

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1289

*Reversed
Disqualification*

PROCEDURAL HISTORY: On June 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and canceling all benefit rights based on wages earned prior to the date of discharge (decision # 85423). Claimant filed a timely request for hearing. On July 9, 2014, ALJ Seideman conducted a hearing, and on July 16, 2014, issued Hearing Decision 14-UI-21587, concluding the employer discharged claimant, but not for misconduct. On July 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Wesco Paint and Equipment Supply employed claimant as a store manager from January 1, 2013 to May 14, 2014. Claimant had worked for the predecessor business owner for 12 years prior to the ownership change in January 2013.

(2) The employer expected claimant to be honest regarding work related matters and refrain from theft of cash from the employer's store till. Claimant was aware of the employer's expectations as a matter of common sense.

(3) In 2014, the employer noticed inventory "shrinkage" in claimant's store and retained a loss prevention group to investigate. Transcript at 8. On May 14, 2014, a loss prevention investigator interviewed claimant on video. Claimant admitted that she had given away paint, products and tools to customers who owned businesses to promote sales without filling out employer forms for such practices, which she claimed to be unaware of. She also admitted to taking cash out of the stores till on a monthly basis. At the investigator's request, claimant wrote a "true and factual" statement regarding her admissions which she agreed was made "without threats or promises of any kind" and understood could

be used in court. Exhibit 2. After admitting she gave away product to customers to promote sales, claimant wrote,

“I also admit that I’m responsible of (sic) taking \$100.00 per month over the past year to help with expenses at my house. I realize that this is theft and it is wrong. I would take this money off of a cash invoice. This amount totals \$1200 last year.”

Exhibit 2.

(4) On May 14, 2014, the employer discharged claimant, in part, for theft.

(5) On May 17, 2014, claimant filed an initial claim for unemployment insurance benefits. On May 20, 2014, the Department sent the employer a Notice of Claim Filed (Form 220). On May 23, 2014, the employer returned the completed Form 220 to the Department stating that it terminated claimant’s employment, in part, for theft. Transcript at 5; Exhibit 3. On June 12, 2014, the employer submitted claimant’s written admission of theft dated May 14, 2014 to the Department. Exhibit 2.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant for misconduct and all benefit rights based on wages earned prior to the date of discharge shall be canceled.

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) (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 discharged claimant, in part, for theft. Claimant did not dispute that she wrote the May 14 statement received into the record as Exhibit 2, that she certified it to be true on the day she wrote it or that the interview that preceded it was recorded on video. However, in Hearing Decision 14-UI-21587, after finding that claimant wrote her statement “word for word” based on what the investigator told her to write, after he told her she would keep her job, and that “all the money was repaid before the deposit”, the ALJ concluded claimant was discharged, but not for misconduct. Hearing Decision 14-UI-21587 at 2, 4. However, we conclude that claimant’s assertions at hearing were not credible. Her testimony was uncorroborated, inconsistent with her written statement she certified to be true and implausible as a matter of common sense. Moreover, claimant did not explain why it was necessary for her to alter the employer’s cash invoices before removing the cash if “all the money was repaid before the deposit.” More likely than not, claimant committed theft of cash from the employer’s till as she admitted on May 14.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment or good faith error. 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 violate the law or that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Claimant’s conduct in taking cash

from the employer's store till "to help with the expenses at [her] house" was tantamount to theft¹, a violation of law, and cannot be excused as an isolated instance of poor judgment. Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that she sincerely believed, or had a rational basis for believing, that the employer would condone her theft of cash from its store till.

The employer discharged claimant for misconduct under ORS 657.176(2) and claimant is disqualified from the receipt of benefits on the basis of her work separation.

Wage Cancellation. ORS 657.176(3) states that an individual's benefit rights based on wages earned prior to discharge shall be canceled if the individual admits to an authorized representative of the Department that he committed a felony or theft leading to his discharge, signed a written admission of a felony or theft that has been submitted to the Department, or has been convicted of a felony or theft by a court, and if the individual's employer notifies the Department of the discharge within ten days of notice from the Department. The employer discharged claimant for committing theft, the employer responded in a timely manner to the Department's Form 220 and submitted claimant's written admission of theft to the Department. Claimant's benefit rights based on wages earned prior to May 14, 2014 are canceled under ORS 657.176(3)(c).

DECISION: Hearing Decision 14-UI-21587 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: September 5, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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¹ ORS 164.015 (defining "theft" in part as taking the property of another with the intent to deprive the owner of the property or its value).