

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0102

Reversed
Disqualification

PROCEDURAL HISTORY: On December 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct but his benefits right based on wages earned prior to the discharge were not cancelled (decision # 90250). Claimant filed a timely request for hearing. On January 4, 2016, ALJ Holmes-Swanson conducted a hearing, and on January 8, 2016 issued Hearing Decision 16-UI-50730, reversing the Department's decision. On January 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from March 12, 1988 until October 27, 2015, last as a freight clerk working the graveyard shift.

(2) The employer expected claimant to refrain from dishonest behavior in the workplace and not to take the employer's money or other property from the employer's premises for his personal use or benefit. Claimant understood the employer's expectations.

(3) On October 12, 2015, a customer made a purchase at the employer's store using the self-checkout aisle. After the customer paid for the purchase, the customer neglected to retrieve \$6.00 in change from the bill dispenser. Shortly after, at 10:48 p.m., claimant was preparing to report for his shift and purchased a soft drink using the same self-checkout aisle. When claimant retrieved the change for his purchase, he noticed there was some paper money left in the bill dispenser from the prior customer's purchase. Claimant looked about, did not see anyone and took the \$6.00. At the time he removed the money, claimant suspected a customer had inadvertently left it behind. Claimant knew the employer would reimburse the customer for the customer's missing change if the customer returned to the store to claim it.

(4) Shortly after claimant removed the \$6.00, the customer returned to the store for his change. When the customer was not able to locate it in the bill dispenser, he went to the employer's customer service representatives and the employer reimbursed him \$6.00 for the missing change.

(5) On October 27, 2015, the employer discharged claimant for taking the customer's money.

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). 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).

In Hearing Decision 16-UI-50730, the ALJ concluded that although the employer demonstrated that claimant intentionally violated the employer's standards when he removed the change that the customer had left behind in the bill dispenser, that willful behavior was excused from constituting misconduct as an isolated instance of poor judgment. We disagree.

At the outset, claimant testified at hearing he deliberately took the money that the customer had left in the bill dispenser. Transcript at 17, 18. Although claimant testified that he thought the customer would not return to claim the money that was owed to him and another store employee likely would take the money if he did not, he also agreed that taking the money was "dishonest" within the meaning of the employer's policy and he was aware that the employer would use its own funds to reimburse the customer if he returned to retrieve his change and it was gone. Transcript at 17-19, 22. Claimant's testimony was an admission that he willfully violated the employer's standards when he took the customer's change from the dispenser. Claimant further testified that he did not think the employer would make such a "big deal" of his "dumb decision" and he thought at most the employer would suspend him or issue a write-up to him. Transcript at 17, 18. However, what claimant thought about the severity of the disciplinary sanction the employer would impose for his violation does not serve to negate or mitigate his knowledge and intentions when he took the money. We agree with the ALJ that claimant's behavior in removing the money that the customer forgot to take from the bill dispenser on October 12, 2015 was a willful violation of the employer's standards.

However, we disagree with the ALJ's conclusion that claimant's willful violation was excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may not be excused as an isolated instance of poor judgment if it "exceeds mere poor judgment" by, among other things, violating the law, being tantamount to unlawful conduct or causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). We specifically do not agree with the ALJ's assertion that "claimant's appropriation of \$6 which had apparently been abandoned by a previous customer does not constitute theft." Hearing Decision 16-UI-50730 at 3.

That the customer returned to the store to retrieve his change shortly after he completed his transaction at the self-checkout aisle demonstrates that the customer did not “abandon” his change, but inadvertently neglected to remove it from the bill dispenser. ORS 164.065 states that one who comes into the control of property of another, and knows or has good reason to know the property was lost or mislaid, commits theft if, with intent to deprive the owner of the property, he or she fails to take reasonable steps to restore the property to the owner. Here, claimant did not think that he had any claim of ownership over the funds when he took them. Claimant testified that he thought the \$6 had been left behind by a customer and that he was aware that the customer might return to the store for the missing change. Transcript at 18, 22. It is reasonably inferable that claimant had good reason to believe that the change had been mislaid by the customer (by forgetting to remove it from the bill dispenser), that claimant intended to exercise control over of the change that he knew did not belong to him, and thereby intended to deprive its rightful owner of it, and that reasonable steps to restore the property to its owner would have included taking the money to a member of management or to the employer’s customer service representatives for safekeeping until or if the customer returned to claim it. Transcript at 27. By failing to take any reasonable steps to return the \$6.00 to the customer, claimant's conduct was commission of, or tantamount to a commission of theft in the third degree, a class C misdemeanor. *See* ORS 165.015(2), ORS 164.043 and ORS 164.065. Because claimant’s behavior on October 12, 2015 violated or was tantamount to violating the law, we disagree with the ALJ and conclude that claimant's conduct exceeded mere poor judgment and was not excusable under OAR 471-030-0038(1)(d)(D).

Nor was claimant’s behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he sincerely believed the employer would condone his removal of the customer’s change from the bill dispenser and taking ownership of it, only that he thought the employer’s penalty for his violation, if discovered, would be less severe than discharge. Since the excuse of good faith error generally involves claimant’s sincere, but mistaken belief, in the correctness of his actions, that excuse is inapplicable on these facts. Claimant’s behavior did not arise from a good faith error in understanding the employer’s requirements.

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

DECISION: Hearing Decision 16-UI-50730 is set aside, as outlined above.

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

DATE of Service: February 23, 2016

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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