

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0289

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103018). Claimant filed a timely request for hearing. On February 23, 2015, ALJ Clink conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34071, affirming the Department's decision. On March 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Macy's West Department Stores, Inc. employed claimant as a beauty advisor at one of its cosmetic counters from November 18, 2003 until December 30, 2014.

(2) During the week of December 7, 2014, the employer initiated a program in which it issued promotional gift cards to customers based on the value of the purchases they made on specified days during the previous week, December 7, 2014 through December 13, 2014. The employer allowed its employees who made purchases during that week to participate in the program and use the gift cards that were issued to them. The promotional gift cards could only be used on the days of December 16, 17 and 18, 2014. The employer expected its employees only to use gift cards that had been issued to them personally and prohibited them from transferring their gift cards to any other person. Claimant was aware of the employer's expectation.

(3) During the week of December 7, 2014, claimant was issued a promotional gift card for purchases she made in that week. When claimant was issued her promotional gift card, she placed it in the pocket of her pants. Claimant habitually wore those particular pants as her work attire and did not launder them between wearings. Sometime before December 16, 2014, claimant's coworker, who was also one of claimant's customers, told claimant that she wanted to use two gift cards that had been issued to her to purchase a cosmetic product and asked claimant to use the gift cards for her between December 16 and

18, 2014 to enable her to offset the price. On that day, claimant went to remove the cosmetic from inventory and to place it aside to remind herself that she was expected to process the purchase for her coworker during the period when the gift card could be used. The cosmetic that claimant's coworker wanted to purchase was out of stock and claimant placed the coworker's gift cards in the same pants pocket in which she had previously placed the gift card that had been issued to her. Claimant did not make a note or record to remind herself that she was expected to purchase the cosmetic for the coworker during the redemption period. It was busy in the employer's store during the Christmas purchasing season and claimant forgot that she had retained possession of the coworker's gift cards or that she had placed them in her pants pocket. Claimant did not consider that the coworker's gift cards were mingled together with her own gift card in that pocket.

(4) On December 16, 2014, claimant purchased some skin care products during the redemption period for the gift cards. As part of the purchase transaction, claimant reached into her pants pocket and used the three gift cards that she found there to apply against the purchase price. Claimant forgot that two of the gift cards in her pocket were not hers, but belonged to her coworker.

(5) On December 20, 2014, the employer's asset protection team reviewed reports about the store-wide redemption of the promotional gift cards during the period December 16 through 18, 2014. The asset protection team determined that claimant had only received one gift card with a balance of \$20, but that claimant had used three gift cards for the purchase that she made on December 16, 2014, including two gift cards with a balance of \$10 each in addition to the \$20 gift card that had been issued to her. The asset protection team members also determined that one of the gift cards had been issued to a customer and not a store employee.

(6) Also on December 20, 2014, members of the asset protection team and the human resources manager interviewed claimant about the gift cards that she had used on December 16, 2014. In this interview, the employer's representatives did not fully explain to claimant the problems with her use of the gift cards and claimant was confused about what they were asking her. When the representatives asked claimant where two of the gift cards she used on December 16, 2014 had come from, she stated that she must have received them for purchases she made during the week of December 7 through December 13, 2014. When the employer's representatives pressed claimant to provide a better answer because two of the gift cards were not issued to her, she speculated to them that she might have picked those gift cards up from the cosmetics counter. At the end of the interview, the employer suspended claimant for using gift cards that were not issued to her to offset the purchase price of a product intended for her personal use.

(7) On December 22, 2014, claimant's manager sent her a text message inquiring about the location of the cosmetic that claimant had been expected to purchase for her coworker during the redemption week for the gift cards because the coworker wanted to pick it up. At that time, claimant remembered that she had kept the two gift cards from the coworker in her pocket and it was likely that she had mistakenly used them when she made her purchase on December 16, 2014. Claimant immediately called the human resources manager and told the manager where she thought that the two unexplained gift cards had come from. The employer interviewed claimant's coworker and the coworker stated that she had given the gift cards to claimant. Transcript at 31.

(8) On December 30, 2014, the employer discharged claimant for using gift cards that were not issued to her on December 16, 2014 and for exhibiting a lack of integrity by providing different explanations for

the source of the gift cards that were not issued to her when she spoke to the human resources manager. Transcript at 8, 10.

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

In Hearing Decision 15-UI-34071, the ALJ concluded that claimant's use of promotional gift cards issued to someone other than herself for a personal purchase on December 16, 2014 was a wantonly negligent violation of the employer's standards. Hearing Decision 15-UI-34071 at 3. The ALJ appeared to reason that claimant's behavior was misconduct regardless of her mental state and whether she mistakenly thought that the gift cards had been issued to her when she made the purchase. *Id.* We disagree.

At hearing, the employer did not contend that claimant was prohibited from using the gift cards from her coworker to make a delayed sale to that coworker during the gift card redemption period. The employer did not dispute that claimant's coworker was the source of the two gift cards that claimant had possessed that were not issued to her. The employer did not suggest, or present evidence showing, that the coworker had not given claimant the two gift cards for the purpose of purchasing a product for the coworker. Nor did the employer contend that claimant knew that one of the gift cards that the coworker provided to her was actually a gift card issued to a customer, and nothing in the record supports such awareness on claimant's part. Given what the employer did not contend and the state of the evidence in the record, the principal issue for purposes of this discharge analysis is whether, under the circumstances as they existed on December 16, 2014, claimant's use of the coworker's gift cards to make a personal purchase was a willful or wantonly negligent breach of the employer's standards.

The ALJ failed to give proper weight to claimant's explanation that, in the hectic Christmas shopping season, she forgot that she had placed the coworker's gift cards in the same pants pocket in which she had placed her own gift card and that, as she was doing her own Christmas shopping, she failed to consider that all of the gift cards she possessed in that pocket were not her own when she tendered of them to the clerk on December 16, 2014. Claimant's explanation was not utterly implausible. Transcript at 22, 23. The employer did present any persuasive reasons to doubt the truth of claimant's testimony. The employer did not attempt to rebut claimant's explanation or to present any facts suggesting that it was a rationalization behind which she was attempting to hide what was otherwise misconduct. The employer presented no evidence showing that claimant's behavior when she used the coworker's gift cards was consciously indifferent, rather than merely a careless or absentminded lapse. Absent such

evidence, the employer did not meet its burden to show that claimant's mental state when she presented the coworker's gift cards for the personal purchase was the minimum required to establish the willful or wantonly negligence behavior that will disqualify her from benefits under OAR 471-030-0038(3)(c). The employer presented insufficient evidence to establish that claimant's behavior on December 16, 2014 was misconduct.

The employer's second justification for discharging claimant, that her two explanations about the source of the gift cards necessarily evidenced a lack of integrity, is also not supported by the record as a whole. Claimant explained that she initially was confused and nonplussed about why she was being interviewed, and when the asset protection team was not satisfied with her statement that she did not know how she might have come to possess two cards not issued to her, she speculated on how that might have occurred. Transcript at 28. After her recollection was prompted by the call from her manager on December 22, 2014, she realized that she had received those gift cards from her coworker and, on her own initiative, called the human resources manager to tell her. Her second statement about the source of the two cards, after her memory was refreshed, was hardly inconsistent with her first statement in which she was only speculating on what might have happened. It is most fairly viewed as the first specific statement she was able to make about the source of the two cards in her pocket that were not issued to her. In addition, if claimant intended to deceive the human resources manager about the two gift cards, it makes no sense that she would belatedly invent a second explanation that undercut her first explanation. Further, the employer presented no evidence showing or tending to show that claimant's manager did not call her on December 22, 2014 and that it was unlikely that a refreshed memory caused her to provide the second explanation. For these reasons, the employer did not demonstrate that claimant's two statements actually conflicted or that they were emblematic of a lack of integrity. The employer did not meet its burden to show that her two different statements to the human resources manager were grounds to reasonably conclude that claimant had engaged in misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-34071 is set aside, as outlined above.

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

DATE of Service: May 5, 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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