

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1453

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74429). Claimant filed a timely request for hearing. On November 28, 2017, ALJ Seideman conducted a hearing, and on December 1, 2017 issued Hearing Decision 17-UI-98013, concluding the employer discharged claimant, but not for misconduct. On December 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB with its application for review but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Ingram Distribution employed claimant from November 30, 1998 to October 4, 2017 as a book sorter in the manual sortation department of its book distribution center.

(2) The employer prohibited the willful falsification of company records. The employer required claimant, as a sorter, to report all errors she saw made by her associates when they were picking orders by turning on a light at her station and having a lead worker assess the issue. Claimant understood the employer required her to report her associates' errors when they were picking orders.

(3) On September 29, 2017, an employee in claimant's production line made an error by omitting one book when she picked the books for a customer's order. Claimant was completing the order, but when she noticed her associate's error, rather than turning on the light to notify a lead worker about the error, claimant told the associate that she had made an error, prompting that associate to go get the book to fix the error. Claimant finished the order and never reported the error. Because the associate corrected her error, her error rate appeared to be less than it was, and she qualified to receive a higher hourly wage, resulting in additional earnings of \$129.

(4) Claimant had not received any warnings of any kind before September 29.

(5) On October 4, 2017, the employer discharged claimant for falsifying company records by not reporting a coworker's error.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. 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 is conscious of her conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the 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). Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

The employer discharged claimant because she violated its policy requiring her to report any errors made by her associates while picking orders. Claimant should have known from the employer's error reporting requirements that her failure to report the associate's error on September 29 probably violated the employer's expectations, and her conscious decision to tell the associate about her mistake and complete the order without reporting the error demonstrated indifference to the consequences of her actions. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that her conduct complied with the employer's expectations. We therefore conclude that claimant's conduct on September 29 was a willful or wantonly negligent violation of the employer's reasonable expectations, which cannot be excused as a good faith error.

However, we find that claimant's conduct was an isolated instance of poor judgment. It is undisputed that claimant had received no other warnings before her conduct on September 29. Her conduct in failing to report her associate's error was, therefore, isolated. Moreover, we find that claimant's conduct did not exceed mere poor judgment. Claimant testified that she did not report the error because she "wanted to get [her] sort out," and reporting the error would have delayed her work. Audio Record at 28:03-28:16. Thus, claimant's conduct on September 29 was motivated her desire to complete her work, and not a financial or other personal gain for herself. Moreover, claimant testified that she did not know that failing to report one error would affect the associate's error rate such that it would qualify the associate for a higher wage. Audio Record at 26:49-27:14. Thus, the record fails to show that claimant

had the requisite intent for her conduct to constitute theft.¹ Because claimant's conduct was not unlawful or tantamount to unlawful conduct, and did not, when viewed objectively, create an irreparable breach of trust in the employment relationship or make a continued employment relationship impossible, it did not exceed mere poor judgment. It was an isolated instance of poor judgment.

Because the conduct for which claimant was discharged was an isolated instance of poor judgment, it did not constitute misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-98013 is affirmed.

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

DATE of Service: January 24, 2018

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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¹ ORS 164.015 provides that a person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person takes, appropriates, obtains or withholds such property from an owner thereof.