

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0083

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 99256). Claimant filed a timely request for hearing. On January 27, 2015, ALJ Wyatt conducted a hearing and issued Hearing Decision 15-UI-32436, reversing the Department's decision. On February 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pacific Cascade Enterprises, Inc. employed claimant from January 8, 2013 until November 28, 2014, last as a restaurant manager.

(2) The employer expected claimant to retain all tickets for food that was ordered and, when it was necessary to void a ticket, to write on the voided ticket an explanation for why it was voided and to have that ticket signed by the manager on duty. The employer also expected claimant to turn in all original tickets she had issued, including those that were voided, at the end of the work day. Claimant understood the employer's expectations.

(3) On approximately November 28, 2014, at around 1:30 a.m., claimant was closing the restaurant, which required her to balance her cash drawer, close the cash drawer, turn in all of her food tickets, close her section and assist in some end-of-the day cleaning. Claimant performed these closing tasks. As claimant was sorting the food tickets, she set aside two tickets that she had voided to allow her to write the required explanation and to sign them as manager on duty. Claimant then took the cash that had been received during the day and the original food tickets to the office. As claimant returned from the office, she noticed that she had forgotten to turn in the voided tickets that she had set on the counter. Because it was late and claimant wanted to get home, she wadded up the two tickets and threw them in the trash. She did not want to take the time to write the required information on the voided tickets. Claimant then left the restaurant and went home.

(4) Later, during the daylight hours of November 28, 2014, the general manager reviewed a daily report showing the food tickets that were issued on November 27, 2014 and the very early morning hours of November 28, 2014. The general manager also reviewed the employer's surveillance video, and saw claimant setting aside what appeared to be two food tickets and, after returning from the office, discarding those tickets in the trash. Because claimant had not followed the employer's policies when she threw away the tickets, the employer was concerned that claimant had intentionally voided those tickets in order to take money from the employer.

(5) On November 28, 2014, the general manager and the district manager met with claimant to learn the reason that she had set aside and then discarded the two original food tickets earlier in the day. Claimant explained to both managers that the tickets she discarded had been voided and that she had thrown them away, rather than taking the time to write the required information on them because it had been late and she wanted to go home.

(6) On November 28, 2014, the employer discharged claimant for violating its policy that required the turning in of all original food tickets, including those that had been voided.

(7) During her employment, claimant had never before thrown away any voided food tickets.

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 carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, claimant conceded that she had thrown away two original voided food tickets on November 28, 2014 and, when she did so, she knew it violated the employer's expectations. Audio at~13:40, ~14:30, ~19:50. Based on claimant's own testimony, she acted with at least wanton negligence when she discarded those two food tickets. Because claimant's behavior violated OAR 471-030-0038(3)(a), she is disqualified from benefits unless her behavior was excused from constituting misconduct under the exculpatory provisions of OAR 471-030-0038(3)(b).

Isolated instances of poor judgment are not misconduct under OAR 471-030-0038(3)(b), even if claimant's behavior in not complying with the employer's expectations was willful or wantonly negligent. An "isolated instance of poor judgment" is a single or infrequent occurrence of willful or wantonly negligent behavior rather than a repeated act or pattern of willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To qualify as an isolated instance of poor judgment, claimant's behavior must not have exceeded mere poor judgment or been of a type that caused an irreparable breach of trust or otherwise made a continued employment relationship impossible. OAR 471-030-0030(1)(d)(D). Here, both parties appeared to agree that claimant had never before discarded any

voided tickets, and there was no evidence in the record that claimant had ever violated any other of the employer's standards. Audio at ~12:18, ~16:00, ~26:55. Claimant's wantonly negligent behavior on November 18, 2014 was a single act in violation of the employer's expectations and meets the first requirement for being excused as an isolated instance of poor judgment

With respect to whether claimant's behavior was excusable as an isolated instance of poor judgment, it must also satisfy a second prong to qualify for this exception, which is that it did not cause an irreparable breach of trust in the employment relationship. Although the employer's witness argued at hearing that he needed to discharge claimant because she refused to provide explanation for her actions on November 28, 2014 and she therefore could no longer be trusted, claimant disagreed and contended that she had given to him when he met with her on November 28, 2014, the same explanation that she gave at hearing. Audio at ~13:40, ~24:21, ~25:10, ~25:26. There is no reason in this record to believe or disbelieve either party's testimony in preference to that of the other. When the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer in a discharge case, because the employer carries the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, it is more likely than not that claimant explained to the employer why she discarded the two food tickets on November 28, 2014. As such, claimant's alleged behavior in refusing to disclose information to the employer could not have been a legitimate factor in any determination by the employer that it could no longer trust claimant. The employer's witness also presented evidence of the importance of enforcing the employer's policy about turning in all voided tickets in order to deter possible employee theft. Audio at ~7:06. However, the focus of determining whether claimant's behavior exceeded mere poor judgment is whether, for some reason, claimant's behavior caused the employer to reasonably believe that it could no longer trust *claimant* and not whether the employer had a generalized interest in deterring all of its employees from potential wrongdoing. Focusing specifically on claimant, her reason for throwing away the two voided tickets, that it was late and she wanted to leave work and get home, although misguided, was understandable. At hearing, claimant appeared genuinely apologetic for her behavior, did not minimize what she had done and candidly conceded that she had violated the employer's policy. Audio at ~13:55, ~14:40, ~14:57. In light of claimant's sincerity, her admissions, and the understandable human motives that gave rise to her behavior, a reasonable employer would not have objectively concluded that because she had thrown away two voided food tickets, claimant could not be trusted in the future to comply with the employer's workplace standards. Because claimant's behavior on November 28, 2014, meets both prongs of the applicable regulation, it is 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 15-UI-32436 is affirmed.

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

DATE of Service: March 17, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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