

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0331

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 120652). The employer filed a timely request for hearing. On February 25, 2016, ALJ L. Lee conducted a hearing, and on March 4, 2016, issued Hearing Decision 16-UI-54349, concluding that the employer discharged claimant for misconduct. On March 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Dollar Tree Stores employed claimant as an assistant manager from October 15, 2014 until September 23, 2015.

(2) The employer's policy required that employees protect the employer's assets and take "reasonable steps to protect them from improper or unauthorized possession or use, damage or destruction, theft, fraud, waste, misuse, loss or damage." Exhibit 1. Among the measures imposed to protect the employer's assets was the requirement that an employee who received a \$100 bill as payment for a purchase take the bill to the safe in the store office and make change for the purchase from money in the safe. Other security measures included the employer's closing procedure, which required that each employee who was present when the store closed open the employee's own cash register drawer, take the drawer to the store office, and count the contents of the drawer in the presence of another employee. If an employee discovered a cash shortage of more than \$3, the employee was required to contact the store manager, who would then investigate the shortage. The employer's policies also prohibited employees from mixing their personal funds with those of the store. Claimant knew about and

understood the employer's policies regarding accepting \$100 bills, closing the store, and mixing personal funds with store funds.

(3) On September 20, 2015, only one other employee was assigned to work with claimant during claimant's scheduled shift. While the employee was outside of the store on her break, claimant worked as cashier at one of the cash registers. A customer gave claimant a \$100 bill for an \$18 purchase. Rather than take the \$100 bill to the office safe, which was approximately 50 feet away from the cash register, claimant opened the drawer of an adjacent cash register and made change for the large bill from that register. Because there was a line of customers at the register where claimant was working, she believed that she was best serving the customers by quickly processing the transaction with the \$100 bill and not taking the additional time necessary to go to the store office. When the employee returned from her break, claimant told the employee about the transaction she had made in the employee's cash register.

(4) On September 21, 2015, claimant and one other employee were present when the store closed. Claimant opened her cash register drawer and the cash register drawer of the other employee; the other employee was present when claimant opened the employee's cash register drawer. Claimant and the employee then took their drawers to the store office. Claimant counted the contents of her drawer in the presence of the other employee. The employee then went to the bathroom, leaving claimant alone with the two cash register drawers. After the employee returned from the bathroom, the employee counted the contents of her drawer in the presence of claimant. The employee discovered that she was \$8 short. Although claimant knew she was required to contact the manager about the shortage, she did not do so because she had a "rocky" relationship with the manager. Transcript at 32 and 35. Claimant then put \$8 of her own money into the employee's cash register drawer to compensate for the shortage. The employee, who was concerned about claimant's actions, subsequently contacted the manager and told the manager what claimant had done. The manager conducted an investigation into claimant's conduct.

(5) On September 23, 2015, the employer discharged claimant for violating its store closing procedures on September 21.

CONCLUSION 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. 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 expected that claimant would protect its assets by following its procedures for counting the contents of the store cash registers when closing the store. Claimant knew and understood the employer's closing procedures. Her actions in allowing an employee to leave her alone in the office

with the contents of two cash registers did not violate an explicit employer requirement, but claimant understood the employer required that each employee count the contents of the employee's register in the presence of at least one another employee. Claimant therefore knew or should have known that allowing the employee to leave her alone in the office was contrary to the employer's general policy that employees "take reasonable steps" to protect the employer's assets and property. Claimant also failed to comply with the employer's expectations when she refused to contact the store manager about a cash register shortage of \$8, and put \$8 of her own money in the register to make up for the shortage. Claimant admitted that she knew her actions violated the employer's closing procedures, but testified that she chose to do what she did because she wanted to avoid contact with the manager, with whom claimant had a difficult relationship. Claimant's desire to avoid a possibly unpleasant encounter with a supervisor was not a reasonable justification for refusing to comply with the employer's closing procedures. Claimant's conscious violation of the standards of behavior the employer expected of her on September 21 was at least wantonly negligent and therefore constituted misconduct.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). To be isolated, an 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). On September 21, claimant exercised poor judgment by allowing an employee to leave her alone with the contents of two cash register drawers, failing to contact her supervisor regarding a cash shortage, and mixing her own funds with those of the employer. Claimant's exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's September 21 conduct also cannot be excused as the result of a good faith error. Claimant did not assert that she reasonably believed the employer would excuse her failure to comply with the employer's closing procedures.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-54349 is affirmed.

DATE of Service: April 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.