

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1139

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115601). Claimant filed a timely request for hearing. On September 8, 2017, ALJ Frank conducted a hearing, and on September 14, 2017 issued Hearing Decision 17-UI-92556, affirming the Department's decision. On September 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB containing new information and documents consisting of a doctor's letter from April 2017 and a charge of discrimination filed with the Equal Employment Opportunity Commission (EEOC). The charge was filed after the hearing in this matter, but the allegations were based on facts known to claimant at the time of the hearing. OAR 471-041-0090(2) (October 29, 2006) provides that EAB may consider new information only when the party offering the information establishes that it is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into the hearing record. The ALJ did not admit the doctor's letter at hearing, and claimant did not address the relevance of the doctor's letter or the EEOC charge. Claimant did not explain factors or circumstances beyond his reasonable control that prevented him from offering the new information contained in his argument into the hearing record. Because claimant failed to show that the new information in his argument and documents is relevant and material to EAB's determination, or that factors or circumstances beyond his reasonable control prevented him from offering the information into the hearing record, we considered only information received into evidence at hearing when reaching this decision, and considered claimant's argument only to the extent it was based on the record. ORS 657.275(2).

FINDINGS OF FACT: (1) Papa Murphys Take and Bake Pizza employed claimant from 2008 until July 20, 2017 as a manager.

(2) The employer's rules of conduct prohibited claimant from falsifying inventories by lying or omission. The employer's rules also prohibited claimant from engaging in poor or careless performance of his duty to input weekly inventories. Exhibit 2 at 7. Claimant knew about and understood these prohibitions.

(3) On April 29, 2015, claimant received a "write up" because, prior to April 21, 2015, he had deliberately misstated his inventory counts for pizza trays to reflect the amounts his store should have had instead of the actual amounts in the store. Claimant did not have a previous violation concerning inventory reporting.

(4) On September 25, 2016, claimant received a "write up" for having an excessive inventory of cheese in his store.

(5) On July 4, 2017, claimant conducted a weekly physical count of the food products in his store. The inventory variance report created from the count showed a difference of 2.93 percent between previous recorded inventory quantity and the inventory quantity claimant counted on July 4. The inventory variance occurred because claimant had recently disposed of food items that the store had used in the past for products it no longer served. On the inventory, claimant noted amounts of pineapple and olives stored under the pizza assembly line that were larger than the space could accommodate.

(6) On July 5, 2017, the employer moved claimant to a different position where he no longer managed the store he had managed for several years. On July 11, 2017, the new manager of claimant's previous store conducted an inventory of the food products in that store that showed a variance of 15.12 percent, which would signify a loss of more than 12 percent in product since claimant's inventory report on July 4. The employer concluded that claimant falsified his July 4 inventory to show that claimant's previous store had more inventory than it actually had.

(7) On July 20, 2017, the employer discharged claimant for allegedly falsifying the July 4, 2017 inventory report.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer carries the burden to show claimant's misconduct by

a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-92556, the ALJ found that claimant engaged in a willful disregard of the employer's interest by intentionally falsifying the July 4 inventory to show that his store had more inventory than it actually had, "most likely to enhance the perception of his restaurant's performance," and that his violation was not an isolated instance of poor judgment because it was repeated act and a breach of the employer's trust.¹ We disagree.

The employer discharged claimant because it concluded that claimant had falsified his July 4 inventory report. The employer had the reasonable right to expect claimant to record accurate inventory information for his store and to refrain from falsifying his inventory. Claimant understood the employer's expectations. The employer alleged that claimant added items that did not exist to "pad" his July 4 inventory report to conceal unacceptable inventory results. Exhibit 2 at 7, Transcript at 4-6. Claimant denied having inflated the inventory figures. Transcript at 25. More likely than not, the inventory claimant completed on July 4 contained errors. The employer asserted that claimant recorded unrealistic amounts of pineapple and olives stored under the pizza assembly line. Transcript at 14-15. Claimant agreed that those amounts would not fit under the pizza assembly line, but explained that he may have accidentally written amounts of pineapple and olives located elsewhere in the store on the incorrect lines on the inventory form. Transcript at 23-24. We find claimant's explanation plausible, especially because it is illogical that claimant would attempt to "pad" the inventory in such an obvious manner, or that he would do so when he knew another manager would be completing an inventory the next week. Moreover, the record does not establish that the variance was attributable to claimant, rather than to the new manager, which was plausible. Thus, although the inventory contained errors, the record does not show by a preponderance of the evidence that claimant willfully or consciously made them.

Moreover, even were we to find that claimant's errors were due to a wantonly negligent disregard of the employer's expectation that claimant refrain from making careless errors, his July 4 conduct would be excusable as an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The July 4 errors were isolated and not a repeated act because the April 2015 warning for misstating the number of pizza trays in his store inventory reports shows that claimant's apparent reliance on his area supervisor's directions was a good faith error, and not misconduct. Claimant had misstated pizza tray numbers "because his last Area Supervisor told [claimant] to put the missing trays back into [his] count because they [were] never going to be right." Exhibit 2 at 9. Given that claimant was following directions from his area supervisor that he plausibly may have understood to be an acceptable practice based on his supervisor's explanation that the tray count "were never going to be right," it cannot be concluded that claimant's behavior in misstating the tray inventory was a willful or wantonly negligent violation of the employer's standards. Regarding the September 25, 2016 warning for having excessive cheese in the store, there is no evidence in the record showing that claimant knew or should have known of errors leading to the excessive cheese or that he was consciously aware that his actions or failures to act violated the employer's expectations. Absent such evidence, that behavior was not wantonly negligent and did not constitute misconduct.

¹ Hearing Decision 17-UI-92556 at 4.

OAR 471-030-0038(1)(d)(D) also provides that some conduct, even if isolated, that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceed mere poor judgment and cannot be excused. The record fails to show that claimant's inventory errors were unlawful, dishonest or, viewed objectively, so egregious that they made a continued employment relationship impossible.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-92556 is set aside, as outlined above.²

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 24, 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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² 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.