EO: 200
BYE: 201925

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-0981

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 9, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 144435). The employer filed a timely request for hearing. On September 19, 2018, ALJ Lee conducted a hearing, and on September 27, 2018, issued Order No. 18-UI-117333, affirming the Department's decision. On October 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Stein Oil doing business as RedBarn Car Wash employed claimant in various positions from July 19, 2017 to June 27, 2018. Claimant's final position was as the car wash assistant manager.

(2) The employer had a practice that managers and assistant managers would ensure that there was sufficient change either in the cash registers or in the safe drop slots to make proper change for customers. Claimant was aware of this expectation. The employer also had an expectation that managers and assistant managers would make bank deposits.

(3) When claimant became an assistant manager, he was trained to make bank deposits for his site. However, claimant had never been trained on what to do if the bank was closed when he needed change for his site. The employer did not have a written policy regarding how to obtain change if the bank was closed.

(4) On January 6, 2018, claimant received a written warning for failing to make a bank deposit.

(5) On March 19, 2018, claimant was given a written warning because the employer received complaints from other employees that claimant would leave the site for long periods of time, and because a customer complained that claimant performed his job duties too slowly. Exhibit 1. Claimant asserted that he was going to the bank and sometimes had to wait in line while other customers were being helped, but the employer believed it was excessive and caused loss of business. Claimant also asserted

that on the particular day the customer complained they were shorthanded and were experiencing a large volume of business. Transcript 26.

(6) On May 25, 2018, the employer gave claimant a written warning for leaving a new employee alone to close the car wash on May 23, 2018. Claimant believed that the employee was capable of closing because he had properly trained the employee on everything he needed to know to be able to close, including having him observe the closing process on four previous occasions, twice with claimant and twice with another employee. Transcript at 21. In addition, on the day of the incident claimant asked the employee if he could close by himself and the employee told him that he could. Transcript at 22. However, the employee later denied knowing all of the closing procedures.

(7) On Saturday, June 23, 2018, when claimant left the car wash for another employee to close, there were plenty of one and five dollar bills in the cash registers. In addition, there were one and five dollar bills in the safe drop tubes.

(8) When claimant opened the car wash on June 24, 2018, the safe record showed that there were five dollar bills in the drop tube. In addition, there were a few one and five-dollar bills in the cash register, but not as many as usual. However, an employee had failed to record a drop of five dollar bills in the safe, so there were not as many five-dollar bills in the safe when claimant left for the day as claimant thought. Claimant was unable to go to the bank, as it was Sunday, so he left the car wash without ensuring that there was sufficient change for the next shift to give customers change. After claimant left, the closing employee contacted the off duty manger to report that he did not have one and five dollar bills to give customers change. The manager went to Safeway and purchased change for the business.

(9) On June 27, 2018, the employer discharged claimant for his failure to leave sufficient change at the end of his shift on June 24, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ and the Department and conclude that claimant's discharge was 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. 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). Isolated instances of poor judgment, good faith errors or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

While the supervisor stated that claimant was discharged for cumulative behavior issues, it is clear from the record that the employer discharged claimant for failing to leave sufficient change at its car wash at

the end of his shift on June 24, 2018. The employer had an expectation that its manager would leave sufficient change at the end of their shifts, for its employees to make change for customers. Claimant was aware of this expectation. Transcript at 16.

It is not disputed that the employer did not have a policy or procedure for managers to follow regarding how to obtain change when the bank was closed. Transcript at 6. It is also undisputed that the employer had never instructed claimant on how to obtain change if the bank was closed. Transcript at 16. In response to the ALJ's question to the supervisor as to whether claimant knew that he should have gone to a grocery store to obtain change, he responded, "I can't say what he knows." Transcript at 6. Claimant asserted that "the reason I didn't go get change is because it was Sunday and the bank was closed." Transcript at 34. Exhibit 1. At the hearing the supervisor argued, "To me, if you're out of change you have to find some. So it would be common sense to go to Safeway or Fred Meyers and see if you could buy some." Transcript at 30. While it may seem like common sense to the supervisor to go to a grocery store to obtain change, there is no evidence that claimant knew or should have known that the employer expected him to go to a grocery store to obtain change.

In order to determine whether a violation of an employer policy or expectation was misconduct for purposes of unemployment insurance benefits, the question is whether claimant's violation was done willfully or with wanton negligence. Based upon claimant's statements at the hearing, his decision to leave the car wash without sufficient change was not a result of his desire to violate the standards of behavior, which the employer had the right to expect of an employee, or out of a disregard for the employer's interests or expectations. Rather, it was due to his lack of experience in dealing with such a situation and his lack of knowledge of the employer's expectations the he go to a grocery store to obtain change. Claimant testified, "We were short on change only happened once, um, the entire year that I was working there." Transcript at 16. It is therefore more likely than not that claimant did not act with the motivation of willfully disregarding the employer's expectation that he leave change at the end of his shift. Nor does the record show that claimant's conduct was wantonly negligent. Claimant's conduct did not display indifference to the employer's expectations or the consequences of his conduct. Claimant testified that based on his previous experience, he thought when he left that customers would pay cash and the site would have sufficient change for the rest of the shift. Transcript at 34.

For the reasons explained, the employer discharged claimant for his inefficiency resulting from his lack of job skills or experience. Because mere inefficiency resulting from lack of job skills or experience is not misconduct, claimant is not disqualified from receiving unemployment insurance benefits based on his discharge.

DECISION: Order No. 18-UI-117333 is affirmed.

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

DATE of Service: <u>November 15, 2018</u>

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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