EO: 700
BYE: 201626

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

363
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1532

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct but his benefits rights based on wages earned prior to the discharge were not cancelled (decision # 11348). Claimant filed a timely request for hearing. On December 4, 2015, ALJ Vincent conducted a hearing, and on December 11, 2015 issued Hearing Decision 15-UI-49256, affirming the Department's decision. On December 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he presented facts that were not introduced into evidence during the hearing. Claimant did not explain why he was unable to present this new information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from doing so. For this reason, EAB did not consider the new information that claimant attempted to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Select Comfort Retail Group Corporation employed claimant from August 15, 2012 until July 1, 2015, last as a manager of its store in Bend, Oregon.

(2) During the time claimant was manager at the Bend store, the staff was comprised of claimant and one subordinate employee. Both of them often worked in the store alone.

(3) Absent an emergency, the employer expected that claimant would close his store no earlier than its posted time for closing. The employer expected claimant to accurately complete his own time cards and to edit his subordinate employee's time cards only to accurately reflect the hours that they were on-duty and working. The employer further expected claimant to take breaks in accordance with state law and to require his subordinate employee to do so as well. Finally, the employer expected that claimant would refrain from allowing non-employees to perform work for the employer. Claimant reasonably

understood the employer's expectations as a result of his training, phone conferences he participated explaining the employer's policies, discussions he had with the employer's district manager and as a matter of common sense.

(4) While claimant managed the employer's Bend store, the store occasionally participated in shows where it displayed its merchandise. Claimant allowed his wife and his son, who were not store employees and were not compensated for their services, to assist him in setting up and removing those displays.

(5) In April 2015, the district manager visited claimant's store to issue to him a coaching memorandum. At that time, she noticed a list of potential customers, with their phone numbers and addresses, which the employer had not compiled. The district manager asked claimant how he came to possess the call list, and he would only tell her it came from a "friend" and he did not pay for it. Transcript at 18, 22. Although the district manager asked him repeatedly, claimant refused to more specifically identify the source of the call list. When the district manager told claimant that it was not ethical for him to use the list if it came from one of the employer's competitors, claimant laughed. Claimant sent postcards to the people on the list soliciting their business.

(6) Sometime before July 1, 2015, the employer began an investigation into claimant's management of the Bend store. The employer learned that claimant had on a multitude of occasions altered his own and a subordinate employee's time cards to show they had taken work breaks. The employer also discovered that claimant had altered his own and the subordinate's time cards on several occasions to show that they had left the store at its posted closing time of 9:00 p.m. However, on at least seventy occasions from March 2015 through June 2015, the employer's surveillance videos showed that the employee working in the store, whether it was claimant or his subordinate or both, had left the store before 9:00 p.m. and the employer's computerized security system showed that the store's alarm had been activated earlier than 9:00 p.m. on those occasions.

(7) Sometime shortly before June 30, 2015, the employer interviewed claimant's one subordinate employee. The subordinate told the employer that he had not taken lunch breaks during his employment, and was not aware that claimant had been adjusting his timecard to show that he had taken a lunch.

(8) On June 30, 2015, the employer interviewed claimant about his practices. Claimant stated he had allowed his wife and son to assist him at trade shows. Claimant agreed he had edited his subordinate employee's timecards numerous times. Claimant also said that he and his subordinate often punched out at 8:53 p.m., rather than the 9:00 p.m. closing of the store, because the time clock would round their time to the nearest quarter of an hour, or 9:00 p.m., but they did not leave the store until 9:00 p.m.

(9) On July 1, 2015, the employer discharged claimant for closing the store early or instructing his subordinate to do so, for altering his own and the subordinate's time card to show that they had taken breaks when they had not and for allowing his wife and son, who were non-employees, to perform work on the employer's behalf.

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. 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).

Claimant testified he understood that the employer expected him to keep the Bend store open for business until 9:00 p.m., the time posted for it to close. Transcript at 38. The employer's witness presented strong evidence that claimant had regularly been closing the store before 9:00 p.m., including video surveillance showing he and his subordinate had punched out at 8:53 p.m. (which the time clock would round up to show 9:00 p.m.) and had left the store before 9:00 p.m. Transcript at 8, 9, 61. The employer's witness buttressed the conclusion that claimant had the store close early by her testimony that the store's computerized security system showed the store's alarm was regularly armed before 9:00 p.m., which very strongly suggests that doors were locked and any potential customers were prevented from entering the store during the final seven minutes it was expected to be open for business. Transcript at 8, 61. Claimant sought to rebut this testimony by asserting that, although he and his subordinate clocked out at 8:53 p.m., they stayed at the workplace until 9:00 p.m. doing closing paperwork and did not leave early. Transcript at 39-40. While claimant stated that they reason they needed to punch out early was because he did not want to wait to shut down the store's computers until 9:00 p.m., that in no way undercuts the employer's video evidence of his and his subordinate's early departure from store or the early locking of the store's door and early activation of the store's alarm system. Moreover, it does not make sense that claimant would be keeping the store open for business until 9:00 p.m. if he had earlier shut off the store's computers, and presumably had removed the ability to process any customer transactions. In view of the strength of the employer's evidence and claimant's failure to present an effective rebuttal, the preponderance of the evidence shows that claimant closed the store early on several occasions from March through June 2015. Given the multitude of times that the store was closed early, claimant could only have known what he was doing, and his actions likely were not the result of a mistake in reading the correct time. By regularly closing the store before 9:00 p.m., claimant violated the employer's standards with at least wanton negligence.

Claimant candidly admitted that he sometimes changed his subordinate's time cards to show that he or the subordinate had taken lunch breaks. Transcript at 42. According to claimant, the subordinate verified that he had taken a lunch on each day that claimant edited the time card. Transcript at 42. However, claimant contended that, even though he had consistently edited the subordinate's time cards to show the subordinate had taken fifteen minute breaks, he had intended those edits to show a lunch break for the subordinate, not a rest break and he did not know that a thirty minute lunch break was required under Oregon law.. Transcript at 42, 43, 59; *see* OAR 839-020-0050(1) (January 1, 2014). Claimant's explanation for why he thought a fifteen lunch break was lawful was that he was trained in Idaho and Idaho law only requires an employer to provide a fifteen minute lunch break. Claimant's explanation was implausible. Idaho law does not require an employer to provide any lunch or meal breaks to employees. *See* https://labor.idaho.gov/ dnn/Business/IdahoLabor Laws/LaborLaws.FAQ.aspx. Transcript at 41, 59. However, late in his testimony, claimant contradicted this earlier testimony and stated that the district manager had told him he needed to start clocking out for an uninterrupted thirty minute lunch. Transcript at 59. Regardless of claimant's understanding of Idaho

law, the district manager's statement was sufficient to at least put him on notice that either Oregon law or the employer required to provide thirty minute and not fifteen minute lunch breaks to his subordinate as well as to himself. Transcript at 59. By not requiring his subordinate to take the required thirty minute meal break, claimant violated the employer's standards of which he reasonably should have been aware with at least wanton negligence.

Although claimant might have engaged in wantonly negligent behavior as discussed above, his behavior is excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To fall within the exculpatory exception for an "isolated instance of poor judgment," claimant's wantonly negligent violation of the employer's standards must have been, among other things, 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). Here, claimant engaged in behavior that violated the employer's standards with wanton negligence on several occasions, including the approximately seventy times he closed or authorized his subordinate to close the store early from March through June 2015. As well, claimant violated the employer's standards with wanton negligence each of the several times he allowed his subordinate to take a fifteen minute, rather than a thirty minute meal break. Given the sheer number of these occurrences when claimant disregarded the employer's expectations with wanton negligence, claimant's behavior was neither isolated nor infrequent, but formed a conspicuous pattern. As such, claimant's behavior was not the type that may be excused as an isolated instance of poor judgment.

Nor was claimant's wantonly negligent behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or present evidence showing that he sincerely but mistakenly believed the employer would condone his actions in closing the store earlier that its posted closing time. With respect to the subordinate's meal breaks, it is implausible that claimant thought the employer would allow him to provide a shorter break than Oregon law required. For these reasons, claimant's behavior falls outside the exculpatory provision for good faith errors.

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

DECISION: Hearing Decision 15-UI-49256 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>February 8, 2016</u>

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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