

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0339**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On February 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 82238). Claimant filed a timely request for hearing. On March 17, 2015, ALJ Shoemake conducted a hearing, and on March 19, 2015, issued Hearing Decision 15-UI-35432, affirming the Department's decision. On March 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record. In accordance with ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered claimant's argument only to the extent it was based on information received into evidence at the hearing.

**FINDINGS OF FACT:** (1) JC Penney Corporation Inc. employed claimant as a product specialist from August 2, 2010 to January 19, 2015.

(2) The employer expected its employees to be ethical in performing their work duties and to refrain from theft or misuse of employer assets. The employer's expectations were set forth as part of its "Integrity Guidelines" in its employee handbook, a copy of which was provided to claimant at hire. Exhibit 1. Claimant was aware of the employer's expectations.

(3) On January 8, 2015, the employer's loss prevention department began an investigation into recent "questionable transactions" involving claimant that were brought to its attention by the employer's home office. Transcript at 8. The investigation revealed that claimant purchased three clearance items using her employee discount and later returned those items to an employer store without a receipt and received a refund voucher in an amount greater than what she paid for the items. At the time claimant received the refund voucher, she knew it was for an amount greater than what she paid for the items, but did not disclose that fact to the cashier. On January 14, 2018, claimant admitted to a loss prevention employee that she received a refund voucher in an amount greater than what she paid for the returned items.

(4) On January 19, 2015, the employer discharged claimant for unethical behavior and misuse of employer assets, based, in part, on the refund transaction.

**CONCLUSIONS AND REASONS:** We agree with the ALJ. 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. 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 is conscious of his conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to be ethical regarding transactions with the employer and to refrain from theft or misuse of employer assets because claimant acknowledged receipt of a copy of the employer's handbook at hire. Claimant violated that expectation when she returned items she had purchased using her employee discount to an employer store and received a refund voucher in an amount greater than what she paid for the items without disclosing her use of the discount to the cashier. At hearing, the following exchange between the ALJ and claimant occurred:

- Q Okay. At the time you returned the items, and you were given either the credit or the money or voucher for the refund, did you notice at that time that you were receiving more money than what you actually paid for the items?
- A Yeah, I did, but I wasn't sure how much more.
- Q Okay. Did you say anything to the individual who was processing the refund?
- A No.

Transcript at 25. By consciously failing to disclose to the cashier issuing the refund voucher her previous use of her employee discount when purchasing the items in question, knowing she was receiving a refund in an amount greater than what she originally paid, claimant demonstrated conscious indifference to the employer's integrity guidelines and was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Under ORS 164.065, a person who comes into control of "property" [e.g. a refund voucher] "that the person knows or has good reason to know to has been . . . delivered under a mistake as to the nature or amount of the property [e.g. full value instead of discounted value] commits theft, if, with intent to deprive the owner thereof [taking possession of the voucher to use in lieu of money to buy items from the employer's store], the person fails to take reasonable measures to restore the property to the owner [claimant said nothing to the cashier even though she knew she had received a voucher larger than she was entitled to receive]." Claimant's conduct was tantamount to theft of lost or mislaid

property<sup>1</sup> and under OAR 471-030-0038(1)(d)(D), acts which that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that she sincerely believed, or had a factual basis for believing, that the employer would tolerate her violation of its integrity guidelines to her potential financial benefit.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 15-UI-35432 is affirmed.

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

**DATE of Service:** May 13, 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](http://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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<sup>1</sup> ORS 164.065 defines theft of lost, mislaid property as follows:

A person who comes into control of property of another that the person knows or has good reason to know to have been lost, mislaid or delivered under a mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intent to deprive the owner thereof, the person fails to take reasonable measures to restore the property to the owner.