

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0184

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110105). Claimant filed a timely request for hearing. On February 12, 2015, ALJ R. Davis conducted a hearing at which the employer did not appear, and on February 13, 2015 issued Hearing Decision 15-UI-33527, affirming the Department's decision. On February 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Circle Inn Tavern employed claimant as a bartender from September 4, 2014 until December 3, 2014. Claimant had been a bartender for over twenty years.

(2) The employer was prohibited by law from selling or serving alcoholic beverages in its bar to people under the age of twenty-one. The employer expected claimant to inspect the identification of all customers who wanted to purchase alcohol to verify that they were twenty one or older, and to refrain from selling or serving alcohol to customers younger than twenty-one. Claimant had taken classes offered by the Oregon Liquor Control Commission (OLCC) to obtain the necessary permit that allowed her to sell and serve alcohol to customers in the employer's bar. The classes addressed verifying the ages of customers before selling or serving alcohol to them and the importance of not serving alcohol to minors. Claimant was aware of the employer's expectations.

(3) On October 22, 2014, two female customers entered the bar and one of them ordered a beer. Claimant asked both customers for their identifications to verify that they were twenty-one or older. When the customer who ordered the beer produced her driver's license as identification, claimant "glanced" at it. Audio at ~8:10, ~9:00. The customer's driver's license had a red border around the customer's photograph appearing on the license, and written in that border was the statement "under 21

until 10-xx-2014," and the date shown was sometime in October after October 22, 2014. Audio at ~9:38. Although the driver's license indicated that the customer was under the age of twenty-one, claimant nonetheless served the customer the beer that she had ordered. After claimant served the under-age customer, both customers identified themselves as OLCC investigators. Shortly after, a local law enforcement officer arrived and issued a criminal citation to claimant for providing alcohol to a person under 21 years of age, a class A misdemeanor.

(4) On November 19, 2014, claimant pled guilty to the misdemeanor charge of providing alcohol to a person under 21 years of age.

(5) On December 3, 2014, the employer discharged claimant for serving alcohol to customer who was under the age of twenty-one.

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. 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. Isolated instances of poor judgment are not misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Oregon statutes and regulations emphasize the importance of not supplying alcohol to minors and place significant responsibility on OLCC licensees, like the employer, and OLCC permit holders, like claimant, for ensuring that minors are not allowed to do so. *See* ORS 471.105 (all purchasers of alcohol must be over age twenty-one); ORS 471.130 (identification of purchasers of alcohol must be inspected to verify that they are over the age of twenty-one); ORS 471.410(6)(a)(B) (it is a class A misdemeanor crime, without a state of mind requirement, for a person holding an OLCC service permit to serve alcohol to a minor); OAR 845-006-0335(May 1, 2010) (OLCC licensees and permittees prohibited absolutely from serving alcoholic beverages to minors and prohibited from serving alcohol to a customer before inspecting their identification if there is reasonable doubt that the customer is at least twenty-one years old); OAR 845-006-0500(7)(a)(E) (May1, 2009) (it is an OLCC class III violation for a permittee, and vicariously for the licensee for whom the permittee works, to sell or serve alcohol to a minor or to fail to check a customer's identification before doing either). Claimant candidly agreed that she knew that she was prohibited by law from serving alcohol to underage customers and that she needed to inspect the identification of customers to verify that they were over the age of twenty one before serving them alcoholic beverages. Audio at ~8:08, ~10:00. When claimant asked the customer for her identification on October 22, 2014, she presumably did so to verify that the customer was of age to be served alcohol. While claimant appeared to contend that, even though she looked at the customer's identification, it somehow did not register with her that the customer was underage, the manner in which claimant described Oregon driver's licenses demonstrated that the notification was conspicuous. Audio

at ~8:57, ~9:38. It can only be inferred that claimant did not in fact inspect the identification of the underage customer or that, if she did, she did not make an inspection that was thorough enough to determine the customer's age. Given claimant's understanding of OLCC requirements, and her responsibilities to verify age by inspecting a customer's identification, whether claimant did not look at the identification or whether she made only a cursory inspection of the identification, she acted with a conscious indifference to the employer's expectation that she would verify the customer's age by looking at the customer's identification. Under these circumstances, claimant could only have known that the cursory manner in which she looked or did not look at the customer's identification was probably a violation of the employer's reasonable expectations. Claimant's behavior on October 22, 2014, was wantonly negligent.

Claimant's behavior on October 22, 2014, was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify for this exception, claimant's behavior must have been, among other things, not the type that causes an irreparable breach of trust in the employment relationship or violates the law or is tantamount to unlawful conduct. OAR 471-030-0039(1)(d)(A). Here, claimant's behavior on October 22, 2014, violated several legal standards as mentioned above, including ORS 471.410(6)(a)(B) (it is a class A misdemeanor crime, without a state of mind requirement, for a person holding an OLCC service permit to serve alcohol to a minor); OAR 845-006-0335 (May 1, 2010) (OLCC licensees and permittees prohibited absolutely from serving alcoholic beverages to minors and prohibited from serving alcohol to a customer before inspecting their identification for age if there is reasonable doubt that customer is over the age of twenty-one). In addition, claimant's wantonly negligent conduct on October 22, 2014, gave rise to possible infractions that might jeopardize the OLCC license that allowed the employer to remain in business serving alcohol. *See* OAR 845-006-0500 (it is an OLCC class III violation, which can result in a loss of a OLCC licensee, for a permittee, and vicariously for the licensee for whom the permittee works, to sell or serve alcohol to a minor or to fail to check a customer's identification before doing either). By claimant's wantonly negligent behavior in inspecting or not inspecting the customer's identification, it was objectively reasonable for the employer to conclude that claimant caused an irreparable breach of trust in the employment relationship, and that it could not trust her in the future to comply with OLCC requirements.

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Rather than contending that her behavior on October 22, 2014 resulted from a misunderstanding of the employer's expectations, claimant agreed that she knew she was expected to check a customers' identification before serving alcohol to the customer and agreed that she was prohibited from selling or serving alcohol to underage customers. Consequently, claimant did not make the threshold showing to apply this excuse.

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

DECISION: Hearing Decision 15-UI-33527 is affirmed.

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

DATE of Service: April 8, 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. Once on the website, use the '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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