

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0237

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 102910). Claimant filed a timely request for hearing. On February 3, 2017, ALJ Shoemake conducted a hearing, and on February 10, 2017, issued Hearing Decision 17-UI-76700, concluding that the employer discharged claimant for misconduct and that claimant's benefit rights based on wage credits were not subject to cancellation. On February 28, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party request review of the portion of Hearing Decision 17-UI-76700 concluding that claimant's benefit rights based on wage credits were not subject to cancellation. We therefore confined our review to the issue of whether the employer discharged claimant for misconduct.

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) From July 17, 2015 until October 13, 2016, Lowe's Home Centers employed claimant as a product services specialist.

(2) The employer required that a customer who was owed a refund, *e.g.*, because the customer had changed an order and the change resulted in a reduction in the price the customer had already paid for merchandise, would have the amount of the refund placed on a merchandise credit card. If the transaction took place by telephone, the employer required that the employee handling the transaction process the refund to a merchandise credit card, tell the customer about the card, and take the card to a store administrative office, where it would be held for pickup by the customer. Merchandise credit cards were numbered, but did not contain the name of the customers to whom they were issued. Claimant knew about and understood the employer's requirements in regard to processing refunds on to merchandise credit cards.

(3) On June 17 and June 28, 2016, claimant processed by telephone customer refunds on to two merchandise credit cards; one card was in the amount of \$11.83 and the second was in the amount of \$47.22. Claimant did not notify the customers about the merchandise credit cards he had created, and did not take the cards to the employer's administrative office after he completed the telephone transactions.

(4) Claimant used the \$11.83 merchandise credit cards to make purchases from the employer's store for his personal use on July 4, 6, 7, and 11, 2016. Claimant used \$47.22 merchandise credit card to make purchases from the employer's store for his personal use on June 17 and 30, and July 8, 13, 14, 19, 22, 25, 26 and 28, 2016.

(5) The employer discovered claimant's personal use of the customers' merchandise credit cards after reviewing weekly reports prepared by its loss prevention managers. On October 13, 2016, it discharged claimant for stealing from customers by making personal use of customers' merchandise credit cards.

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).

Claimant understood, as a matter of common sense, that the employer expected him not to steal from customers. Claimant also understood the employer's policy for processing customer refunds by telephone: any refund owed to a customer was to be placed on a merchandise credit card, the customer told about the card and the card taken to the employer's administrative office to await pickup by the customer. On June 17 and 28, 2016, claimant processed two customer merchandise credit cards, but failed to notify the customer about the cards and also failed to take the cards to the administrative office. Claimant then used these two cards to make personal purchases on numerous occasions in June and July 2016. Claimant's actions constituted a conscious violation of the standards of behavior with which the employer expected him to comply; his behavior was at least wantonly negligent.

Claimant, however, contended that his use of the two merchandise credit cards was inadvertent and not intentional. Claimant asserted that he had received a personal merchandise credit card from the employer which he had lost, possibly in June 2016. He testified that he believed that after processing one of the customer merchandise credit cards, he kept it rather than taking it the office, and subsequently

found the card after he left work and had returned home. Claimant stated that after he discovered the card, he mistakenly concluded it was the personal merchandise credit card he had lost and began using the card to make personal purchases. Transcript at 29. According to claimant, his use of the card resulted from his error in confusing the customer's merchandise credit card with his personal card, and not from any intent to steal from a customer. The record shows, however, that claimant used one customer's merchandise credit card the same day he processed it, on June 17, 2016, making implausible claimant's assertion that he only discovered the customer's card after he finished his shift and returned home. In addition, claimant was unable to provide a plausible explanation why he used two customer merchandise credit cards. When questioned by the ALJ about this matter, claimant testified as follows:

[ALJ]: Okay. So then when you found the second card didn't that raise any red flags to you?

[Claimant]: I didn't find that until I was done with the first one.

[ALJ]: Okay. Well, when you knew you had finished using the first one and found the second card, did that raise any red flags?

[Claimant]: No. It didn't. Because I thought I was still using that same card.

Transcript at 31.

The record shows, however, that claimant possessed and used both cards on multiple occasions in July 2016. Given the implausibility of claimant's explanation of his discovery and use of the customer merchandise credit cards, we conclude it is more likely than not that claimant knowingly used customers' merchandise credit cards to make personal purchases in June and July 2016. Claimant's conduct was a willful violation of the employer's expectation that he not steal from customers.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Because claimant used customers' merchandise credit cards on numerous occasions in June and July 2016, his willful and wantonly negligent behavior was neither a single nor infrequent occurrence.

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, that the employer condoned his use of the customers' merchandise credit cards to make personal purchases.

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-76700 is affirmed.

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

DATE of Service: March 27, 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.

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.