

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0309

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 18, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105408). Claimant filed a timely request for hearing. On February 12, 2014, ALJ Micheletti conducted a hearing, and on February 21, 2014 issued Hearing Decision 14-UI-10891, affirming the Department's decision. On February 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Baney Corp/Oxford Hotel Bend employed claimant as a room attendant and housekeeper from April 26 to November 27, 2013.

(2) The employer prohibited employees from stealing from other employees. Claimant understood that expectation. Claimant also understood that if she found personal items at work and did not know to whom they belonged, she was expected to give them to her supervisor, the executive housekeeper.

(3) Claimant knew that other housekeepers routinely kept their coats, purses and personal belongings on a shelf in the employer's laundry room while they worked, and routinely did so herself. Other housekeepers sometimes left beverages on the shelf for claimant, and told her when they had done so.

(4) On April 22, 2013, claimant took a scarf she knew belonged to another housekeeper from the shelf in the laundry room, placed it in a yellow bag, and hid the bag behind a large garbage can. The housekeeper had not given permission to take the scarf. Claimant intended to steal the scarf.

(5) When the housekeeper left work for the day, she noticed that her scarf was missing, and notified the executive housekeeper. The executive housekeeper asked the other housekeepers, including claimant, if they had seen the housekeeper's scarf. Claimant lied, stating that she had not seen the scarf. The executive housekeeper searched for the scarf and found it in the bag behind the garbage can. Claimant admitted that the bag was hers, but repeatedly denied knowing how she scarf got in to her bag.

(6) On April 23, 2013, claimant reported for work at approximately 7:30 a.m. At approximately 1:20 p.m., the executive housekeeper and the employer's restaurant manager again questioned claimant about the scarf, and claimant admitted placing it into her bag.

(7) The employer discharged claimant for stealing the other housekeeper's scarf.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to prohibit employees from stealing from other employees. Claimant understood that expectation. At hearing, claimant testified that she believed that anyone was allowed to take the scarf from the shelf in the employer's laundry room, which she attributed to a mental disability that impaired her memory, comprehension, and ability to drive. Transcript at 18-25. However, claimant admitted understanding that if she found personal items and did not know to whom they belonged, she was expected to give them to her supervisor. Transcript at 19. Claimant also admitted that other housekeepers kept their personal belongings on the shelf while they worked, and that the housekeeper had not given her permission to take the scarf. Transcript at 17-19. Claimant hid the bag containing the scarf behind a large garbage can, admitted that she falsely denied seeing the scarf, and then falsely stated stating that she did not know how the scarf got into her bag. Transcript at 24-25. The preponderance of evidence in the record establishes that claimant intended to steal the other housekeeper's scarf, and did not believe she was allowed to take the scarf. Claimant therefore willfully violated the employer's expectation that she refrain from stealing from other employees.

Claimant's attempt to steal the scarf was not the result of an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Acts that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). In this case, claimant also exercised poor judgment in falsely stating that she had not seen the scarf, and then falsely stating that she did not know how the scarf got into her bag. Claimant's exercise of poor judgment in attempting to steal the scarf was not, therefore, a single or infrequent occurrence. In addition, claimant's

attempt to steal the scarf was tantamount to attempted theft,¹ exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error. As demonstrated above, the preponderance of evidence establishes that claimant intended to steal the other housekeeper's scarf, and did not sincerely believe, or have a rational basis for believing, that she was allowed to take the scarf.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-10891 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: March 18, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

¹ ORS 164.015 provides that a person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person takes, appropriates, obtains or withholds such property from an owner thereof. ORS 161.405 provides that a person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.