

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0771

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102824). Claimant filed a timely request for hearing. On May 6, 2015, ALJ Frank convened a hearing at which claimant did not appear and issued Hearing Decision 15-UI-38015, dismissing claimant's hearing request based on claimant's failure to appear. On May 12, 2015, claimant filed a request to reopen the hearing. On June 15, 2015, ALJ Seideman conducted a hearing, and on June 18, 2015 issued Hearing Decision 15-UI-40293, allowing claimant's request to reopen the hearing and affirming decision # 102824. On June 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Because no adversely affected party sought review of that portion of the hearing decision allowing claimant's request to reopen, EAB confined its review to the issue of claimant's discharge.

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant as an all-purpose clerk from March 15, 2006 until March 16, 2015. Claimant generally worked at the customer service counter in the employer's store.

(2) Federal and State law prohibited the employer from selling tobacco products to customers under the age of 18. Before selling tobacco products to a customer, federal law required the employer verify the age of the customer by inspecting the customer's photographic identification if the customer was under the age of 26. The employer expected claimant to comply with these laws and, before selling a tobacco product, to inspect the identification of any customer who appeared to be 30 years of age or younger, and to verify customer's age by entering the birth date appearing on the identification into the employer's electronic cash register system. Claimant was aware of the employer's expectations.

(3) On February 28, 2015, at approximately 3:12 p.m., a female who was under the age of 18 came up to claimant at the customer service counter and asked to purchase a pack of cigarettes. Exhibit 2 at 1. Claimant asked the customer for her photographic identification, took the identification and then handed it back to the customer. Claimant did not enter the birth date shown on the customer's identification into the electronic cash register, as it prompted her to do after she entered in a tobacco product sale. Instead, claimant entered "no birth date needed," which overrode the prompt and allowed the transaction to proceed without entering a birth date for the customer. The female paid for the cigarettes and left the store with them.

(4) Sometime before March 16, 2015, the Federal Food and Drug Administration (FDA) notified the employer, by letter, that it had conducted a sting operation on February 28, 2015, and at approximately 3:12 p.m. that day, one of the employer's clerks had allowed an underage person to purchase cigarettes. Exhibit 2 at 1; Exhibit 5 at 1. The appearance of the clerk was described in the letter but the clerk was not identified by name. The employer's store manager reviewed surveillance videotapes of the transactions occurring in the store on that day around 3:12 p.m. and observed claimant selling cigarettes to a young female customer at the customer service counter and not entering the birthdate from the identification that the female had produced into the employer's cash register before completing the transaction. Although the employer's customers could pay for cigarettes at the store's general merchandise check-out stands, all cigarettes in the store were stocked behind the customer service counter and any cigarettes purchased in the store originated there before being taken to a general merchandise check-out stand. Reviewing the surveillance videotapes for times before and after approximately 3:12 p.m., the store manager did not observe any purchases of tobacco products other than the one transaction involving claimant and the female customer, and did not observe claimant providing cigarettes to any customer which the customer would later pay for at a different cash register.

(5) Sometime on or before March 16, 2015, the store manager discussed with claimant the letter from the FDA and the sting operation the FDA had conducted at the employer's store. The store manager showed claimant still photographs of the transaction in which the underage female purchased the cigarettes from her. Claimant stated that she did not recall the transaction and gave no reason for not entering the birthdate appearing on the customer's identification into the employer's electronic cash register.

(6) On March 16, 2014, the employer discharged claimant for selling cigarettes to an underage person.

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).

Claimant agreed that she understood the employer's policy prohibiting the sale of cigarettes to individuals under the age of 18, was aware that the employer "advised" her to inspect the photographic of identification of any individual who appeared to be under the age of 30 and was aware that she was

expected to enter the birthdate of any individual whose identification she inspected into the employer's electronic cash register to verify the individual's age. Audio at ~23:42, ~24:19, ~28:55. While claimant stated that she did not recall the particular transaction at issue, she did not seriously dispute the accuracy of the store manager's review of the surveillance videotapes or that she sold tobacco to an underage female at approximately 3:12 p.m. on February 28, 2015. Although claimant stated that she wanted additional evidence before admitting that she had allowed the sale, such as copies of the purchase receipt for the sale and the underage female's identification, the probative value of that evidence on the issue of whether claimant completed the transaction is not clear. Audio at ~25:38. Based on the apparent authenticity of the FDA's letter to the employer, and the care that the store manager took in reviewing the videotapes, it is more likely that not that it was claimant who sold the cigarettes to the underage person.

Claimant had no explanation for why she asked the underage female customer to produce her identification and then failed to enter it into the electronic cash register. Audio at ~20:27, ~21:30, ~22:40. On these facts, it appears unlikely that claimant thought that the female was over the age of 30 because she asked for the female's identification. It also appears unlikely that claimant merely forgot or overlooked that she needed to enter the birthdate into the cash register because she had the identification in her hands, which, most likely, would have reminded her of what she was required to do. In addition, the electronic register would have further reminded her of her responsibilities since it would not allow her to complete the sale until she entered a birthdate or an override. It appears, most likely, that claimant entered the "no date needed" key to override the register's prompt. On balance, when claimant had already evidenced a concern about the customer's age from the customer's appearance, it was at least wantonly negligent of claimant to override the cash register's prompt and to bypass the requirement of entering the birthdate, which would have verified the customer's correct age. Under these circumstances, claimant showed a conscious indifference to the employer's age verification requirements, and she should have known that her behavior in bypassing those requirements probably violated the employer's standards. *See* OAR 471-030-0038(1)(c).

Claimant's wantonly negligent behavior on February 28, 2015 was not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is not an isolated act of poor judgment if it "exceeds mere poor judgment" by, among other things, violating the law, being tantamount to unlawful conduct, creating an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D). In this case, claimant's behavior in allowing an underage person to purchase cigarettes arguably violated 21 CFR §1140(a) (retailer prohibited from selling tobacco products to anyone under the age of 18) and 21 CFR §1140(b)(2) (retailer must verify age by inspecting the photographic identification of any person attempting to purchase tobacco who is under the age of 26). While these regulations ostensibly apply to "retailers" who sell tobacco products, since claimant was acting on the employer's behalf when she sold the cigarettes to the underage female, her behavior was, if not a direct violation of them, tantamount such a violation. Moreover, it is well known that legal requirements controlling the sales or distribution of tobacco products to underage individuals are the embodiment of very important social, political and health objectives. *See* 21 CFR §1140.2 (tobacco products regulated by age to reduce life-threatening consequences to children and adolescents). Based on these overarching concerns, a reasonable employer would objectively conclude that claimant's behavior in demonstrating indifference to those objectives and legal requirements created an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. For these reasons, claimant's

behavior on February 28, 2015 exceeded mere poor judgment and was not the sort of behavior that may be excused as an isolated instance of poor judgment.

Claimant's wantonly negligent behavior also was not excused as a good faith error under OAR 471-030-0038(3)(b). At hearing, claimant did not assert or present evidence showing that she sincerely believed that the employer would condone her behavior in bypassing its age verification requirements and selling cigarettes to an underage individual, or that her behavior resulted from a good faith misunderstanding of the employer's standards. Because claimant did not make the threshold showing that the excuse of good faith error applied to her violation of the employer's standards, there is insufficient evidence on which to conclude that her behavior was excused on this ground.

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

DECISION: Hearing Decision 15-UI-40293 is affirmed.

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

DATE of Service: August 12, 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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