

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0849

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision 84347). The employer filed a timely request for hearing. On July 2, 2015, ALJ Kangas conducted a hearing, and on July 7, 2015 issued Hearing Decision 15-UI-41136, affirming the Department's decision. On July 14, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT; (1) McDonald's of Central Oregon employed claimant from April 26, 2011 until May 14, 2015, last as a shift manager.

(2) As shift manager, one of claimant's closing duties was to accurately count the money received at the cash registers during the shift, reconcile those cash receipts with the sales generated during the shift and deposit the money. The employer expected claimant to notify the employer's general manager or assistant manager whenever a cash shortage exceeded \$40. Claimant understood the employer's expectation.

(3) The employer also expected claimant to "put the customer first" and to make customer service the "number one priority" when she performed her work. Transcript at 5, 6, 7, 26, 33-34, 49; Exhibit 1 at 3, 5. Claimant was aware of these general expectations.

(4) After claimant became a shift manager, the prior general manager told claimant several times that she was not allowed to leave the restaurant at the end of her shift until she had counted and reconciled the cash receipts and made the required closing deposit. If claimant was unable to perform those tasks during her scheduled shift, she was expected to stay late, after her shift ended, to complete them.

(5) On August 14, 2014, the employer issued a warning to claimant for the manner in which she treated her subordinates. Exhibit 1 at 11. On October 2, 2014, the employer issued a warning to claimant and placed her on a performance improvement plan for, among other things, beginning to count the shift's cash receipts when her subordinates needed help serving customers, which "create[d] an environment that is not focused on the customer." Exhibit 1 at 7. On February 2, 2015, the employer gave claimant a performance review in which she was reminded to "put the customer first" and not "forget about the customers." Exhibit 1 at 5. On April 21, 2015, the employer gave claimant a verbal warning for preparing the shift's cash receipts for deposit when her subordinates needed help serving customers. Transcript at 24-25.

(6) On May 11, 2015, claimant scheduled a 4:15 p.m. medical appointment for her daughter, which was 15 minutes after the scheduled end of her shift. Claimant planned to meet her daughter at the medical office and felt it was necessary to attend the appointment with her. Sometime around 3:00 p.m., claimant began the closing count of the cash receipts for the shift. Claimant's count revealed a \$100 cash shortage, and she could not determine the reason. Claimant "panicked" because she thought that such a large shortage could jeopardize her job. Transcript at 42. Claimant continued to try to determine if there was some way to account for the cash shortage before she deposited the cash receipts. Claimant was concerned about the time she was taking to finish the deposit because she needed to attend her daughter's medical appointment and could not stay late to investigate the shortage. In the midst of claimant's efforts, the shift manager on the floor approached her and asked her to help serve customers in the restaurant because it had become very busy. Claimant told the other shift manager that she was unable to do so because she was having problems with the cash count and was \$100 short. Transcript at 39. Within a very few minutes, a subordinate crew member also asked claimant to assist in serving customers and claimant again explained that she could not because the cash count for the shift was \$100 short. Claimant called the opening manager to determine if she had taken any money from the cash tills, and when claimant did not reach her, claimant sent her a text message. Claimant did not attempt to contact the general manager about the cash shortage because the assistant manager had told all the other managers, including claimant, that the general manager was attending a funeral on May 11, 2015 and could not be disturbed that day for any reason. Claimant did not attempt to contact the assistant manager because it was his day off and the supervisor with overall responsibility for the restaurant had told all the managers, including claimant, that they were not allowed to contact the assistant manager on his days off because it "stressed him." Transcript at 52, 53. Claimant finally determined that the \$100 shortage was accounted for by the opening manager putting the missing cash in her coin order. Transcript at 53. Once claimant accounted for the coin order, she determined that the cash for May 11, 2015 was short only \$8.11.

(7) On May 14, 2015, the employer discharged claimant for refusing to help customers on May 11, 2015 when she was trying to determine why the cash count was \$100 short and for not making the customers "the first priority." Transcript at 5.

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

The contention of the employer's witnesses at hearing was, in essence, that making the customer a "number one priority" meant that claimant needed to drop all work-related duties, however pressing, whenever she was needed to provide service to customers in the restaurant. *See* Transcript at 5, 6, 26, 27, 28, 48. This, however, is a generally stated aspirational objective. It does not appear that claimant should have reasonably understood the employer's expectation of "putting the customer first" or making the customer the "number one priority" necessarily meant that there were no circumstances under which another objective could take precedence. Here, competing with the employer's objective of customer service, claimant had the work-related objective of tracking down the cause of the employer's relatively large cash shortage before the scheduled end of her shift and the personal objective of leaving the workplace in sufficient time to keep her daughter's medical appointment. In light of the size of the cash shortage, it appears plausible and reasonable that claimant was concerned that her job would be in jeopardy if she could not account for the shortage. In light of claimant's job duty to count the closing cash, perform a cash reconciliation and deposit the cash, it also appears plausible under the circumstances that she would balance those duties against the duty to provide good customer service and could reasonably decide that the employer's interest in determining the source of a relatively large cash shortage took precedence over providing somewhat quicker service to the customers in the restaurant.

The employer did not dispute that claimant's need to leave her shift at its end because she needed to take her daughter to a medical appointment, and could not stay late to investigate the source of the cash shortage, was a legitimate one. When asked what claimant should have done on May 11, 2015 to reconcile the employer's competing imperatives of good customer service and an accurate cash count under this circumstance, the employer's witnesses contended that claimant was expected to contact her supervisors, apparently the general manager and the assistant manager, for guidance on dealing with the cash shortage and reasonably should not have decided to forego providing assistance to the customers in the restaurant regardless of the magnitude of the cash shortage. Transcript at 48. However, claimant's testimony that she was not allowed on that day to contact either the general manager or the assistant manager was not rebutted, and was partially corroborated by the general manager's testimony at hearing. Transcript at 52, 53, 55. Given that this option was not available to claimant, she took the reasonable substitute step of attempting to contact the opening manager for assistance in tracking down the source of the cash shortage. On this record, claimant did not willfully or with wanton negligence disregard the employer's interest in providing good and responsive customer service for no legitimate reason, but was furthering one of the employer's interests in correctly accounting for its cash, which she reasonably determined she was not able to do and simultaneously meet the employer's customer service objective. While the employer might disagree with the decision that claimant made in light of the employer's competing objectives, claimant's decision was not made with an intent to violate the employer's expectations or a conscious indifference to the employer's interests or to the consequences of her decision. It was a reasonable and good faith effort to reconcile those objectives under circumstances where the usually prescribed method of balancing them (contacting the general manager or the assistant

manager) was not available to claimant. Claimant's behavior, and the decision she made, was not a willful or wantonly negligent violation of the employer's standards.

The employer did not show that claimant engaged in misconduct on May 11, 2015. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-41136 is affirmed.

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

DATE of Service: August 25, 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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