

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1262

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164828). Claimant filed a timely request for hearing. On October 20, 2015, ALJ Triana conducted a hearing, and on October 21, 2015 issued Hearing Decision 15-UI-46247, affirming the Department's decision. On October 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) The Salvation Army employed claimant from November 1, 2010 to August 29, 2015, last as a sales representative.

(2) In January 2015, the employer told the sales representatives they were permitted to sell products to customers for less than the price marked only with prior approval from a manager. There were no exceptions to the policy. Claimant knew and understood this policy.

(3) After January 2015, claimant frequently sold items to customers for discounted prices without obtaining a manager's approval.

(4) On August 27, 2015, a customer complained to claimant that a pair of pants had a stain on them. At the time, one of claimant's managers was in a back room containing the employer's food bank. The store was equipped with a paging system that was audible in the food bank. Claimant gave the customer a discount on the pants without attempting to contact the manager for approval because it was a small item and the discount was for only \$1.00. Claimant did not give the customer a receipt for his purchase although it was customary to provide a receipt for purchases. The customer complained to the employer

about the transaction. Later that day, the manager asked claimant if he had given the customer a discount, and claimant told the manager he had because he wanted to make money for the store.

(5) On August 29, 2015, the employer discharged claimant for violating its discount policy.

CONCLUSIONS 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he violated the employer's discount policy. Claimant understood that the employer required him to obtain management approval to sell an item at a reduced price. Claimant violated the employer's discount policy on August 27, 2015 when, at a customer's request, claimant reduced the price of an item he sold to the customer without first contacting a manager for approval. Claimant testified that he "didn't think it would be a big thing" when he reduced the price for the item without manager approval because it was a small item, and the discount was for only \$1.00. Audio Record at 14:01 to 14:19. However, although claimant asserted that the employer "made it sound" like the policy applied only to big items, claimant did not provide any evidence of how the employer "made it sound" like there were any exceptions to its discount policy. Audio Record at 14:22 to 14:54. On the contrary, claimant testified that the policy was simply to ask a manager before lowering a price. Audio Record at 14:48 to 15:19. By failing to obtain a manager's approval before selling an item for a reduced price, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore willfully violated those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's willful conduct was repeated over a period of eight months. It was not isolated, and cannot be excused as such.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). For an act to be considered a "good faith error," claimant's conduct must necessarily have involved some sort of mistake made with the honest belief that his conduct was of the sort that the employer would deem acceptable. *See Goin v. Employment Dept.*, 203 Or App 758, 126 P3d 734 (2006). Claimant did not hold the requisite honest belief. Claimant asserted that he acted in the best interest of the store by discounting damaged merchandise that might otherwise be thrown away "just to make money for the store." Audio Record at 19:59 to 21:18. However, when the employer announced the discount policy, claimant specifically asked the employer if he could "haggle" with customers to sell damaged items and make more money for the store. Audio Record at 15:37 to 16:16. The employer responding by telling

claimant that had to obtain permission from management for discounts because discounts were a management issue. *Id.* Thus, claimant did not show he sincerely believed, or had a rational basis for believing, that the employer would condone his failure to follow the discount policy, even for damaged merchandise.

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

DECISION: Hearing Decision 15-UI-46247 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 17, 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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