

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0199

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123900). Claimant filed a timely request for hearing. On January 27, 2016, ALJ Wyatt conducted a hearing, and on February 4, 2016 issued Hearing Decision 16-UI-52317, concluding the employer discharged claimant, but not for misconduct. On February 24, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from October 19, 2005 to October 27, 2015 as a grocery cashier.

(2) The employer expected cashiers to refrain from mishandling cash and other negotiable instruments and causing a financial loss to the employer. Claimant was an experienced cashier, and had received training regarding how to accept payment from customers. Claimant understood the employer's expectation.

(3) On July 13, 2015, during a busy period at the store, claimant mistakenly failed to finalize a credit card transaction when a customer purchased grocery items through claimant's register, resulting in a loss to the employer's store.

(4) On July 21, 2015, claimant agreed to a last chance agreement instead of termination as result of the July 13 incident. Claimant agreed that a second violation of the employer's policy regarding handling cash and other negotiable instruments would result in immediate discharge.

(5) On October 25, 2015, claimant received a check from a customer to pay for grocery items at her register. Claimant "ran" the check on the register, and inadvertently handed the check back to the

customer along with the customer's receipt. The customer did not return the check to claimant, resulting in a loss to the store.

(6) On October 26, 2015, the employer discovered there was a check missing from claimant's register. The manager reviewed video of what occurred on October 25, and discussed the incident with claimant. Claimant was unaware of her error until that time, and told her manager she was surprised because she normally put a customer's check in the register before she removed the receipt from the register. Exhibit 1 at 2.

(7) On October 27, 2015, the employer discharged claimant for mishandling a negotiable instrument and causing a financial loss to the employer on October 25.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that 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 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 she violated the employer's reasonable expectation that she refrain from mishandling a negotiable instrument for payment, and causing a financial loss to the employer. Claimant understood that expectation. The record shows that her normal practice was to place a customer's check in the register before handing the customer a receipt.

It was undisputed at hearing that claimant's act of returning the check to the customer on October 25 was an inadvertent mistake and not intentional. Audio Record at 11:39 to 11:52, 22:19 to 22:45. Because claimant did not intend to return the check, her violation was not willful. Nor does the record show that the final incident occurred because of claimant's conscious indifference to following the employer's procedures regarding how to accept payment, or because she was indifferent to the consequences of her conduct.

The employer argued in its written argument that claimant knew she would be terminated if she violated the employer's payment acceptance procedures again after the incident on July 13, and that claimant's further "negligence" on October 25 was therefore misconduct. Employer Argument. Claimant did not contest that she understood she would be terminated for another payment error occurring after she signed the last chance agreement on July 21. However, that awareness does not itself make it more or less likely that claimant consciously engaged in conduct that she knew or should have known would result in her failure to put the check in the register on October 25. Moreover, even if we infer that

claimant's mistake on October 25 resulted from claimant's negligent behavior, to disqualify her from unemployment benefits, the employer must show more than carelessness or mere negligence. The employer must show that claimant's mistake was the result of willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). The employer has not met that burden.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-52317 is affirmed.

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

DATE of Service: March 14, 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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