

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0143

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 24, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74607). Claimant filed a timely request for hearing. On January 26, 2015, ALJ M. Davis conducted a hearing, and on January 28, 2015 issued Hearing Decision 15-UI-32848, affirming the Department's decision. On February 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that presented new information not offered into evidence at the hearing. Claimant did not explain the relevance of this information to the issues before EAB, nor did she show that factors or circumstances beyond her reasonable control prevented her from offering this information at the hearing as required under OAR 471-041-0060(2) (October 29, 2006). Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Bi-Mart Corporation employed claimant from November 1, 1999 until November 17, 2014, last as an area coordinator for sporting goods.

(2) The employer's sporting good department sold guns and was federally license to do so. Gun sale transactions were subject to state and federal standards. One of those standards was that a federal firearms transaction record, Bureau of Alcohol Tobacco and Firearms (ATF) form 4473, needed to be completed for each sale. The first part of the form was to be filled out by the prospective purchaser of the gun and was intended to elicit background information to determine if the purchaser was prohibited from buying the gun. ATF Form 4473, Part A, http://www.atf.gov/files/forms/download/atf_f-4473-1.pdf. The second part of the form was to be filled out by the seller of the gun and included, among other things, a detailed description of the gun to be purchased. ATF Form 4473, Part B. The purchaser and the seller were required to certify that the information they provided in the form was true and accurate. ATF Form 4473 at boxes 16 and 33. Once it was completed, the form was transmitted to the Oregon Firearms Instant Check System (FICS) operated by the Oregon State Police to perform a background check on the prospective purchaser of the gun.

(3) The employer expected employees selling guns not to guide, coach or assist customers in filling out the parts of Form 4473 that the customer was responsible for completing. The employer also prohibited its employees from arranging for background checks of customers to determine if a particular customer was able to purchase a gun. The employer provided training to its employees on its expectations when they sold guns and how to complete the parts of Form 4473 for which the seller was responsible. Claimant received this training and was aware of the employer's expectations.

(4) On November 12, 2014, claimant was working as a salesperson in the employer's sporting goods department. A customer came into the gun section and told claimant that he had been unable to purchase a gun in October 2014 because of a felony conviction in the state of New York. The customer told claimant that he had since had the felony conviction expunged and wanted to know if the expunction had been processed and his background no longer precluded him from purchasing a gun. The customer told claimant that he did not want to purchase a gun at that time. Claimant told the customer that it appeared he needed to have a background check performed and the employer did not perform background checks for customers. The customer then told claimant that he had called FICS to determine if the expunction had been processed in its records and if he was now eligible to purchase a gun, and a clerk at FICS had told him he could not access claimant's records to answer his question and could only do so if claimant attempted to purchase a gun and a Form 4473 was submitted to FICS. Claimant attempted to contact FICS to determine how best she could implement the customer's need for only a background check, but could not reach a live person. Audio at ~29:45. Claimant did not attempt to contact a manager to determine what she was and was not authorized to do for the customer if he did not want to actually purchase a firearm. Audio at ~27:46.

(5) Claimant believed that the customer had given her accurate information about the expunction and his call to FICS. Claimant proceeded to have the customer fill out the first part of form 4473 as if the customer was actually attempting to purchase a gun. When the customer reached question 11(c), which inquired whether he had ever been convicted of a felony, he asked claimant how he should answer it. Claimant told the customer that she "couldn't tell him how to answer it [question 11(c)], but if he answered "yes," [she] could not submit the form [to FICS]." Audio at ~25:37. The customer then answered the question "no." Because Form 4473 required the attempted purchase of an identified gun, claimant filled out the seller's section of the form listing a manufacturer for the gun, a gun model, a serial number and the type of the gun that the customer intended to purchase. Claimant certified that the information she provided in the seller's section of Form 4473 was accurate. On November 12, 2014, claimant transmitted the completed Form 4473 to FICS. Later on November 12, 2014, a trooper from the Oregon State Police arrived at the employer's store because FICS's initial background check of the customer indicated that he was a convicted felon and prohibited from purchasing a gun. In the presence of the store manager and the trooper, claimant said that she had had told the customer about the ramifications of his answer to question 11(c) on Form 4473, and that she had completed Form 4473 to indicate that a sale of a gun to the customer was anticipated when it was not.

(6) On November 17, 2014, the employer discharged claimant for assisting the customer in completing form 4473 and for submitting form 4473 when an actual gun purchase was not anticipated.

CONCLUSIONS AND REASONS: The employer discharged claimant 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. 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 did not dispute that the employer trained her in its expectations when she transacted a gun purchase, and that she was aware that the employer prohibited her from assisting a customer in any way in answering the buyer's questions on Form 4473. Claimant did not justify the guidance that she gave the customer in answering question 11(c), other than stating that she understood an expunged conviction was "erased" from the customer's record and that it was therefore permissible for the customer to answer "no" to that question in light of the expunction. Audio at ~25:48; Claimant's Written Argument at 2. While claimant's position may be correct as to the impact of an expunction and how the customer was permitted to answer question 11(c), that she might have been correct in her advice did not authorize her to disregard the employer's prohibition against assisting the customer and guiding him to a particular response. Form 4473 at 6 (instructions to form 4473 state that if a conviction has been expunged, the buyer is entitled to answer "no" to question 11(c)). Moreover, at the time when she assisted the customer in answering question 11(c), claimant did not know with any certainty that the customer was telling her the truth about the alleged expunction, and he might have been attempting to determine only if a past, unexpunged conviction was going to be revealed on a background check when he attempted a gun purchase. Since claimant was aware of the employer's prohibition, and nonetheless proceeded to guide the customer in the response that he gave to question 11(c), claimant's behavior was at least wantonly negligent. See OAR 471-030-0038(3)(c).

Claimant also agreed that she was aware that the employer did not permit her to have a background check conducted to determine whether a customer was eligible to purchase a gun from the employer if he decided to do so at a later time. Audio at ~13:55, ~23:40, ~25:21, ~31:10. Claimant failed to fulfill these expectations by completing a Form 4473 for the customer who did not actually want to purchase a gun but only wanted a background check. Claimant's contention – that she understood that FICS had authorized the use of Form 4473 to obtain a background check – is not supported by claimant's description of what the customer actually stated to her. According to claimant, the customer told her only that FICS would not access the customer's criminal history records until he actually tried to purchase a gun and submitted a Form 4473 to it. Audio at ~24:31, ~24:39, ~28:28. On its face, it was implausible that FICS would advise the customer that it was authorizing a gun dealer or seller to provide false information on an official form about an anticipated gun sale. At a minimum, it was wantonly negligent for claimant to proceed to make misrepresentations on Form 4473, including specifically identifying the gun to be purchased, before reaching an FICS representative to determine what it had actually advised the customer. When claimant could not reach an FICS representative to confirm whether it wanted her to supply false information on Form 4473, it was also wantonly negligent of her not to contact a store manager to determine how to address this customer's needs in light of claimant's interpretation of the advice the customer had received from FICS. Although claimant contended that her primary objective was to "take care of the customer," as the employer often advised, in a situation as unusual as this one, when the result would be making knowingly false statements on an official document, claimant demonstrated conscious indifference to the consequences of her actions by

failing to seek advice from a manager about her actions. Audio at ~27:55, OAR 471-030-0038(1)(c). In this respect, claimant's behavior in submitting a form 4473 for a purpose other than for which that form was intended, and including in it information about an anticipated gun purchase that she knew was false, was, at a minimum, wantonly negligent.

Claimant's wantonly negligent behavior, both in guiding the customer in answering question 11(c) and in supplying false information about an anticipated gun purchase, were not excused from constituting misconduct as isolated instances of poor judgment under OAR 471-030-0038(3)(b). For behavior to fall within this exception it must, among other things, not have exceeded mere poor judgment by being an act that violated the law or was tantamount to unlawful conduct. OAR 471-030-0038(1)(d)(D). Here, claimant completed an official ATF form and signed a certification that it contained only true, correct and accurate information, when she knew that she had included false information in the form about an anticipated gun purchase transaction. ATF Form 4473 at 2-3. 18 USC §§921-929 requires that a licensed dealer or seller of firearms maintain a firearms transaction record for all anticipated purchases of firearms. Under 18 USC §924(1)(a), it is unlawful for a person acting on behalf of a federally licensed seller or dealer of firearms to knowingly make false statements in records relating to firearm sales, and under 18 USC §1001(a)(3), it is unlawful for any person to knowingly submit a record required by a federal bureau or agency that contains materially false statements or misrepresentations. By knowingly completing, certifying and submitting a Form 4473 that contained false information, claimant's behavior was unlawful or, at the very least, tantamount to unlawful conduct. For this reason, it exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Although claimant contended that she believed the employer would approve of her behavior as facilitating its objective of "taking care of the customer," it is highly implausible that she believed that the employer would condone her actions in coaching a customer in completing a form required by a federal bureau designed to determine whether the customer was eligible to enter into a particular transaction, or in making knowing misrepresentations on that form that might result in criminal liability.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-32484 is affirmed.

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

DATE of Service: March 30, 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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