

68537-6

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NO. 68537-6

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

NOELEE LOEFFELBEIN,

Respondent,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Appellant

RESPONDENT'S BRIEF

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COURT OF APPEALS
DIVISION I
SEATTLE, WA


I. INTRODUCTION

Noelee Loeffelbein, the respondent, has shown two judges that her conduct did not constitute dis-qualifying misconduct. This court should uphold the Administrative Law Judge and the Superior Court Judge's assessments of the case and afford Loeffelbein to retain her unemployment benefits in accordance with the Employment Security Act. These two judges - the only two authorities to have the opportunity to hear oral testimony and pose questions to Loeffelbein themselves - understood Loeffelbein's explanation of the circumstances and awarded her benefits.

II. STATEMENTS OF THE CASE

Noelee Loeffelbein worked for the Bartell Drug Company for over 13 years before she was terminated. She began her career as a cashier/clerk and through the years proved that she was a hard-working, dedicated employee with only the company's interest in mind, which is why she earned the title of store manager in 2006.

She had proven herself as having sound judgment in how she conducted her business. She made her way to work during the worst snow/ice storms, sometimes walking miles to get there, even to the point that she slept in the break room to make sure her store would be able to open the next day, receiving recognition in the company newsletter for her

willingness to do what was necessary. Each year Noelee was a store manager, she earned performance-based bonuses which increased each year. At the time of Noelee's termination, she was in line to receive a sizable bonus, which would have been issued 3 days after the date of termination, had she still held the position. For Noelee to have been terminated, and the subsequent denial of unemployment benefits, for supposedly violating the company's check writing policy and the timing of such termination, was deemed by the court as punitive.

The employer has not shown to the courts that their check-writing policy forbade store managers from writing checks above the customer/employee associate supposed limits. As respondent has successfully demonstrated to the previous courts, store managers were the top authority in their store and were autonomous in their actions, approving transactions for customers and employee associates as part of their everyday job description, potentially for hundreds of dollars at any given time. The store manager is responsible for thousands of dollars of currency, and hundreds of thousands of dollars worth of merchandise. Store managers are not given this responsibility without demonstrating sound decision making and judgment.

III. ARGUMENT

In making her decision, the commissioner weighed heavily on the statement given by respondent to the employer. The commissioner portrays the statement as respondent having prior knowledge that her conduct was not in line with company policies. There was no warning issued, which is one stipulation for finding willful disregard of company rules under the Employment Security Act. In the statement itself, which was dictated by Loss Prevention Specialist Dave Siler himself for Loeffelbein to write on a statement form, Loeffelbein was instructed/compelled to write the following statement "In talking with Dave, *I am now aware* that my actions exceeded my authority". This fact seems to be forgotten by the commissioner in her finding.

In fact, the interview by the employer was done under duress

- 1) without warning that she was being investigated by the loss prevention specialist, Dave Siler, for wrong-doing when he came into her office,
- 2) without time to consult personal records before making any statement,
- and 3) without having the opportunity to have representation present for questioning. Loeffelbein was never given the opportunity to refute statements made to Mr. Siler before the decision of her termination was made by Bartell's human resources department.

The commissioner's assessment of the Bartell check-writing policy is incorrect. There were no imposed or implied limits on “manager's discretion” stated in the manual or any subsequent memos or communication. The check writing policy was ambiguous, to the point that after respondent's termination, the employer changed the policy to clearly define their intended limits. Had the policy in place at the time of respondent's termination contained clear limits, the employer would not have felt the need to write a new policy.

Both the administrative law judge and the superior court judge agreed that Noelee did not violate policy as it was written in the handbook. Since Noelee's termination, Bartells has chosen to revise and amend their old policy with a new policy, which did not take effect until February 2011. Loeffelbein was terminated in March 2010; almost 1 year had elapsed before Bartells chose to finally revise their existing regulations/policies.

It is important to note again that the checks in dispute were never subject to any delays or deficiencies experienced by Bartells. All checks were honored and paid when put through their respective banks/institutions, and it was only the cumulative total of **all** the checks that were written which totaled \$3620 that caused alarm, seven to eight checks in an one month period.

What is also important to note is that Bartells' representatives and the appeal commissioner, and also the attorney general's appeal failed to address that Noelee was dealing with store emergency and staffing deficiencies when she wrote the checks. She explained in her testimonies at both hearings that because of work-related needs, she was forced to stay at the store because her managerial responsibilities prevented her from leaving the store to conduct personal matters and business, especially making transactions during normal business/banking hours. She only wrote these checks so she could stay in the store beyond her normal hours and ensure that someone else could carry out these personal duties, given her inability to be away from the store.

It is also important to note, which was also outlined in testimonies, Noelee's banking institutions were not accessible to her during normal business hours because they were located in other parts of the city to which there were no branches available to her in the university district in which she was employed. She has brought the fact up several times about each bank having its own policies about posting deposits by a certain hour, and it was explained in those testimonies as to why she was needing to obtain funds while working in the store so these matters could be handled without detriment or deficiency to the consistency of Bartells store operations. This again was going above her stated responsibilities as

store manager to work these longer hours to ensure store operations. She put her store first and was only trying to find a way to stay at the store without causing problems in regards to conducting her personal business. It is very difficult to try to be in two places at one time. Bartells is well aware of the many deficiencies that exist at the University Avenue store, and Noelee was finding herself in unexpected situations that required her attention beyond normal operating hours. In turn she was going beyond expectations to ensure and not jeopardize Bartell assets/interests.

These aforementioned circumstances were not addressed or considered at the time the decision was made to terminate her employment. Both the administrative law judge and the superior court judge noted this fact as to the reasons she was needing to cash these checks and that at no time - as established in the evidence and the testimony - were Bartells' assets at question or at risk and therefore Noelee was deemed by both adjudicators to have not committed misconduct meriting termination.

It is critical to understand that in the current revised Bartells policy of February 2011, that even in the face of Noelee's actions in 2010 – the “so-called” willful disregard of policy - that based on current policy directives would not have warranted or mandated immediate termination

as she was subjected to in March 2010. See attached copy of revised policy.

IV. CONCLUSION

Noelee seeks the following as a result of this hearing:

- 1) This court to uphold the decision of the superior court judge and allow Loeffelbein to retain benefits.
- 2) Reasonable attorney fees and costs associated with the denial of benefits, and subsequent fees resulting from ongoing proceedings.
- 3) Any other relief this court may deem fair and equitable.

V. APPENDIX

Included at the end of this brief is the aforementioned Bartell Drug employee check acceptance policy dated 02/01/2011. It is attached so the court can see the policy implemented after termination of respondent. Please take notice of section A purpose for the new policy. It demonstrates that their previous policy was inconsistent and ambiguous.

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Approved		

THE BARTELL DRUG COMPANY

Title

EMPLOYEE CHECK ACCEPTANCE POLICY

A. PURPOSE

To establish consistent guidelines within Bartell Drugs for acceptance of checks written by employees. This policy will eliminate inconsistent check acceptance procedures.

B. POLICY

When making purchases at any of our stores, employees may make payment by personal checks. A purchase is required when writing a check. The Company does not allow for cashing of personal checks in tender exchange transactions (i.e. getting cash with a check with no purchase).

C. PROCEDURE

1. Any employee purchase, whether paid by check or other tender, may only be processed by store management or other authorized individual.
2. The following types of checks, written by employees, may be accepted:
 - a. Personal checks made payable to the Bartell Drug Company for the purchase of the merchandise.
 - b. Checks can be written for up to \$40.00 over the amount of purchase, if authorized by store management or other authorized individual. Cash back amounts over \$40.00 and up to a limit of \$100.00 require Store Manager approval. Cash back amounts over \$100.00 require District Manager approval.
 - c. Checks will be accepted for Metro Passes.
3. The following types of checks will **NOT** be accepted:
 - a. Checks dated other than the day on which they were written.
 - b. Two-party checks.
 - c. Payroll checks.
 - d. Expense checks.
 - e. Cashiers Checks, Money Grams, Wire Transfers
 - f. Any other check that, in Bartell Drug's discretion, it elects not to approve.
4. The procedure for returned checks written by employees is as follows:
 - a. The office will follow normal procedures for returned checks. If a check is not paid by the financial institution due to insufficient funds, as a courtesy, it will be resubmitted one time. If the funds are still not available upon resubmission, the check will then be considered returned.
 - b. A verbal warning will be given to the employee for the first returned check. If the check is not paid immediately, further disciplinary action may result.

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EMPLOYEE CHECK ACCEPTANCE POLICY

- c. A written warning and 6 month suspension of check writing privileges will be issued if the situation occurs a second time. A copy of this warning will be retained in the employee's personnel file.
- d. In the event the amount of the returned check is not repaid immediately, the employee will lose check writing privileges for 12 months and further disciplinary action may result.
- e. For the third offense within 12 months, the employee may be subject to further disciplinary action, which could result in termination of employment.
- f. It is a violation of this policy, if an employee writes a check knowing, at the time the check is written, that he/she has insufficient funds to cover the check, in an attempt to "borrow" money from our company until that amount subsequently is covered in his/her account (whether or not the check is covered at the time it is processed by their bank). Doing so may result in disciplinary action up to and including termination of employment.

PROOF OF SERVICE

I, Noelee Loeffelbein, respondent, certify under penalty of perjury under the laws of the State of Washington, that the aforementioned facts are true and correct and that a copy of this "Respondent's Brief" has been served upon the Appellant at the address below by hand on Oct. 12, 2012.

Leah E. Harris
Washington State Attorney General's Office
800 5th Ave, Suite 2000
Seattle, Wa 98104-3188
Appellant

DATED at Seattle, Washington this 12 day of October, 2012.



Noelee Loeffelbein
Respondent