

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1219

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103030). Claimant filed a timely request for hearing. On October 8, 2015, ALJ Frank conducted a hearing, and on October 9, 2015 issued Hearing Decision 15-UI-45712, affirming the Department's decision. On October 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB. Claimant's argument consisted primarily of information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing and the portions of claimant's argument that were based on the record when reaching this decision.

FINDINGS OF FACT: (1) Winco Foods Inc. employed claimant as a cashier from March 20, 2007 to August 14, 2015.

(2) The employer expected claimant to behave in a courteous and professional manner toward coworkers and customers. Exhibit 1 at 8. Claimant received customer service training at hire, and the employer's expectations were repeated regularly at staff meetings. Claimant understood the employer's expectations.

(3) On May 12, 2015, claimant made a derogatory comment to a customer in her cashier line about "living in America and not speaking English." Exhibit 1 at 3. A customer complained to the employer about being insulted by claimant's comment. Claimant told the employer she did not know she had offended a customer and was "only kidding" when she made the comment. Transcript at 11. The employer gave claimant a five-day unpaid suspension for the incident and warned claimant that further violations of any company policy would result in disciplinary action including termination. *Id.*

(4) On August 7, 2015, while checking out customers through her cashier line, claimant asked the lead clerk if she had forgotten claimant's lunch break. Claimant told the clerk it was late. Claimant continued to talk about her lunch break while assisting customers in her line. The lead clerk walked to claimant and told her she was busy and did not forget about claimant's break. Exhibit 1 at 13. Claimant continued to talk about her break and threw one customer's bag of bagels down the checkout belt toward the bagging area while processing his groceries. The customer commented to claimant, "Thank you for throwing my food." Transcript at 26. The lead clerk noticed claimant was still upset, approached claimant, and told her take her lunch. Claimant responded, "I don't want to make anyone mad." Exhibit 1 at 13. The lead clerk told claimant again to take her break, and took over claimant's line at the cash register. At least two customers in line complained to the lead clerk about claimant's behavior. The earlier customer who purchased bagels also complained later to a manager that claimant threw his bagels while processing his groceries. Exhibit 1 at 14.

(5) A manager reviewed a video of the August 7, 2015 transaction with the customer who complained that claimant threw his groceries and observed that claimant "flippedly" tossed the customer's products down the belt, and that "it seemed clear from [claimant's] body language that she wasn't happy" Transcript at 18. Claimant told the manager she recalled the transaction, and that the customer commented that she had thrown his bread. Claimant told the manager she told the customer on August 7 that his bread was "all right here," instead of apologizing to the customer. Transcript at 19.

(6) On August 14, 2015, claimant met with the store manager and told her she was not feeling well on August 7, and "knew that she had been not being herself [sic] and that she needed to be kind to the customers and that she was very apologetic for the [August 7] incident and that she was very sorry." Transcript at 15. Later that day, the employer discharged claimant for failing to behave in a courteous and professional manner while assisting customers.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she was discourteous toward customers by complaining about her late break in front of customers, and throwing one customer's groceries. The employer had a right to prohibit employees from engaging in unprofessional behavior in front of customers and being

discourteous to customers. Claimant understood the employer's expectations from prior warnings and common sense and knew or should have known that complaining to the lead clerk in front of customers and throwing a customer's food down the belt out of frustration on August 7, 2015 probably violated those expectations.

Claimant denied having been "purposely" discourteous to customers on August 7. Transcript at 22. However, it is undisputed that claimant asked the lead clerk about her break in front of customers, and that she continued to comment about the matter in front of customers after the lead clerk reassured her she would have her break. Moreover, it is implausible that customers in the grocery line would have complained about claimant's conduct had claimant behaved appropriately. This evidence, combined with the manager's testimony about claimant's body language that he viewed on the video shows that, more probably than not, claimant was consciously discourteous to customers on August 7. *See Exhibit 1* at 13-14.

Claimant also asserted at hearing that she was a "fast checker" and that the customer who reported that she tossed his bagels mistakenly "perceived" her speed as rude behavior on August 7, 2015. Transcript at 25-26. However, not only is it implausible that a customer would have misinterpreted speed for frustration, the record shows that claimant was upset about her break at the time, and that the manager who reviewed the video of claimant's actions also interpreted claimant's body language as being "unhappy." Thus, the weight of the evidence shows claimant threw the customer's food in frustration because claimant was upset that her lunch break was late. Claimant's conscious decision to complain about her break in front of customers, and to throw a customer's groceries, demonstrated indifference to the consequences of her actions, and therefore was, at best, wantonly negligent.

Claimant's conduct on August 7, 2015 cannot be excused as an isolated instance of poor judgment. To be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant exercised poor judgment on May 12, 2015 when, with indifference to the consequences of her statements, she made derogatory comments in front of customers about non-English speaking residents of the United States that she knew or should have known probably violated the employer's expectations regarding customer courtesy. Claimant's exercise of poor judgment on August 7, 2015 therefore was part of a pattern of wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct on August 7, 2015 cannot be excused as a good faith error. At hearing, claimant testified that her "voice carries," and she was not purposely discourteous to customers when she spoke to the lead clerk about her break. Transcript at 22, 25. However, the record shows that she continued to comment about her break after the lead clerk left, and fails to show that she sincerely believed, and had a rational basis for believing, that making those statements in front of customers or throwing a customer's groceries would be condoned. Absent such a showing, we cannot find that claimant's conduct was the result of a good faith error in her understanding of those expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-45712 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 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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