

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0219

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80556). Claimant filed a timely request for hearing. On February 3, 2015, ALJ Murdock conducted a hearing, and on February 5, 2015 issued Hearing Decision 15-UI-32968, affirming the Department's decision. On February 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The City of Seaside employed claimant from March 1, 2005 to June 30, 2014 as a utility worker in its water department.

(2) The employer expected claimant to follow the law and "reflect a good image" of the employer to the public, and to accurately and honestly report the time she worked. Exhibit 1.

(3) On May 2, 2014, the employer gave claimant notice that her water bill was \$374.95 in arrears. The employer's practice was to maintain service in hardship cases where the customer made a means-related, partial payment each month. Exhibit 1. Claimant was in arrears during all of 2014, and made monthly payments of \$15, \$50 and \$75 in January, February and March 2014 to avoid having her water shut off. Exhibit 1. Claimant was employed full time during April and May 2014, but made no payment toward her water bill during that time. Exhibit 1.

(4) On May 19, 2014, the employer gave claimant notice it would shut off the water to her residence if she did not pay her bill. On May 20, 2014, the employer shut off the water meter at claimant's residence. On or about May 21, 2014, claimant manually turned the water back on to her residence and used water without the employer's authorization.

(5) On May 23, 2014, the employer shut off claimant's water again, and secured the water meter with a lock. The employer learned on May 27, 2014 that claimant had cut the lock and was again using water in her residence.

(6) On May 27, 2014, the employer placed claimant on paid administrative leave while the employer and police investigated claimant's conduct, and to permit claimant time to provide additional information to the employer for the investigation.

(7) On May 29, 2014, the employer gave claimant a letter directing her "to remain at home and available for call during [her] scheduled work hours." Exhibit 1. The employer's letter also instructed claimant to contact her supervisor or the city manager if she had to leave her home so the time would be counted as paid time off or leave without pay, rather than administrative leave. The letter stated that claimant's failure to contact her supervisor if she left her home would be considered "theft of time." Exhibit 1.

(8) On May 30, 2014, claimant left her home at 2:00 p.m. to meet a friend to borrow money. Claimant did not advise the employer she was leaving her home during work hours that day.

(9) On June 30, 2014, the employer discharged claimant because she turned the water back on to her residence and used water without authorization, and because she failed to report the time she was not on call in her residence while on administrative leave.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, in part, because she failed to inform the employer that she left her house to engage in personal business during scheduled work hours while she was on administrative leave. Claimant argued that the employer did not tell her she had to remain at her house, but instead told her to "be by [her] phone in case [she] was needed," and that she did so because she always had her cell phone with her. Audio Record at 33:52 to 34:50. The employer disagreed, but failed to show by a preponderance of the evidence that claimant's understanding of the administrative leave rule was not a good faith error.

However, the employer also had the right to expect claimant to refrain from using water without paying for it. Claimant understood that expectation as a matter of common sense. In May 2014, claimant twice turned on the water to her residence and used water without authorization after the employer shut it off due to nonpayment. On the second occasion, claimant damaged the employer's property by cutting the lock. Claimant testified that she turned the water back on because she did not want the house to be condemned and her family to become homeless. Audio Record at 26:35 to 26:45. However, the record contains no evidence that claimant believed she was permitted to use the employer's water after it shut

the water off. Claimant's conduct each time she turned on and used the water therefore constituted a separate willful violation of the employer's prohibition against theft of water service.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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). In addition, acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). In the present case, claimant exercised poor judgment by turning the water on to her residence on May 21, and a second time several days later when she cut the lock. Claimant's exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence. In addition, claimant's conduct constituted theft (ORS 164.015¹) and theft of services (ORS 164.125²), and therefore was unlawful. Under OAR 471-030-0038(1)(d)(D), claimant's unlawful conduct exceeded mere poor judgment and cannot be excused under OAR 471-030-0038(3)(b). Nor can claimant's conduct be excused as a good faith error under OAR 471-030-038(3)(b). Claimant did not assert or show that she sincerely believed, or had a factual basis for believing, that her theft of services would be considered acceptable to the employer.

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

DECISION: Hearing Decision 15-UI-32968 is affirmed.

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

DATE of Service: April 14, 2015

¹ ORS 164.015 defines theft:

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:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof;

* * *

² ORS 164.125 defines theft of services:

(1) A person commits the crime of theft of services if:

(a) With intent to avoid payment therefor, the person obtains services that are available only for compensation, by force, threat, deception or other means to avoid payment for the services;

(2) As used in this section, services includes, but is not limited to, * * * the supplying of commodities of a public utility nature such as * * * water.

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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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