

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0628

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On January 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 80051). The employer filed a timely request for hearing. On March 19, 2014, ALJ Hoppe conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13218, reversing the Department's decision and stating that claimant's disqualification was effective on December 15, 2013. On April 7, 2013, ALJ Hoppe issued Hearing Decision 14-UI-14434, amending Hearing Decision 14-UI-13218 to state claimant's disqualification was effective on December 22, 2013 but otherwise leaving that decision in its original form. On April 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Summerville Store & Tavern employed claimant as a bartender and cook from August 8, 2013 until December 22, 2013.

(2) The employer expected claimant to treat customers courteously and to refrain from shouting at customers or berating, embarrassing or humiliating them. Claimant understood the employer's expectations as a matter of common sense.

(3) Before December 21, 2013, the employer's owner talked to claimant about how she treated customers in the tavern and told her to moderate her approach. The tavern was located in a small community in a rural area. The tavern was a very small place and customers could easily overhear what was said in it. Many of the customers at the tavern were regular patrons who knew each other. The employer relied on business from those regular customers to remain open.

(4) On December 21, 2013, claimant arrived at work at approximately 3:20 p.m., as two customers were leaving the tavern. The two customers were regulars at the tavern. As those customers prepared to

leave, they noticed that money they had previously placed on their table to pay their bill was no longer there. The customers spoke to claimant and told her they did not have any other money with them to settle the bill. Claimant told them not to accuse her or her coworkers of stealing their money. Transcript at 6, 7. The customers then spoke to the owner about their bill because they were displeased with claimant's statement to them. Because they were regular customers, the owner agreed to allow them to bring in the money that they owed on the following day. As the customers left, one of them picked up an open beer bottle, which still had some beer in it, and took it with him out the door. Claimant went to the tavern door and "very loudly" shouted at the customer who was then in the parking lot, "Get your ass back in this tavern and bring that beer bottle back in here." Transcript at 10. Claimant shouted this or similar statements two or three times at the customer and generally engaged in a very loud "tirade" until the customer brought the bottle back into the tavern. Transcript at 8. The customer came back in to the tavern, returned the beer bottle, said nothing and left. Claimant shouted at the customer as he left, "don't come back" and "you can tell your blankety blank friend [the other customer] . . . [t]hat he's not welcome here again and you can't come back [either]." Transcript at 11. Claimant continued to shout other foul words at the customers as they left. The owner and at least twelve other customers that were in the tavern during claimant's interaction with the two customers heard claimant's statements to the two customers.

(5) Immediately after the incident, the owner went up to claimant and told claimant that she should not have made such a scene and should not have embarrassed and humiliated the two customers, particularly in front of other customers. Claimant did not apologize or admit that she had overreacted. Claimant said, "I had to make a point of them, you know, leaving with a beer bottle" and that she thought she had handled the situation as the employer wanted her to handle it. Transcript at 8, 10. Claimant then abruptly left the owner's presence and went on break.

(6) On December 22, 2013, the employer discharged claimant for the way she treated the two customers on December 21, 2013.

**CONCLUSIONS AND REASONS:** The employer discharged claimant 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's owner provided very detailed testimony about what claimant did and said to the two customers on December 21, 2013. Transcript at 7-11. However, claimant contended that she "really didn't think" she shouted at the customers or used foul language and never told the customers that they could not come back to the tavern. Transcript at 16, 17, 18. Despite this contention, claimant also admitted that she made a "fuss" after the customer left with the beer bottle, without specifying the exact nature of the "fuss," and that she was "a little bit firm" with the customer in order to protect the employer from allowing a violation of Oregon Liquor Control Commission (OLCC) regulations by

permitting the customer to leave the tavern with an open beer bottle. Transcript at 15, 24. Claimant had difficulty explaining why the owner might have fabricated an account of claimant's behavior on December 21, 2013, and then speculated that it was because four months earlier claimant had told the owner that some employees were stealing from the tavern. Transcript at 19, 21, 22. Accepting claimant's speculation, it makes little sense that the owner would have waited four months to concoct a story to justify the employer's discharge of claimant. Given that the owner was present during the incident at the tavern on December 21, 2013, the detail and consistency with which the owner testified, the lack of a persuasive explanation for the owner to provide fabricated testimony and claimant's wavering testimony about what she actually did and said, it is more likely than not, that the owner's testimony about claimant's behavior was accurate.

The employer expected claimant to refrain from behavior that openly and rudely berated customers. Claimant was aware of that expectation as a matter of common sense. Although claimant contended that she acted to protect her OLCC server's license when she tried to halt the customer from leaving the tavern with an open beer bottle, this need did not justify the tirade against the customers that claimant engaged in, the foul language that she used, and her shouted statement to the customers that they could not come back to the tavern in the future. Transcript at 19. Claimant's behavior toward the customers on December 21, 2013 was clearly disproportionate under the circumstances. By her behavior on December 21, 2013, which was conscious and deliberate, claimant willfully violated the employer's expectations.

Claimant's behavior on December 21, 2013 was not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, behavior that does not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(c)(D). Claimant agreed that the employer relied on patronage from its regular customers to stay in business and that the customers she interacted with on December 21, 2013 were regular customers. Transcript at 15, 16. Claimant also testified that she knew that the employer prohibited her from barring customers from the tavern premises without the owner's permission since the employer relied on business from repeat customers. Transcript at 17. By willfully berating, and using foul language toward two regular customers on December 21, 2013, in front of other customers, and barring those customers in the future from the tavern premises, a reasonable employer could objectively conclude that claimant's behavior would negatively affect its future business from both the two customers who were directly involved and the other customers who witnessed it. Based on this conclusion, a reasonable employer might further conclude that claimant's behavior created a irreparable breach of trust in the employment relationship, particularly when claimant remained unapologetic about the manner in which she had treated the customers and there was no assurance that she would avoid similar tirades in the future. Transcript at 8, 10, 24. Because claimant's behavior caused a fundamental rupture in the employment relationship, it exceeded mere poor judgment and cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(c)(D).

Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Because claimant denied she had overreacted in her dealings with the two customers on December 21, 2013, she did not assert that she sincerely believed or had a factual basis for believing that the employer would condone her behavior in openly berating the two customers, using foul language to them and barring

them in the future from the tavern premises. Absent these assertions or similar assertions, it cannot be concluded that claimant's behavior was excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 14-UI-14434 is affirmed.

Tony Corcoran and J.S. Cromwell, pro tempore;  
Susan Rossiter and D.E. Larson, not participating.

**DATE of Service:** May 21, 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>.

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