

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0106**

*Affirmed*  
*Disqualification*  
*Wage Credits Canceled*

**PROCEDURAL HISTORY:** On December 1, 2014, the Oregon Employment Department (the Department) issued notice of a claim filed by claimant. On December 11, 2014, the employer notified the Department that claimant was discharged for theft. On December 9, 2014, the Department issued a notice of claim determination. On December 12, 2014, the employer again notified the employer that claimant was discharged for theft. On December 16, 2014, the Department served notice of an administrative decision concluding the employer discharged claimant for misconduct because of the commission of theft (decision # 154059). Claimant filed a timely request for hearing. On January 27, 2015, ALJ Shoemake conducted a hearing, and on January 29, 2015 issued Hearing Decision 15-UI-32573, affirming the Department's decision. On February 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Cash & Carry Stores LLC employed claimant as an assistant store manager from February 6, 2013 to November 25, 2014.

(2) The employer expected employees to refrain from stealing its merchandise. Claimant understood that expectation, but sometimes intentionally took retail items from the employer's store without paying for them. Claimant knew his conduct violated the employers' expectations.

(3) On one occasion prior to November 19, 2014, claimant took two cases of milk from the employer's store without paying for them. On November 19, 2014, claimant took two undamaged boxes of aluminum foil squares from the employer's store without paying for them. Claimant knew his conduct violated the employer's expectations.

(4) The employer learned that claimant had taken the milk and aluminum foil squares from the employer's store without paying for them. On November 21, 2014, the employer's investigator interviewed claimant, who asserted that the milk had expired. However, claimant gave no explanation for failing to pay for the undamaged aluminum foil squares, and wrote and signed a statement admitting that he had taken products from the employer's store due to financial problems, stating that what he did was selfish and foolish and that he was embarrassed and ashamed, and offering to pay the employer \$500 in restitution. The employer suspended claimant.

(5) Later that day, claimant telephoned the employer's corporate manager of human resources. Claimant again asserted that the milk he took from the employer's store had expired, but gave no explanation for failing to pay for the undamaged aluminum foil squares.

(6) On November 25, 2014, the employer discharged claimant for theft. On December 12, 2014, the employer presented claimant's signed written statement to the Department.

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

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). Acts that violate the law 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).

If an individual was discharged for misconduct because of the commission of theft, all benefit rights based on wages earned prior to the date of the discharge shall be canceled if the employer notifies the Department of the discharge within 10 days following issuance of the notice of claim filed or 30 days following issuance of the notice of claim determination, and the individual has signed a written admission of theft and the written admission has been presented to the Department. ORS 657.176(3).<sup>1</sup> A person commits theft when, with intent to deprive another of property or to appropriate property to the person or a third person,<sup>2</sup> the person takes, appropriates, obtains or withholds such property from an

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<sup>1</sup> For purposes of satisfying ORS 657.176(3), any person, party or entity may present the Department with the written admission. OAR 471-030-0054 (August 1, 2004).

<sup>2</sup> "Property" means any article, substance or thing of value, including, but not limited to, money, tangible and intangible personal property, real property, choses-in-action, evidence of debt or of contract. ORS 164.005(5). "Deprive another of property" means to withhold property of another or cause property of another to be withheld from that person permanently or

owner thereof. ORS 164.015. In a prosecution for theft, it is a defense that the defendant acted under an honest claim of right, in that the defendant reasonably believed that the defendant had a right to acquire or dispose of the property as the defendant did. ORS 164.035.

The employer had a right to expect claimant to refrain stealing its merchandise. At hearing, claimant asserted that he took only damaged or expired food items, which therefore did not constitute theft because the items had no value, and that he acted under an honest claim of right because he reasonably believed he had a right to acquire and dispose of the damaged and expired items as he did. Transcript at 46. Claimant further asserted that he forgot to pay for the undamaged aluminum foil squares, and that taking them from the store therefore did not constitute theft because he had no intent to deprive the employer of the aluminum foil squares, or appropriate them to himself or a third party. Transcript at 39. However, we find it unlikely that claimant would have written and signed an admission that he took products because of financial problems if he took only damaged or expired food items with no value, and forgot to pay for the aluminum foil squares. We also find it unlikely that claimant would not have explained to the employer's investigator or corporate manager of human resources that he had forgotten to pay for the aluminum foil squares if that were true. More likely than not, claimant intentionally took the aluminum foil squares and food items of value from the employer's store without paying for them.

Claimant therefore willfully violated the employer's expectation that he refrain from stealing its merchandise, which cannot be excused as a good faith error. Nor can claimant's conduct be excused as an isolated instance of poor judgment, given that it constitutes theft under ORS 164.015. The employer therefore discharged claimant for misconduct because of the commission of theft. The employer notified the Department of the discharge within 10 days following issuance of the notice of claim filed, and within 30 days following issuance of the notice of claim determination. Claimant signed a written admission of theft on November 21, 2014, and the employer presented the written admission to the Department on December 12, 2014. Claimant therefore is disqualified from the receipt of benefits, and all benefit rights based on wages earned prior to November 25, 2014 are canceled.

**DECISION:** Hearing Decision 15-UI-32573 is affirmed.

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

**DATE of Service:** March 19, 2015

**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](http://courts.oregon.gov). Once on the website, use the

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for so extended a period or under such circumstances that the major portion of its economic value or benefit is lost to that person; or dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property. ORS 164.005(2). "Appropriate property of another to oneself or a third person" means to exercise control over property of another, or to aid a third person to exercise control over property of another, permanently or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property; or dispose of the property of another for the benefit of oneself or a third person. ORS 164.005(1).

'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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