

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0577

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 14, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142307). Claimant filed a timely request for hearing. On May 9, 2018, ALJ Micheletti conducted a hearing, and on May 17, 2018 issued Order No. 18-UI-109589, reversing the Department's decision. On June 6, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Safeway Stores, Inc. employed claimant from May 12, 2015 until January 30, 2018, last as a courtesy clerk in its deli department.

(2) The employer expected that claimant would purchase any store merchandise before consuming it or removing it from the store. Notwithstanding this expectation, the manager who first supervised claimant permitted claimant and his coworkers to consume merchandise and pay for it later if the check-out stands were busy. Thereafter, claimant and his coworkers followed that practice when purchasing merchandise they intended to consume on the store premises.

(3) Claimant had Spina Bifida and hydrocephalus. As a result of those conditions, claimant had impaired mobility, impaired cognition and short-term memory difficulties.

(4) Sometime in early January 2018, an employee reported to the person-in-charge that the employee had observed claimant removing a beverage from the deli cooler, consuming it without paying for it and discarding the beverage container in the trash. Afterward, the assistant store director reviewed store surveillance video for the day in question and confirmed that claimant had taken, consumed the beverage and discarded its container without having paid for it. The assistant director referred the matter to a loss prevention officer.

(5) Approximately one week after the assistant store director reviewed the video of claimant consuming the beverage, a loss prevention officer and the assistant store director met with claimant and discussed the incident. Claimant admitted he might have removed a beverage from the cooler without first paying for it. Claimant stated that it was his practice to take and drink beverages and pay for them after consumption. Claimant stated that he thought he had paid for the beverage after consuming it. The loss prevention officer reviewed the video from the date at issue and did not observe claimant to pay for the beverage. After the loss prevention officer informed claimant that she did not observe him paying for the beverage, claimant was asked to complete an employee interview form. In that form, claimant stated that he “didn’t pay for a [beverage] right away” and he “forgot to pay for my drink [later].” Exhibit 1 at 4.

(6) On January 30, 2018, the employer discharged claimant for consuming store merchandise without first having paid for it.

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) (January 11, 2018) 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 employer carries the burden to prove by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer’s witness cited the employer’s written policy prohibiting the consumption of store merchandise before paying for it as establishing that claimant willfully or with wanton negligence violated the employer’s standards by doing so, but claimant contended that he was merely following a practice established by a prior manager and which his workers also followed. Transcript at 11, 30, 41, 51. While the employer’s witness, the assistant store director, testified that claimant’s prior manager had never allowed employees, including claimant, to take and consume merchandise before paying for it, the manager in question did not testify at hearing. Claimant’s first-hand evidence as to what his manager allowed and the practices of his coworkers is entitled to more evidentiary weight than the employer’s hearsay evidence and the conclusory assertions of the assistant store director. Claimant’s testimony about basis for his belief that, regardless of its written policy, the employer condoned his consumption of merchandise before payment is accepted as accurate. Claimant’s testimony as to his belief appeared sincere and credible. Although it might have violated the letter of the employer’s written policy, that claimant consumed the beverage at issue before paying for it was excused from constituting misconduct as a good faith error.

That claimant did not ultimately pay for the beverage he consumed also violated the employer's standards. Claimant's position was that, if he did not ultimately pay for the beverage, it was because he forgot to do so. Transcript at 35; Exhibit 1 at 4. To disqualify claimant from benefits due to misconduct, the employer must show that claimant willfully or with wanton negligence violated the employer's standards, or that he willfully or with wanton negligence failed to pay for the beverage he had consumed. Behavior that arises from inadvertent lapses, oversights, errors, accidents, forgetfulness, or the like, without more, is generally not accompanied by the consciously aware state of mind needed to establish a willful or wantonly negligent violation of the employer's standards. Absent additional evidence, which the employer did not provide, the employer did not meet its burden to show that claimant's failure to ultimately pay for the beverage that he consumed was willful or wantonly negligent behavior, or that it constituted misconduct.

The employer did not establish that it discharged claimant for misconduct. Claimant is not disqualified from unemployment insurance benefits.

DECISION: Order No. 18-UI-109589 is affirmed.

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

DATE of Service: July 10, 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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