

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0683

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91203). Claimant filed a timely request for hearing. On May 17, 2017, ALJ Frank conducted a hearing, and on May 19, 2017 issued Hearing Decision 17-UI-83834, affirming the Department's decision. On June 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Multnomah County School District # 1 employed claimant from February 6, 2014 to March 20, 2017 as a high school bookkeeper.

(2) The employer's student body funds manual stated that the bookkeeper was to make daily deposits of school funds via armored vehicle. Exhibit 2 at 7, 13, 17. Claimant was aware of the policy in the manual.

(3) Despite the language in the employer's student body funds manual, the employer never instructed claimant to make daily deposits, and claimant's understanding of the employer's expectations was that she should make the deposits as often as possible within her time constraints. Claimant's receipt of funds varied each day, from no funds to larger amounts from fundraising, fees or events. Claimant contacted the armored vehicle company each time she had a deposit.

(4) Claimant sometimes waited several days between deposits. Claimant provided her manager a report each month showing the amounts and frequency of her deposits, and her manager never told her to make deposits more frequently. The reports showed that, in August 2016, claimant had a period of ten days before a deposit of \$7,439 was made. In September 2016, claimant had a period of eight days before a deposit of \$9,733 was made. In early November 2016, there was a period of 14 days before a deposit of \$4,483 was made. In January 2017, there was a period of six days before a deposit of \$5,684 was made. Exhibit 3, at 5-6. Although claimant had received some warnings related to attendance, the employer had never counseled or warned her regarding the timeliness of her deposits.

(5) On January 27, 2017, claimant prepared a deposit, but was unable to send out the deposit for several days because it contained a check that required a signature from a staff person who was unavailable. Once claimant received the signature, she forgot to contact the transport company to pick up the deposit. The school was closed on Friday, February 3, 2017 due to snow. On February 6 and 7, 2017, the next two scheduled workdays, claimant had to complete work she had not been able to complete due to the snow day, and focused on completing two matters that she believed were of higher priority than the daily deposits. On February 8, 2017, claimant took part of the day off due to illness, and then reported to work, knowing she needed to complete the deposit that day.

(6) On February 8, 2017, the secure transport vehicle service that the employer used to deliver cash to the bank notified the school where claimant worked that no deposits had been made from January 24 to February 8, 2017. More than \$10,000 had accumulated in the school safe during that time. The employer put claimant on paid administrative leave while it investigated the matter.

(7) On March 20, 2017, the employer discharged claimant for failing to make timely deposits according to the employer's written policy.

CONCLUSIONS AND REASONS: We disagree 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 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that the employer discharged claimant for misconduct, finding that the employer's expectations were "stated simply and repeatedly" that deposits were, without exception, to be made daily, "allowing for no contingencies or discretion on the part of the bookkeeper."¹ The ALJ reasoned that claimant's assertion that the employer's policy was "gray" lacked evidence in the record, and that claimant violated the policy by failing to make a deposit repeatedly over a two-week period. We disagree.

Although the ALJ found that the employer's policy was simple and clear, the evidence shows the employer's expectation was "gray" and does not support the conclusion that claimant knew or should have known that the employer required her to make deposits on a daily basis. Throughout claimant's employment, the employer knew from the monthly deposit reports claimant submitted to her manager

¹ Hearing Decision 17-UI-83834 at 4.

that claimant did not make deposits on a daily basis. The record shows claimant had prior deposits made as infrequently as eight, ten and 14 days apart, for deposits of more than \$9,000, \$7,000, and \$4,000, respectively. There is no evidence showing the employer had ever counseled or warned claimant that her deposit frequency violated its expectations. The employer showed claimant participated in meetings to review her job description and responsibilities, but did not testify or otherwise show that it ever instructed or warned claimant that she was to make deposits on a daily basis. *See* Exhibit 1 at 10, 11; Exhibit 3 at 2-3. Moreover, the employer asserted that claimant had prior warnings, but the record shows those warnings related to attendance and not how she performed her bookkeeping duties.

The remaining issue is therefore whether claimant's failure to make a deposit, albeit not a daily deposit, from January 24 to February 8, 2017 was a willful or wantonly negligent violation of claimant's reasonable understanding of the employer's expectations. Claimant asserted that the deposit held in the school safe on February 2 was late (Exhibit 3 at 4), and she forgot to arrange for the armored vehicle to retrieve it immediately after she obtained a missing signature. However, claimant's failure to arrange for the armored vehicle before February 2 was due to forgetfulness, and her failure to address the deposit on February 6 and 7 was due to other intervening urgent bookkeeping matters. Mere forgetfulness, alone, is usually insufficient to show the willful or wantonly negligent state of mind required to establish misconduct. There is no evidence that claimant was on reasonable notice that she needed to take steps to correct the forgetfulness. Moreover, the record does not show that claimant knew or should have known that she should give priority to the deposit rather than the other urgent matters she worked to resolve on February 6 and 7. Nor did the employer show that claimant could have completed the intervening duties and the deposit, especially considering pressure due to a school closure due to snow and her own illness. Claimant's possible inefficiency in performing her job duties does not constitute misconduct. OAR 471-030-0038(3)(b). In sum, the preponderance of the evidence fails to show that claimant willfully or with wanton negligence violated the employer's expectations regarding deposits.

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

DECISION: Hearing Decision 17-UI-83834 is set aside, as outlined above.

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

DATE of Service: June 30, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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