EO: 200
BYE: 201915

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0721

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 113521). Claimant filed a timely request for hearing. On June 18, 2018 and July 3, 2018, ALJ Murdock conducted a hearing, and on July 9, 2018 issued Order No. 18-UI-112783, reversing the Department's decision. On July 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not contained in the hearing record. However, claimant failed to show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. For this reason, EAB considered claimant's written argument only to the extent it was based on information in the record.

FINDINGS OF FACT: (1) Home Depot USA Inc. employed claimant as a cashier from December 13, 2005 until April 17, 2018.

(2) Claimant worked at one of the two "pro registers." The pro registers were used by contractors when they purchased merchandise from the store. Particular contractors regularly purchased and paid for merchandise at claimant's register and claimant became acquainted with many of them. LS was one of the contractors who often purchased merchandise at claimant's register. LS "friended" claimant on Facebook, as had other contractors with whom claimant regularly dealt.

(3) The employer expected claimant to charge contractors for all merchandise they brought to her register for purchase if the employer customarily sold it rather than gave it away. Claimant was aware of the employer's expectations.

(4) The employer sold damaged or distressed "cull" lumber at a price that was marked down by 70 percent from its original price. The employer also allowed customers to take "stickers," which were

boards used to separate or bind stacks of lumber, free of charge since the employer considered "stickers" unsellable and needed to dispose of them. Store associates, including claimant, had the discretion to mark down, without management approval, merchandise for customers if the merchandise or its packaging was damaged, the customer complained and for miscellaneous other reasons so long as the total discount on any transaction did not exceed $50. Store associates would sometimes approach claimant's register when she was processing a transaction to inform her that they had authorized a discount on or a giveaway of certain merchandise for the particular contractor with whom she was dealing.

(5) Between February 8 and April 9, 2018, claimant processed 16 transactions in which LS purchased merchandise at her register. The employer reviewed videos and still pictures of those transactions and concluded that claimant allowed LS to take merchandise that was for sale without paying for it. Those transactions were:

On February 8, 2018, claimant charged LS for four items on the cart that he brought through claimant's register while there appeared to be a stack of sellable lumber on the cart for which claimant did not charge him. Exhibit 1 at 35.

On February 14, 2018, while claimant charged LS for most of the merchandise that was on his cart, the employer concluded claimant did not charge LS for a "roll product" that was on the cart under his hand. Exhibit 1 at 34.

On February 21, 2018, the employer concluded that claimant did not charge LS for sellable lumber that appeared to be on his cart. Exhibit 1 at 32.

On February 22, 2018, while claimant charged LS for one board and some items in a bag, the employer concluded that claimant did not charge LS for what appeared to be sellable lumber on the bottom of his cart. Exhibit 1 at 33.

On March 1, 2018, while claimant charged LS for three items on his cart, the employer concluded claimant did not charge LS for what appeared to be sellable lumber on his cart. Exhibit 1 at 31.

On March 9, 2018, while claimant charged LS for two items on his cart, the employer concluded that claimant did charge LS for what appeared to be three pieces of sellable lumber that were also on his cart. Exhibit 1 at 30.

On March 12, 2018, while claimant charged LS for two sheets of MDF, the employer concluded claimant did not charge LS for two additional sellable sheets that were on the cart. Exhibit 1 at 29.

On March 13, 2018, while claimant charged LS for two items on his cart, the employer concluded claimant did not charge LS for what appeared to be sellable lumber at the bottom of his cart. Exhibit 1 at 26.

On March 14, 2018, while claimant charged LS for four items on his cart, the employer concluded that claimant did not charge LS for what appeared to be several pieces of sellable lumber on his cart. Exhibit 1 at 27.

On March 20, 2018, while claimant charged LS for two items on his cart, the employer concluded that claimant did not charge LS for what appeared to sellable lumber on his cart. Exhibit 1 at 28.

On March 26, 2018, while claimant charged LS for two items on his cart, the employer concluded that claimant did not charge LS for what appeared to be several boards of sellable lumber. Exhibit 1 at 25.

On March 27, 2018, while claimant charged LS for one item on his cart, the employer concluded that claimant did not charge LS for what appeared to be a second board of sellable lumber that was on his cart. Exhibit 1 at 23.

On April 4, 2018, the employer concluded that claimant gave LS a cull discount on metal roofing, which it was not a product that was part of the cull discount program. Exhibit 1 at 21.

On April 5, 2018, while claimant charged LS for some items that were on his cart, the employer concluded that claimant did not charge LS for what appeared to be two pieces of sellable lumber and a power tool and drill bits that were also on the cart. Employer concluded that claimant deactivated a theft prevention device on the power tool at a different register and then returned the tool back to LS's cart. Exhibit 1 at 10-11.

On April 6, 2018, while claimant charged LS for two items, the employer concluded that claimant did not charge LS for what appeared to be a full cart of sellable lumber. Exhibit 1 at 22.

On April 9, 2018, while claimant charged LS for one item on his cart, the employer concluded that claimant did not charge LS for what appeared to be pieces of sellable lumber on his cart. Exhibit 1 at 24.

(6) Sometime before April 17, 2018, the employer's loss prevention department was notified by the employer's corporate office that claimant had been using the "item correct" function on her cash register an unusual number of times when she processed sales transactions involving LS. The loss prevention department investigated and reviewed the receipts that claimant issued to LS over time and surveillance videos and still pictures of the transactions involving claimant and LS.

(7) On April 17, 2018, the employer discharged claimant for having allowed LS to take sellable merchandise from the store without paying for it between February 8, 2018 and April 9, 2018.

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. 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 Order No. 18-UI-112783, the ALJ concluded that the employer demonstrated that it had discharged claimant for misconduct. The ALJ first found as fact that claimant had "personal associations" with LS that went beyond routine business dealings with a contractor-customer, presumably to provide a reason that claimant would have given away the employer's merchandise to him. Order No. 18-UI-112783 at 2. Without an analysis of the evidence, the ALJ then summarily concluded that the employer had demonstrated that claimant had permitted LS to leave the store with merchandise that he had not paid for on several occasions. Order No. 18-UI-112783 at 3. We disagree.

At the outset, that claimant was Facebook "friends" with LS and that claimant knew that LS was a member of her daughter's church is insufficient to establish a personal association that could be presumed to supply motive for claimant to give store merchandise away to him free of charge. As claimant plausibly explained many of the contractors who regularly patronized the employer's store had "friended" her on Facebook, without her encouragement, and her relationship with them meant nothing more than that they had visited her Facebook page. Transcript of June 18, 2018 Hearing (Transcript 1) at 18. Notably, the employer did not present evidence that LS and claimant exchanged comments on Facebook or used Facebook to facilitate personal communications between them. *See* Exhibit 1 at 13. Claimant further explained that the extent of LS's relationship with her daughter, other than through the daughter's church, was that LS had hung some blinds for her daughter. Transcript 1 at 18. This evidence is an insufficient basis to infer that claimant's relationship with LS predisposed her to give free merchandise to LS.

Also at the outset, the employer's witnesses and claimant addressed at length during the hearing whether it was or was not appropriate for claimant to have sold certain pieces of lumber at a cull discount. However, the testimony of the employer's witnesses was that the employer discharged claimant because it believed that she had not charged LS for merchandise that she allowed him to take from the store free of charge, and not that she should not have sold certain lumber to LS at a cull discount. Transcript 1 at 5, 8; Transcript of July 3, 2018 Hearing (Transcript 2) at 46-47. For this reason, EAB has limited its review to whether or not claimant gave away sellable merchandise to LS, except with respect to the transaction on April 4, 2018 in which the employer contended that claimant improperly discounted some metal roofing for LS when such roofing was not part of the cull program.

With respect to the transactions at issue on February 8, 21, 22, March 1, 9, 13, 14, 20, 26, 27 and April 5 6 and 9, 2018, the employer principally contended that claimant allowed LS to leave the store with sellable lumber that she did not charge him for. All parties agreed that the employer gave away "stickers" free of charge and that LS should not have been charged for any stickers that were on his cart when he brought the cart to claimant's register. Transcript 1 at 11-12, 30-31, Transcript 2 at 10, 16, 27, 28. Reviewing the still pictures that the employer offered into evidence during the hearing, they are not

sufficiently distinct to allow us to determine the boards, dimensions of the boards and other merchandise that the employer contended was on LS's cart when claimant processed his purchases during the transactions at issue. *See* Exhibit 1 at 10-13, 21-35; Exhibit 2 at 5-13. Claimant contended that, from the still photographs, she thought that much of the merchandise at issue in those transactions was stickers, for which LS should not have been charged. Transcript 1 at 11-12, 20; Transcript 2 at 27, 28, 29, 47. The employer's witness agreed that some of the lumber shown on the still pictures of LS's cart "had the potential to be stickers" or was "hard[] to identify." Transcript 2 at 10, 11, 16. Because of the limitations in the still photographs we are unable to determine whether some or all of the disputed boards were stickers that LS was entitled to have free of charge. Claimant also contended, and the employer's witnesses challenge, that given the amount of the discount provided to LS on March 14 and April 4, 2018 transactions, management approval was required before LS would have been allowed to leave the store, which would likely not have happened if LS had sellable merchandise on his cart for which he had not been charged. Transcript 2 at 35-36. For these reasons, the employer did not rule out that the disputed lumber purportedly shown in the still pictures was not stickers and therefore did not show that with respect to the transactions of February 8, 21, 22, March 1, 9, 13, 14, 20, 26, 27 and April 5, 6 and 9, 2018, claimant allowed LS to take lumber from the store without paying for it.

With respect to the transaction on February 14, 2018, the employer contended that claimant allowed LS to take a "roll product," which it believed to be sheet metal, from the store under his hand without paying for it. Transcript 2 at 8. Claimant contended that from the pictures she thought the rolled product under LS's hand in the still picture was a rolled carpet sample of 3.62 feet for which she charged LS $1.19, as shown on the receipt from that transaction. Transcript 2 at 26; Exhibit 1 at 19. As above, we cannot determine from the still pictures if LS had sheet metal, a carpet roll or some other merchandise under this hands. In light of claimant's rebuttal, the employer did show, more likely than not, that claimant allowed LS to leave the store with a "roll product" that he had not paid for.

With respect to the transaction on March 12, 2018, the employer contended that claimant charged LS for two sheets of MDF but did not charge him for an additional two sheets that were on his cart. However, claimant testified that the associates working in lumber sometimes authorized her to give away MDF for free if it had a broken corner or was otherwise damaged. Transcript 2 at 25. Claimant also stated that the transaction on March 12, 2018 was approved by a manager given the size of the discount to LS. Transcript 2 at 30. As above, is unlikely that a manager would have allowed LS to leave the store without having been charged for all sellable MDF on his cart as well as that the employer's witnesses did not rule out that other associates told claimant to give the two sheet of MDF at issue away to LS for free. In light of claimant's rebuttal, the employer did not show, more likely than not, that claimant allowed LS to leave the store without having paid for two sellable sheets of MDF.

With respect to the transaction on April 4, 2018, the employer contended that claimant improperly gave a cull discount to LS for the purchase of metal roofing. Transcript 2 at 22. However, claimant contended that merchandise discounting was not limited to the cull program and she was allowed to discount merchandise, like metal roofing, if it was damaged so long as the total discount on the transaction did not exceed $50. Transcript 2 at 42-43. The employer's witness appeared to agree that associates had the discretion to give discounts of the type that claimant gave to LS for the metal roofing and, although the employer's witness thought the 70 percent, discount claimant gave might have been "excessive," she did not contend that claimant was prohibited from giving it. Transcript 2 at 46-47. In light of the testimony

of the employer's witness, the employer did not show, more likely than not, that claimant did not have authorization to discount the roofing she sold to LS on April 4, 2018.

With respect to the transaction on April 5, 2018, the employer contended that claimant allowed LS to leave the store with a power tool and drill bits that he did not pay for. Transcript 2 at 5. The employer contended that before LS left the store claimant took the power tool to a different register so she could deactivate a theft deterrent device that was affixed to it, suggesting an intent on claimant's part to give the tool to LS. Claimant did not recall a transaction in which she sold a power tool to LS. Transcript 1 at 16, 39, 40. The circumstances surrounding the April 5, 2018 transaction were not made known during the hearing. However, it appears that claimant's work at the pro register was often fast-paced and she was subject to distractions. It is plausible under the circumstances that claimant merely overlooked ringing up the power tool and drill bits or failed to do so due to interruptions or other distractions. Mistakes, inadvertent lapses, oversights and the like are generally not accompanied by the consciously aware mental state required to show that a claimant has engaged in the willful or wantonly negligent behavior necessary to a finding of misconduct. *See* OAR 471-030-0038(3)(a). On this record, the employer did not show, more likely than not, that claimant's failure to charge LS for the power tool and drill bits on April 5, 2018 was willful or wantonly negligent behavior and that it was misconduct.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-112783 is set aside, as outlined above.

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

DATE of Service: <u>August 24, 2018</u>

NOTE: This decision reverses an order 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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