

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0222

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 85532). Claimant filed a timely request for hearing. On February 16, 2017, ALJ Murdock conducted a hearing, and on February 16, 2017, issued Hearing Decision 17-UI-77140, affirming the administrative decision. On February 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From March 6, 2015 until October 21, 2016, Dollar Tree Stores employed claimant as a part time clerk.

(2) The employer expected that employees would not take products from its store without paying for them, and that employees would only purchase store items during their rest or lunch breaks, or after the employees' shifts had ended. Claimant knew about and understood the employer's policy and expectation.

(3) Because claimant's rest breaks lasted only 10 minutes, and because the lines at the cash registers were often long, claimant regularly took items he wanted to purchase off the store shelves and placed them by his register so that he could more quickly purchase the items on his break. Sometime prior to September 11, 2016, however, claimant discovered that items he had placed by his register to purchase had been removed.

(4) On September 11, 2016, claimant put his finger in a jar of petroleum jelly that was on a store shelf, and then put the jar back on the shelf. Claimant planned to purchase the jar of petroleum jelly on his break. Claimant's actions were observed on store surveillance video, however, and the jar of petroleum jelly was removed from the store shelf.

(5) On October 21, 2016, the employer discharged claimant for taking store merchandise without purchasing it by using petroleum jelly without first purchasing it on a break or after his shift had ended.

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 connected with work. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

As a matter of common sense, claimant understood that the employer expected him to pay for any products he took from the shelves of the employer's store. Claimant was also aware of the employer's requirement that he only purchase store merchandise on his breaks or after he had completed his shift. Audio recording at 13:01. On September 11, 2016, claimant violated the employer's expectation and policy when put his finger in a jar of petroleum jelly on a shelf of the employer's store that he had not purchased, and left the jar on the store shelves. Claimant's conduct constituted a deliberate and conscious violation of the employer's expectation that he not take products without paying for them, and that he make any such purchases on his breaks or after his shift had ended.

Claimant, however, asserted that he believed in good faith that his actions did not constitute theft of the employer's merchandise. According to claimant, he did not steal anything, because he did not remove the jar of petroleum jelly from the shelf and take it into his exclusive possession. Claimant contended that his apparent use of a small amount of petroleum jelly from the jar, which he left on the employer's store shelf, did not violate the employer's expectation or policy because he intended to purchase the jar at a later time. We find it implausible that claimant sincerely believed the employer would condone his actions in opening a jar of petroleum jelly, putting his finger in it, and replacing it on the shelf where a customer could purchase it. In addition, claimant admitted that he knew his actions were contrary to the employer's expectation: he testified that in hindsight, he realized that he should have purchased the jar of petroleum jelly on his lunch break or after his shift at ended. Audio recording at 13:01. Claimant's conduct cannot therefore be excused as resulting from a good faith error.

Claimant's actions cannot be excused as an isolated instance of poor judgment under the provisions of OAR 471-030-0038(3)(b). To be considered an "isolated instance" of poor judgment, claimant's wantonly negligent behavior on September 11, 2016 must have been, among other things, a single or infrequent occurrence of poor judgment rather than a repeated act of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). It also must not have exceeded "mere poor judgment" by unlawful or tantamount to illegal conduct and must not have caused an irreparable breach of trust in the employment relationship or otherwise have made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's actions created an irreparable breach in employment

relationship because his conduct would cause any reasonable employer to believe it could no longer trust claimant to perform his job duties as a clerk without taking products he had not purchased.

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

DECISION: Hearing Decision 17-UI-77140 is affirmed.

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

DATE of Service: March 16, 2017

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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