

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0435

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but that her wage credits were not subject to cancellation (decision # 104246). Claimant filed a timely request for hearing. On March 30, 2015, ALJ Shoemake conducted a hearing, and on April 2, 2015 issued Hearing Decision 15-UI-36215, concluding claimant's discharge was for misconduct. On April 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, this decision would remain the same for the reasons explained herein. The employer's argument was timely received and served upon claimant, however, there were no substantive arguments for the Board's consideration contained therein.

FINDINGS OF FACT: (1) Pendleton School District #6 employed claimant as a custodian from June 24, 2013 to January 20, 2015.

(2) The employer expected employees to be honest about work-related issues. Claimant understood the employer's expectation.

(3) During the first half of January 2015, a student at the employer's high school left a paper box containing jewelry on a table. Claimant subsequently picked up the box. The student later reported the box and its contents as missing, and the employer undertook efforts to recover the student's property.

(4) During the week of January 12, 2015, the employer twice questioned claimant about the box. During this questioning, claimant said nothing about having picked up the box.

(5) Between January 12, 2015 and January 16, 2015, the employer's management viewed security footage of the location and at the time the student's property was lost. The footage showed that claimant took the box from the table.

(6) On January 16, 2015, the employer's assistant superintendent and a union representative met with claimant. The assistant superintendent asked claimant about the student's jewelry, and claimant denied knowledge of it. The assistant superintendent told claimant that the employer had video showing that claimant took the box. At that point, claimant admitted that she had taken the box, and admitted to the assistant superintendent that she had lied when she initially denied having taken it.

(7) Claimant agreed to return the student's property. She told the assistant superintendent that the box was at her home, and that she would retrieve it. Claimant knew at the time that the box was not at her home and knew she had lied to the assistant superintendent about the location of the box. Claimant subsequently went to the custodial closet where she kept her work supplies; she retrieved the student's property and returned it to the employer. She also admitted to the assistant superintendent that she had lied about the property being at her house.

(8) The employer concluded that claimant had committed theft of the box and its contents, and that she had repeatedly been dishonest with the employer during its investigation. On January 20, 2015, the employer discharged claimant, in part, due to her dishonesty.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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.

As a preliminary matter, claimant's evidence was not reliable. Not only does the record show claimant admitted to a pattern of dishonesty with the employer, her testimony about her involvement with the student's property was not plausible. Claimant initially claimed that she denied having knowledge about the student's property because the employer asked about a jewelry box and not a box of jewelry, which amounts to an implicit admission that she knew the box in question contained jewelry. She later contradicted herself, however, by claiming that she did not look inside the box or know that it contained jewelry until she retrieved the box from her custodial closet on January 16, 2015. Next, if she truly believed the box was valueless and had discarded it in the ordinary course of her duties as she alleged, it makes no sense that she could have such a clear recollection of what she did with the box. If claimant's description of picking up the box prior to January 12, throwing it away, emptying the garbage on her cart several times a day for a week or more was true, and she lacked any recollection of that information when she was subsequently questioned about the box on January 12 and January 16, then it does not

make sense that she would have any recall about the box just based on the assistant superintendent's statement that she was seen on video taking the box. It does not make sense that the box was in the garbage bin on her custodial cart for a week if, as she claimed, she emptied the garbage several times each workday. Nor does it make sense that if claimant threw the box away as she claimed, she would know that she still had the box, tell the assistant superintendent she still had the box, and then return the box to the employer. Because claimant's evidence was implausible and internally inconsistent, we must conclude that her evidence was not reliable. Therefore, where the evidence was in dispute, we found facts in accordance with the employer's version of events.

The employer had the right to expect claimant to be honest about work-related matters, and claimant understood that expectation. On January 12, 2015, and repeatedly on January 16, 2015, claimant intentionally lied to the employer concerning her knowledge of the student's property. She then admitted to the employer that she had lied, and then lied to the employer again by claiming that she had the student's property at her house even though she knew it was not there and she ultimately recovered the property from the custodial closet where she kept her work supplies, and admitted that she had lied about the location of the box, as well. Claimant argued that she was overwhelmed at the time of her January 16 lies; however, the record shows that claimant knew the employer prohibited dishonesty, and knew at the time of each lie that she was lying, and knew that, in doing so, she was violating the employer's expectations of her. Claimant's repeated lies to the employer constituted repeated willful acts of misconduct.

Claimant's conduct cannot be excused under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment or a good faith error. Acts of poor judgment are only excusable if they are isolated. OAR 471-030-0038(1)(d). Claimant repeatedly exercised poor judgment when she engaged in repeated acts of willful dishonesty. She had time for reflection between each of her lies, when she lied on January 12, then lied about her knowledge of the box to the assistant superintendent on January 16, then lied again about where the missing property was located. Claimant's conduct was therefore not isolated. Nor did she allege or show that she held a sincere belief that the employer would condone her dishonesty or that she acted based on a good faith belief that her dishonesty would be acceptable under the circumstances.

For the foregoing reasons, we conclude that the employer discharged claimant for misconduct based on her dishonesty. Having so concluded, we need not and do not address the employer's allegation that claimant's possession of the box amounted to theft or attempted theft of the student's property. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-36215 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 11, 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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