

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0278

Reversed
Disqualification

PROCEDURAL HISTORY: On January 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92223). Claimant filed a timely request for hearing. On March 1, 2018, ALJ Janzen conducted a hearing and issued Hearing Decision 18-UI-104283, concluding that claimant's discharge was not for misconduct. On March 20, 2018, employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores Inc. employed claimant as a cashier from May 12, 2016 to December 31, 2017.

(2) The employer prohibited employees from using their discount cards for their sisters' transactions. The employer notified claimant of the prohibition when it gave her the discount card, and claimant understood it.

(3) On December 22, 2017, claimant and her sister shopped together. Claimant used her discount card for her sister's purchase, either to "help out her sister for Christmas" or because she wanted to "get points" for her own use. *See* Exhibit 1, 12/31/17 Witness Statement; Audio recording at ~ 21:00.

(4) The cashier who processed claimant's sister's purchase immediately reported the incident to the employer, and the employer investigated. The employer's surveillance video showed that claimant gave the discount card to the cashier, but did not suggest that the cashier had asked her for it. During the interview process claimant made a written statement for the employer that stated "I was helping my sister on Christmas shopping. I know I did wrong, at the time of purchase." Exhibit 1.

(5) On December 31, 2017, the employer discharged claimant for violating the discount card policy.

CONCLUSIONS AND REASONS: We disagree 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's use of the discount card on December 22, 2017 was wantonly negligent. Hearing Decision 18-UI-104283 at 3. We agree. Claimant consciously used her discount card for her sister's purchase, which is conduct that she knew or should have known violated the employer's discount card policy. The ALJ also concluded, however, that claimant's conduct was excusable as an isolated instance of poor judgment because "it was the only incident where claimant violated the employer's policies," and did not exceed mere poor judgment because "claimant did not intend to be dishonest or to mislead the employer." *Id.* We agree with the ALJ that claimant's conduct was isolated, but disagree and conclude that claimant's conduct did, in fact, exceed mere poor judgment.

OAR 471-030-0038(1)(d)(A)-(C) defines an isolated instance of poor judgment, in pertinent part, as a single or infrequent occurrence of poor judgment. Claimant's conduct meets that definition for the reasons the ALJ explained. However OAR 471-030-0038(1)(d)(D) provides that acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible, "[a]cts that violate the law, [and] acts that are tantamount to unlawful conduct" exceed mere poor judgment cannot be excused.

This record fails to show that claimant's single misuse of her employee discount card was such that no reasonable employer would continue to employ her; claimant's conduct therefore did not create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. Theft, as defined in Oregon law, requires the individual to have acted "with intent to deprive another of property or to appropriate property to the person or a third person" by taking, appropriating, obtaining or withholding such property from its owner. On this record, the evidence fails to show that claimant acted with the intent to deprive the employer of its property by misusing her employee discount card. *See* ORS 164.015. Claimant's conduct was, however, tantamount to unlawful conduct, because regardless whether claimant acted with the intent to help her sister at Christmas by getting her purchases discounted, or acted with the intent to accrue more "points" on her own discount card, claimant consciously acted in a way that would foreseeably result in the employer being deprived of profits from the sale of its goods. Her conduct was therefore tantamount to unlawful conduct, exceeded mere poor judgment, and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct also cannot be excused as a good faith error. At the hearing, claimant asserted that it was the cashier's idea for her to use her discount card for her sister's purchase, implicitly arguing that she did not know she was violating the employer's policy at the time of the act, and that she did not realize her conduct was wrong until after-the-fact. Audio recording at ~ 21:00, 22:40, 24:10. The record fails to support her assertions. The employer's video surveillance evidence suggests that the cashier did not ask claimant for her discount card when processing the sister's transaction, and it is implausible that the cashier would have done so then immediately reported claimant's conduct to the employer as a possible policy violation. Claimant also told the employer she was aware at the time of the transaction that her conduct was wrong. *See* Exhibit 1. Claimant's statements that she did not realize her conduct was wrong until after the fact is, at best, equally balanced by her testimony that she realized her conduct was wrong at the time she misused her discount card, and suggests that claimant's testimony is not reliable with respect to her claim that she did not understand her conduct was wrong until after-the-fact. The record therefore does not support a finding that she acted in good faith at the time she misused her discount card.

The employer discharged claimant for misconduct. Claimant is therefore subject to disqualification from benefits because of this work separation, until she has requalified for benefits under Employment Department law.

DECISION: Hearing Decision 18-UI-104283 is set aside, as outlined above.

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

DATE of Service: April 12, 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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