

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0584

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision #93957). The employer filed a timely request for hearing. On April 30, 2015, ALJ R. Davis conducted a hearing, and on May 8, 2015, issued Hearing Decision 15-UI-38191, concluding that the employer discharged claimant for misconduct. On May 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer Jewelers employed claimant from January 15, 2008 to February 18, 2015, last as a store manager.

(2) The employer permitted employees to offer customers reduced prices on jewelry purchases only if an item was on sale, or if the regional manager authorized the price reduction. Claimant knew and understood this policy.

(3) Some time prior to September 2014, the employer contracted with a vendor to offer a new “Lifetime Jewelry Repair Plan” (LJRP) to customers. The plan provided lifetime service and repair on jewelry purchased from the employer. Prices for the plan were fixed at different levels, depending on the cost of the jewelry purchased. A portion of the price paid for an LJRP went into a reserve fund maintained by the vendor to cover the cost of jewelry service and repair; the employer retained the remaining portion of the plan price. When a customer purchased an item and an employee entered the price of the item in the sales register, the system automatically added the cost of the LJRP appropriate for the jewelry purchased to the total price. An employee was required to manually delete the LJRP price if the customer did not want to purchase the plan. The employer offered rewards to employees to encourage them to sell LJRPs to customers. The employer and the vendor provided in person training regarding the plan to claimant and other managers. The training included an explanation of the plan price structure.

(4) After the employer began offering LJRP to customers, claimant sometimes sold a customer an LJP at a reduced price. Claimant did so if she felt it was necessary to persuade the customer to purchase the plan. Claimant also told at least one of the employees she supervised that the employee could offer a customer a LJP at a reduced price if it was necessary to make the sale.

(5) From September 1 through September 5, 2014, claimant sold 6 LJRP at reduced prices. From September 15 through 20, 2014, claimant sold 5 LJRP at reduced prices.

(6) From October through December 2014, the employer conducted a sales contest where employees received cash bonuses based, in part, on the number of LJRP they sold. Claimant won a \$2,000 bonus in this contest.

(6) In February 2015, the employer audited records for the sale of LJRP in its stores. At that time, it discovered that claimant and at least one of the employees she supervised had been selling customers LJRP at reduced prices. The auditors also found that claimant's store was the only store where LJRP had been sold at reduced prices.

(7) On February 18, 2015, the employer discharged claimant for violating its policy concerning discounts by selling customers LJRP at reduced prices.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

Claimant knew and understood that the employer did not permit her to sell merchandise at reduced prices, unless an item was on sale or a district manager authorized the price reduction. Claimant violated this policy when, on several occasions, she sold customers LJRP at reduced prices. In order to conclude that claimant's violation of the employer's policy constituted misconduct, however, we must find that claimant's conduct was willful or wantonly negligent. Claimant's behavior was willful and wantonly negligent only if she consciously engaged in behavior she knew or should have known would violate the employer's policy. Here, claimant contended that she was unaware that the policy prohibiting discounts applied to the sale of LJRP and that as a result, she believed in good faith that her conduct was appropriate. We disagree.

Claimant understood, as a result of the training in which she participated, that the price of a LJRP was tied to the price of the item purchased. Claimant also asserted that at this training, she was never told that she could not reduce the price of an LJRP offered to a customer. Claimant's belief – that she could not reduce the price of a piece of jewelry but could reduce the price of an extended warranty that was based on the piece's price – makes no sense. At the hearing, claimant repeatedly stated that she concluded it was acceptable to offer discounts on the LJRPs because she was never told during the training that she could not do so. We find this belief of claimant to be implausible. The employer's February 2014 audit showed that no other manager reached the same conclusion claimant did as a result of the training – that it was acceptable to sell LJRPs at discounted prices. Finally, we note that claimant had a strong financial incentive to persuade customers to purchase LJRPs. For all these reasons we find it more likely than not that claimant's sale of LJRPs at reduced prices was not the result of a mistaken but good faith belief that the employer would allow her to do so. Because claimant consciously engaged in conduct she knew or should have known violated the employer's expectations, her behavior was willful or wantonly negligent.

Claimant's conduct was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An incident is isolated if, among other things, it is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). The record shows that on numerous occasions in September 2014, claimant sold LJRPs to customers for reduced prices. Claimant's violation of the employer's policy was not a single or infrequent occurrence.

The employer discharged claimant for misconduct, and she is disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-38191 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: July 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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