

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0248

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104011). Claimant filed a timely request for hearing. On February 23, 2015, ALJ Vincent conducted a hearing, and on February 26, 2015 issued Hearing Decision 15-UI-34173, affirming the Department's decision. On March 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from September 4, 2007 until December 29, 2014, last as a loss prevention manager.

(2) In her job as a loss prevention manager, claimant was responsible for monitoring the activities of employees to ensure that they complied with various of the employer's policies intended to avert financial loss. Claimant also investigated suspected employee violations of the employer's loss prevention policies and participated in the process of disciplining employees for such violations.

(3) The employer expected its employees who handled purchase transactions to process all checks tendered for payment through a check reading system and, if the system declined the check, not to accept it as payment and to ask the customer for another form of payment or to refer the customer to the employer's person-in-charge (PIC) or the bank examiner if the customer insisted on negotiating the check. Exhibit 1 at 8, 12. The purpose of the employer's check acceptance policy was to prevent financial loss by refusing checks when there was a risk that they would not be honored. The employer expected claimant to enforce the employer's check acceptance policy and not to condone employees' violations of it. Claimant was aware of the employer's expectations. Claimant had previously participated in the employer's process for disciplining employees who violated the employer's check acceptance policy. Audio at ~32:20.

(4) On December 21, 2014, claimant was off-duty and in the employer's fuel station purchasing gasoline for her vehicle. Claimant presented a personal check to pay for the fuel. The fuel attendant was aware that claimant was the loss prevention manager for the employer's store. Audio at ~25:56. The fuel attendant processed the check twice through the employer's check reading system and each time it was declined. Claimant told the fuel attendant, "I'm in a hurry. I have \$108 in cash in my pocket. Call the bank examiner [or] stamp it [the check] as cash." Audio at ~23:47. Although the check had been declined, the fuel attendant accepted it as payment for the fuel purchase in violation of the employer's check acceptance policies and placed it in the till drawer. Claimant did not attempt to deter the fuel the fuel attendant from accepting the declined check or suggest that he was prohibited from doing so. Later that day, the fuel attendant called the employer's PIC and told the PIC that he had not been comfortable in accepting the check, but that he had done so because claimant was the loss prevention manager and she had suggested it. Audio at ~8:01.

(5) Sometime after December 21, 2014, the store director discussed with claimant what she had done on December 21, 2014. Claimant told the store director that she did not know why her check was declined and, because she had funds in her account, she "suggested" to the fuel attendant that he "run it [the check] as cash." Audio at ~19:56.

(6) On December 29, 2014, the employer discharged claimant for condoning a violation of the employer's check acceptance policy on December 21, 2014 when, as a manager, she suggested to the fuel attendant that he accept her declined check as payment for the fuel purchase.

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. 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).

Although claimant tried to evade the ALJ's questions, she finally agreed that she implicitly proposed to the fuel attendant that it was permissible for him to accept her declined personal check as payment for her fuel purchase, and that she was aware that such conduct violated the employer's check acceptance policy. Audio at ~ 24:02. ~25:11, ~25:46, ~28:03, ~30:35. While claimant emphasized that the fuel attendant "made his own decision" to violate the employer's policy, she did not deny that she knowingly condoned, if not encouraged, the attendant's violation of that policy. Audio at ~ 24:12. Under the circumstances of claimant's managerial position, her responsibility for monitoring the actions of subordinate employees to ensure that they complied with the employer's loss prevention policies and the fuel attendant's knowledge of claimant's position and her principal responsibilities, claimant was aware as a matter of common sense that the fuel attendant would be induced to accept her check if she presented that as a permissible option. Also as a matter of common sense, claimant was aware that the employer expected her not to propose to subordinate employees that they violate the employer's loss

prevention policies. By the options that she presented to the fuel attendant about dealing with her declined personal check, claimant, as a loss prevention manager, willfully violated the employer's expectations as she reasonably understood them.

Claimant argued at hearing that the employer was not allowed to discharge her based on a single violation of its check acceptance policy because the employer uniformly gave its employees only a warning for a first violation of that policy. Audio at ~31:05. However, claimant's position is contradicted by the language of the employer's policy. The policy plainly states, without qualification, that any violation of the check acceptance "will result in discipline up to an including termination," leaving the appropriate sanction within the employer's discretion. Exhibit 1 at 12. Moreover, EAB's determination in this case is limited to whether or not claimant engaged in misconduct within the meaning of OAR 471-030-0038(3)(a), and is properly disqualified from benefits. EAB's authority does not extend to reviewing whether discharge was the appropriate disciplinary sanction for an act which has otherwise been determined to have been misconduct. For these reasons, claimant's argument is outside the scope of matters properly within EAB's jurisdiction.

Although claimant's behavior on December 21, 2014 was a willful violation of the employer's standards it may be excused from constituting misconduct if it was an isolated instance of poor judgment. OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is, among other things, an act that does not exceed "mere poor judgment" by 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). In this case, claimant was a manager charged with the responsibility for ensuring that the employees subordinate to her conformed with the employer's policies to prevent loss, including enforcing the employer's standards for accepting personal checks. By suggesting to the fuel attendant that he could make an exception for her personal check when it was declined, a reasonable employer would objectively conclude that claimant could not be trusted in the future to neutrally and even-handedly enforce the employer's standards when her own interests conflicted with those of the employer. A reasonable employer would conclude that claimant's behavior on December 21, 2014 caused an irreparable breach of trust in the employment relationship. As such claimant's behavior exceeded the scope of the types that are properly excused as an isolated instance of poor judgment.

Nor was claimant's willful behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend, or present evidence showing, that she sincerely believed that the employer would condone behavior in encouraging the fuel attendant to violate the employer's check acceptance policy, or that she engaged in the actions that she did because she misunderstood the employer's policy or her role in enforcing that policy. As such, there was insufficient evidence in the record to meet the threshold for showing that claimant's behavior on December 21, 2014 was motivated by a good faith error.

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

DECISION: Hearing Decision 15-UI-34173 is affirmed.

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

DATE of Service: April 23, 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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