

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0379

Reversed
Disqualification
(Descalificación)

PROCEDURAL HISTORY: On February 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 124017). The employer filed a timely request for hearing. On March 25, 2015, ALJ Triana conducted a hearing, and on April 1, 2015, issued Hearing Decision 15-UI-36096, affirming the Department's decision. On April 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Seven Feathers Hotel employed claimant as a valet attendant from September 9, 1997 to January 7, 2015.

(2) The employer expected its valet attendants to immediately place any tips received from customers into one of two locked valet booth tip boxes, the contents of which were later distributed equally amongst valet attendants as part of their paychecks. The employer also prohibited valet attendants from placing tips into their pocket. Finally, the employer expected its employees to refrain from engaging in dishonest activities, specifically including theft. Claimant was aware of the employer's expectations.

(3) On January 1, 2015, claimant received a twenty dollar bill as a tip from a regular guest, placed it into his pocket and left at the end of his shift, without placing it into either of the valet booth tip boxes. A valet attendant working with claimant near the casino entrance observed claimant pocket the tip and reported it to the valet supervisor. After claimant left, the supervisor and the hotel manager requested video surveillance footage of claimant's actions and both valet booth tip boxes and later, under video surveillance, unlocked the hotel valet booth tip box and determined that it did not contain a twenty dollar bill. The hotel manager contacted the guest who gave claimant the tip and she verified she had tipped claimant with a twenty dollar bill on the date in question. The video surveillance footage showed that claimant placed the bill he received from the guest into his pocket and did not drop a bill into either tip box.

(4) On January 5, 2014, claimant returned to work after being off since January 1 and was interviewed by the hotel manager. Claimant asserted that he “didn’t remember anything about the situation” including the guest or receiving a twenty dollar bill as a tip. Transcript at 10. The following day, claimant was interviewed again and “remembered fully the exact guest...[and]...the twenty dollar bill”, but asserted he dropped it into the hotel valet booth tip box. Transcript at 10.

(5) On January 7, 2015, the employer discharged claimant for theft of the \$20 dollar tip based on claimant’s statements and the results of its investigation.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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). Under OAR 471-030-0038(1)(d)(D), isolated acts that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

In Hearing Decision 15-UI-36096, after finding “claimant did not place the tip in the tip box” despite claimant’s testimony to the contrary, the ALJ concluded the employer discharged claimant, but not for misconduct, reasoning that claimant’s conduct was no more than an isolated instance of poor judgment because “no evidence was presented that claimant had the requisite intent to deprive the employer (or other employees) of the \$20”, i.e. commit theft. Hearing Decision 15-UI-36096 at 3-4. We disagree.

As a preliminary matter, we agree with the ALJ’s implied finding that claimant was not credible. Claimant’s various accounts of the event were internally inconsistent. On January 5, claimant “didn’t remember anything about the situation” including the guest or receiving a twenty dollar bill as a tip. On January 6, claimant “remembered fully the exact guest...[and]...the twenty dollar bill”, but asserted he dropped it into the hotel valet booth tip box. At hearing, claimant asserted that he remembered the event but did not know if the tip he received was a twenty dollar bill. Transcript at 25. Moreover, the employer presented corroborated evidence that the video showed that claimant did not place a bill into either valet tip box, that the guest confirmed she gave claimant a twenty dollar bill, and that when the contents of the locked hotel valet tip box, where claimant asserted he placed the bill, was examined, it did not contain a twenty dollar bill. Because claimant was not a credible witness, we found facts in accordance with the employer’s evidence.

The employer had the right to expect claimant to place any tip received into a valet tip box and to refrain from keeping it for himself. Claimant violated that expectation on January 1, when he accepted twenty dollar tip from a guest, placed it into his pocket and later failed to drop it into a tip box before leaving at the end of his shift. Based on the employer’s video surveillance footage, “[i]t appeared that [claimant] actually palmed the tip in his hands...[and]...when he turned around... put the tip in his pocket.” Transcript at 27. Based on claimant’s furtive conduct in palming the bill, his inconsistent accounts of

his actions, and the discrepancies between his accounts and the video footage, we infer that claimant intended to keep the tip for himself and that his violation of the employer's expectations was willful.

Accordingly, and contrary to the ALJ's conclusion that claimant's conduct was excusable as an isolated instance of poor judgment, we conclude the employer met its burden to show that claimant intended to deprive his coworkers of their share of the tip in question. Claimant's conduct was tantamount to theft in the third degree¹ and under OAR 471-030-0038(1)(d)(D), and acts 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 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show that he sincerely believed, or had a factual basis for believing, that the employer would tolerate his violation of its policies against theft and dishonesty by keeping a guest tip for himself, especially since he did not claim that he had any belief that he had the right to keep the tip himself, his testimony demonstrated his understanding that tips were to be placed in the tip boxes, and he did not dispute the employer's assertion that he had turned in other valets in to the employer for similar conduct. Transcript at 13.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-36096 is set aside, as outlined above. *Decisión de la Audiencia 15-UI-36096 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: May 29, 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,

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;

* * *

A person commits the crime of theft in the third degree if the person commits theft as defined in ORS 164.015 and the total value of the property in a single or aggregate transaction is under \$100. ORS 164.043.

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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

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