

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0152

Hearing Decision 15-UI-33254 Affirmed
Disqualification
Hearing Decision 15-UI-0152 Reversed
No Overpayment Assessed

PROCEDURAL HISTORY: On November 14, 2014, the Oregon Employment Department (the Department) served two notices of administrative decision, the first concluding the employer discharged claimant for misconduct (decision # 165035) and the second assessing an overpayment of \$484, a monetary penalty of \$72.60 and four penalty weeks. Claimant filed timely requests for hearing on both decisions. On February 2, 2015, ALJ Holmes-Swanson conducted two hearings, and on February 10, 2015 issued Hearing Decision 15-UI-33254, affirming decision #165035 and Hearing Decision 15-UI-33250, modifying the overpayment decision to assess only an overpayment of \$484 and no penalties. On February 17, 2015, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-33254 and 15-UI-33250. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0151 and 2015-EAB-0152).

EAB considered claimant's written argument when reaching this decision.

Since no adversely affected party sought review of those parts of Hearing Decision 15-UI-33250 that concluded claimant was not liable for a monetary penalty or penalty weeks, EAB confined its review of that decision to the assessment of an overpayment.

FINDINGS OF FACT: (1) 7-Eleven 2352 20806f employed claimant as a cashier and sales associate from April 12, 2013 until September 9, 2014. One of claimant's duties was to perform sales transactions, including ringing up sales, taking cash for purchases from customers, depositing that cash in a till and making and giving change to customers.

(2) The employer allowed its employees to make purchases from the store through a payroll deduction plan in which they did not immediately pay for items, but had the purchase price deducted from their next paycheck. The employer expected employees to use the payroll deduction plan only for purchasing items from the store and not for other purposes. The employer also prohibited employees from purchasing alcoholic beverages while on duty or using their payroll deduction for this purposes. Claimant was aware of the employer's expectations.

(3) Sometime in approximately July 2014, the employer's owner observed claimant handling a transaction in which a customer was purchasing miscellaneous items, including some beer. The customer did not have enough money to pay for the purchase, and claimant made up the amount of the shortage for the customer using his payroll deduction. After the transaction was over, the owner spoke to claimant and told him that, although the beer was intended for the customer, claimant was absolutely prohibited from paying for alcohol for customers, or using his payroll deduction to do so when he was on duty even if the alcohol was for someone else. A short time later, another customer was purchasing some beer and other items and claimant scanned all the items into the employer's electronic sales system to determine the total purchase price. The customer also did not have sufficient money to pay for the entire purchase. Notwithstanding the owner's previous warning, claimant made up the amount of the shortage for the customer using his payroll deduction. The beer remained one of the purchased items.

(4) On many occasions after July 2014, when customers purchased items at the store using cash, claimant would ring up the items, take cash from the customers, push the "no sale" key to open the cash drawer, calculate and give the customers any change they were owed, and then push the "payroll deduction" key to record a payroll deduction as the method of payment for the items purchased. Although claimant had taken cash from the customer while simultaneously recording the sale as paid for by a payroll deduction, the owner did not find unexplained cash overages when he balanced the till after the shifts that claimant worked.

(5) In September 2014, the owner noticed that claimant's use of the payroll deduction to purchase store items had markedly escalated in the past few months and that some of the items that claimant appeared to have purchased seemed odd, such as several different brands of cigarettes on a single day. The owner randomly viewed the store's surveillance videos from the days when claimant's use of the payroll deduction seemed excessive and he observed claimant taking cash from customers for sales and then pushing the "payroll deduction" key on the register to account for the sale as his own purchase. The owner observed this behavior "quite a few" times in July through August 2014 and in early September 2014 he observed it to happen eight times. Audio of Hearing on Hearing Decision 15-UI-33254 (Audio 1) at ~16:04, ~16:55.

(6) On September 9, 2014, the owner spoke with claimant at work. He told claimant what he had seen on the surveillance videos. The owner was very upset and accused claimant of stealing money from the store by taking cash from the till in the amount of the customer's purchase that he had recorded as a payroll deduction transaction. During the conversation the owner's anger at claimant escalated. The owner told claimant, "I really can't have you keep working here." Audio 1 at ~30:16. At that time, claimant decided to leave work rather than being discharged. Claimant perceived his leaving was "mutual decision" between him and the owner. Audio of Hearing on Hearing Decision 15-UI-3250 (Audio 2) at ~19:18. Claimant left the workplace and did not return.

(7) On September 13, 2014, after claimant quit work with the employer, he was hired by another employer, Norpac. Exhibit 1 at 13; Audio 2 at ~18:00. Claimant worked full time at Norpac and earned \$9.50 per hour or \$380 per week. Exhibit 1 at 12. On October 3, 2014, Norpac laid claimant off. Claimant earned at total of \$1,140 from Norpac from September 13, 2014 through October 3, 2014. Exhibit 1 at 12 (3 wks x \$380 = \$1,140).

(8) On October 6, 2014, claimant filed a claim for unemployment insurance benefits. Claimant's claim was determined valid with a weekly benefit amount of \$242. Claimant claimed and was paid benefits for the weeks of October 12, 2014 and October 19, 2014 (weeks 42-14 and 43-14), the weeks at issue. The total benefits paid to claimant during the two weeks at issue were \$484.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause on September 9, 2014 and was disqualified from receiving benefits based on that work separation until he earned remuneration that equaled or exceeded four times his weekly benefit amount beginning the week of September 14, 2014. Claimant was not paid unemployment benefits to which he was not entitled and is not liable to repay any amounts to the Department or to have any amounts deducted from any future benefits otherwise payable to him.

The Work Separation. The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although the employer's owner testified that he discharged claimant, he never identified how or when he did so or ever allude to the words that he used to express this intention. Audio 1 at ~9:19. When the ALJ questioned the owner closely about the final conversation that apparently led to the work separation, the owner did not make any reference to discharging claimant. Audio 1 at ~23:40, ~24:03. In contrast to the owner's lack of detail, claimant described the owner's upset at him, telling him that he thought he was misappropriating the employer's funds and stating, "I can't have you keep working here." Audio at 1 ~29:14, ~30:06. Accordingly to claimant, he and the owner had a further discussion which he interpreted as a "mutual decision" that he would leave work. Based on this evidence, it appears that claimant decided that he was going to leave work and told the owner so before the owner had an opportunity to actually discharge him. Although the owner might have wanted to discharge claimant, because claimant acted first to unequivocally sever the work relationship, claimant's work separation was a voluntary leaving on September 9, 2014. Even claimant was correct and a mutual agreement was reached between him and the owner that the work relationship was over, claimant's work separation was still a voluntary leaving on September 9, 2014. *See Employment Department v. Shurin*, 154 Or App 352, 959 P2d 637 (1998) (when employer and claimant mutually agree to terminate the work relationship the nature of the work separation is considered a voluntary leaving and not a discharge).

The Voluntary Leaving. A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable

alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). It is not good cause to leave work to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

From the testimony of the employer's owner and claimant, it was obvious that the owner was very upset and angry at claimant and thought that claimant's use of the payroll deduction had been to facilitate theft of the employer's funds. Audio 1 at ~24:03, ~29:14, ~30:05, ~30:16. As claimant described the escalation in their discussion on September 9, 2014, including the owner's persistent accusations of theft and the owner's comment about claimant not remaining an employee, the most reasonable and reliable inference that can be drawn is that claimant resigned to avoid the owner proceeding to discharge him on the spot. Audio 1 at ~ 29:14, ~30:16. To determine whether the circumstances under which claimant left work disqualify him from receiving unemployment benefits, it must be ascertained whether the discharge he sought to avoid would have been 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.

The owner's contention at hearing was that claimant was using the payroll deduction for purposes other than those for which it was intended. Audio 1 at ~12:35, ~13:16, ~15:30, ~17:26. It was not clear from his testimony whether the owner thought that claimant was using the payroll deduction to steal money or whether he thought that claimant was using it as a way of obtaining a cash advance on his upcoming paycheck. Claimant's testimony at hearing was that he understood that the purpose of the payroll deduction was to allow employees to purchase items from the employer's store without making an immediate payment. Audio at ~37:03. Claimant conceded at hearing that he took money from customers for purchases and then recorded those purchases as payroll deduction purposes. Audio at ~32:09, ~33:21. Claimant contended that he took these steps to enable him to balance the cash till and to make up for any shortages because of errors he or a trainee made during sales transactions. Audio at ~33:09, ~33:21, ~34:40. However, it appears unlikely that claimant would, for no discernible reason, agree to pay out of his own paycheck any shortages caused by himself or by the trainee. If his explanation is accepted, it further appears that it would have been reasonable for the trainee to have assumed at least some of the financial burden for the shortages and used his own payroll deduction to cover them, but claimant did not provide such an explanation and the evidence about disproportionately using the payroll deduction was limited to a single employee – claimant. Furthermore, it appears implausible that claimant (or the trainee) would perform sales transactions and then some later time suddenly become aware that one or both of them had made errors and know the approximate amount of those errors to allow claimant to find a later transaction on which to use the payroll deduction to replenish the employer's cash drawer in the approximate amount of the shortage. Viewing the record as

a whole, it appears most likely that claimant was not using the payroll deduction to cover any legitimate cash shortages in the till, and thereby to reimburse the employer using his own money. On this record, claimant's actual purpose in behaving as he did with the payroll deduction cannot be determined.

Regardless of the lack of evidence as to claimant's actual purpose, claimant reasonably and as a matter of common sense knew that the employer expected him to use the payroll deduction for its intended purpose of allowing employees to purchase items from the store and to defer payment until pay day. Claimant also reasonably knew, as a matter of common sense, that the employer prohibited him from manipulating transactions in a way that hid what truly had happened, such as covering a cash shortage with the proceeds from a later transaction or taking a short term cash advance to be repaid via the payroll deduction. The actions that claimant took in using the payroll deduction for sales transactions in which a customer had already paid in cash were so far beyond any reasonable interpretation of a permissible use of the payroll deduction that they were at a minimum wantonly negligent.

Claimant's wantonly negligent misuse of the payroll deductions from July through September 2014 was not excused from constituting misconduct as isolated instances of poor judgment under OAR 471-030-0038(3)(b). To constitute an "isolated instance of poor judgment," claimant's behavior must have been, among other things, 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). Here, claimant's misuse of the payroll deduction plan occurred on multiple occasions in July and August 2014 and at least eight times in September 2014. Moreover, claimant admitted that he used the payroll deduction to assist a customer in buying beer after the owner had expressly told him he was prohibited from assisting in the purchase of any alcoholic beverages during his shifts, even if the alcohol was for someone else. Audio 1 at ~39:12, ~39:29. While claimant contended that he "didn't even think about it [when] I did it," it is implausible that after having been so recently warned by the employer, and after having presumably looked at the beer when he scanned it into the sales system and placed it in a bag for the customer, claimant would not have been aware or reasonably aware of the presence of the beer in the sales transaction for which he used his payroll deduction. Claimant's behavior in using the payroll deduction for at least a second alcohol purchase in July 2014 was at a minimum a wantonly negligent violation of the employer's standards. Because claimant's wantonly negligent behavior in connection with the use of the payroll deduction for transactions in which a customer had already paid cash happened on many occasions, combined with his wantonly negligent use of it in July 2014 to assist a customer in purchasing beer, his wantonly negligent behavior was not a single or infrequent occurrence. For this reason it is not excused from constituting misconduct as an isolated instance of poor judgment. Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). It is implausible that claimant subjectively believed that the employer allowed him to manipulate transactions in the manner that he did through using his payroll deduction.

The evidence shows that the behavior underlying the discharge that claimant resigned to avoid would have been for misconduct. Under OAR 471-030-0038(5)(b)(F), claimant did not have good cause to leave work when he did.

The Overpayment. In Hearing Decision 15-UI-33250, the ALJ concluded that claimant's work separation from the employer disqualified him from benefits under ORS 657.176(2) and that therefore he received \$484 in benefits to which he was not entitled for weeks 42-14 and 43-14 and he was liable to repay those benefits to the Department. We disagree.

We agree with the ALJ that claimant's work separation on September 9, 2014 did disqualify him from receiving benefits for some period of time. ORS 657.176(2)(c). However, ORS 657.176(2) states that an individual whose work separation is disqualifying is disqualified from benefits based on that separation only until the individual has received remuneration from employment in an amount that equals or exceeds four times the individual's weekly benefit amount subsequent to the week in which the act causing the disqualification occurred. It is undisputed that after left his work with the employer, claimant was hired by and received pay from Norpac for full time work beginning on September 13, 2014, which was the first week after he separated from the employer. Through October 3, 2014, the date that Norpac laid claimant off, claimant received \$1,140 in pay from Norpac. The pay that claimant received from Norpac exceeded \$968, or four times his weekly benefit amount of \$242. As a result, as of October 3, 2014, claimant was no longer disqualified from receiving benefits based on his work separation from the employer on September 9, 2014 and was not, for that reason, disqualified from receiving the \$242 in benefits he claimed for the weeks of October 12, 2014 and October 19, 2014 (weeks 42-14 and 43-14). When claimant filed his claim for benefits on October 6, 2014, he was entitled to receive benefits despite his initial disqualifying work separation from the employer.

Claimant did not receive \$484 in benefits to which he was not entitled. Claimant is not liable to repay any benefits he received based on the disqualifying nature of his work separation from the employer.

DECISION: Hearing Decision 15-UI-33254 is affirmed
Hearing Decision 15-UI-33250 is reversed, as set out above.

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

DATE of Service: April 6, 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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