

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0467**

*Modified*  
*Wage Credits Not Canceled*  
*Disqualification*

**PROCEDURAL HISTORY:** On October 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct and cancelling claimant's wage credits (decision # 151821). On December 4, 2015, the Department served notice of an administrative decision (decision # 93143) concluding that claimant did not timely file a claim for unemployment benefits for the week of November 8 through 14, 2015 (week 45-15) and was ineligible to receive benefits for that week. Claimant filed timely requests for hearing. On February 5, 2016, ALJ Shoemake conducted hearings, and on February 9, 2016, issued the following hearing decisions: Hearing Decision 16-UI-52618 affirmed decision # 93143 (the late claim decision) and Hearing Decision 16-UI-52647 affirmed decision # 151821 (the discharge and wage cancellation decision). On February 24, 2016, claimant filed applications for review of both hearing decisions and with the Employment Appeals Board (EAB).

On March 14, 2016, EAB issued Appeals Board Decisions 2016-EAB-0211, which adopted Hearing Decision 16-UI-52618, and 2016-EAB-0210, which reversed Hearing Decision 16-UI-52647 and remanded the matter to the Office of Administrative Hearings for further development of the record. On April 5, 2016, ALJ Shoemake conducted a hearing and on April 12, 2016, issued Hearing Decision 16-UI-57073, adopting Hearing Decision 16-UI-52647. On April 22, 2016, claimant filed an application for review with EAB.

**FINDINGS OF FACT:** (1) Payless Shoe Source, Inc. employed claimant as an assistant manager from April 29, 2014 until August 14, 2015.

(2) The employer's policy prohibited an employee from misusing or using multiple discount coupons to purchase items for the employee's personal use, and also prohibited an employee from processing the

employee's personal purchase of items from the employer. Claimant knew about and understood this policy.

(3) Sometime prior to August 2015, the employer checked records for the store where claimant worked and concluded that the percentage of coupons used in claimant's store was above average for stores in the market. The employer began an investigation into the transactions processed at claimant's store. The employer's investigation showed that on June 9, August 2 and August 10, 2015, claimant applied multiple discount coupons to purchase items for her personal use. Exhibit 3. Claimant processed these transactions herself because her manager told her she was permitted to do so.

(4) On one occasion during her employment with the employer, claimant's father gave claimant \$20 to purchase a pair of shoes for him. Claimant paid \$14 for the shoes. When she attempted to give her father \$6, her father told claimant to keep the money. April 5 Hearing Transcript at 88-89.

(5) Based on its investigation, the employer concluded that claimant had processed numerous transactions that violated its code of conduct. On August 13, 2015, the employer's regional loss prevention manager met with claimant and presented her with evidence of transactions the employer believed were improper. At this meeting, claimant prepared a written statement in which she admitted that some of the transactions she had processed may have violated the employer's policies, but asserted that it was "not my intention to gain profits" from these transactions and that she had "no intention to re-sell or profit from" items she may have improperly purchased. Claimant stated that she purchased these items "because I'm a compulsive shopper." Exhibit 1.

(6) On August 14, 2015, the employer discharged claimant for violating its policies by processing her own personal purchases, by using multiple discount coupons to make personal purchases, and by reselling merchandise purchased from the employer at prices higher than those she originally paid for the merchandise.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that the employer discharged claimant for misconduct. We disagree with the ALJ and conclude that claimant should not have all wage credits prior to her discharge cancelled.

### **Discharge**

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v.*

*Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).<sup>1</sup>

The employer discharged claimant for allegedly violating its policies by processing her own personal purchases, by applying multiple discount coupons to make personal purchases, and by reselling items purchased from the employer at prices higher than those she originally paid for the items. Claimant admitted that she processed her personal purchases, but presented un rebutted evidence that her manager told her she could do so. Exhibit 4. Although the manager's instructions may have been contrary to the employer's policy, claimant was sincere in her belief that she could trust her supervisor. Claimant's conduct in processing in her own purchase resulted from her reliance in good faith on her supervisor's directive; good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In regard to the employer's allegation that claimant bought merchandise from the employer and resold it for higher prices; the employer's contention was based on hearsay evidence from one of claimant's coworkers. The coworker asserted that claimant told the coworker that claimant's sister took items claimant purchased from the employer to resell in Mexico. Exhibit 3, p. 14; April 5 Hearing Transcript at 29-30. Claimant denied that she had ever given her sister items to sell in Mexico, and denied that she had ever told a coworker she had done so. We find claimant's firsthand testimony more credible than the hearsay evidence presented by the employer and conclude that the employer failed to meet its burden to demonstrate that claimant resold items purchased from the employer for profit.<sup>2</sup>

In regard to the charge that claimant applied multiple discount coupons to her personal purchases, the employer presented transaction records that demonstrated that claimant made several of these purchases on June 9, August 2 and August 10, 2015. Although claimant denied that any of these purchases violated the employer's policy, she was unable to present a clear explanation regarding the transactions the employer's records which showed she obtained substantial discounts by applying the multiple coupons several times to her purchases. Exhibit 3; April 5 Hearing Transcript at 55 through 57. Accordingly, we conclude that the employer met its burden to demonstrate that claimant knowingly and repeatedly violated the employer's policy by using multiple discount coupons to make personal purchases. Claimant's actions were at least wantonly negligent, and, because they involved repeated exercises of poor judgment, were not excusable as an isolated instance of poor judgment.

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

### **Theft/Cancellation of Wage Credits**

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<sup>1</sup> Conduct is considered isolated if, in pertinent part, it involves a single or infrequent exercise of poor judgment, and not when it involves a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d).

<sup>2</sup> Claimant testified at some time during her work for the employer, her father gave her \$20 to purchase shoes for him. Claimant purchased the shoes for \$14 for the shoes, and her father told her to keep \$6. We consider this \$6 as a gift from claimant's parent, and not a deliberate attempt profit from merchandise purchased from the employer at a discounted price.

If an individual was discharged for misconduct because of the commission of theft, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if certain requirements are met, which include presentation of a written admission of theft signed by the individual to the Department. ORS 657.176(3).<sup>3</sup> A person commits theft when, with intent to deprive another of property or to appropriate property to the person or a third person,<sup>4</sup> the person takes, appropriates, obtains or withholds such property from an owner thereof. ORS 164.015. The Department asserted that claimant's benefit rights based on wage credits earned prior to the date of her discharge must be cancelled under ORS 657.176(3) because of the written statement she prepared on August 13, 2015, after her interview with the employer's loss prevention manager. As we noted in Appeals Board Decision 2016-EAB-0210, however, this statement failed to demonstrate that claimant intended to deprive the employer of its property by engaging in transactions that violated the employer's policies. In her August 13 statement, claimant asserted that "it was not my intention to gain profits" from her purchases from the employer. Exhibit 2, Claimant's 8/13/15 statement. Although claimant acknowledged in her August 13 statement that she profited from some of the transactions in which she engaged, she explained that she made the purchases she did because she is a compulsive shopper. The record therefore fails to demonstrate that claimant committed theft because the evidence does not show that claimant acted with an intent to deprive the employer of its property. Claimant is not subject to cancellation of unemployment benefit rights based on wages earned prior to the date on which the employer discharged her.

**DECISION:** Hearing Decision 16-UI-57073 is modified, as outlined above.

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

**DATE of Service:** May 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](http://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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<sup>3</sup> For purposes of satisfying ORS 657.176(3), any person, party or entity may present the Department with the written admission. OAR 471-030-0054 (August 1, 2004).

<sup>4</sup> "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract. ORS 164.005(5). "Deprive another of property" means to withhold property of another or cause property of another to be withheld from that person permanently or for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person; or dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property. ORS 164.005(2).

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