 30, 2014, even if it was wantonly negligent, 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-29175 is affirmed.

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

DATE of Service: January 28, 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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