EO: 700
BYE: 201601

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0461

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115039). Claimant filed a timely request for hearing. On April 1, 2015, ALJ S. Lee conducted a hearing, and on April 3, 2015, issued Hearing Decision 15-UI-36314, affirming the Department's decision. On April 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider that written argument when reaching this decision.

FINDINGS OF FACT: (1) Jeld-Wen employed claimant, last as an exterior lay-up laborer, from February 17, 2014 to January 14, 2015. Claimant had also worked for the employer from August 23, 2008 to December 31, 2013.

(2) The employer had a written policy that prohibited employee theft or dishonesty. Claimant received a copy of the policy at hire and understood the employer's expectation as a matter of common sense.

(3) The employer maintained a company store on-site that included an unattended, self-checkout cash register, where items to be purchased were scanned by the employee. The store and cash register were operated and maintained by a separate business, Quail Mountain. There were similar cash registers in other areas of the employer's premises approximately 100 yards away. The cash register in the company store occasionally "was down" and not operable. Transcript at 32. When the register was "down", employees often took items for use and returned later, when the register was operating, to pay for them. The employer did not have a protocol or policy for employees to follow at such times.

(4) On January 13, 2015, claimant was working at an assembly area and gave money to the assembly organizer, who was headed to the company store, to purchase two waters for him. She later returned with his money and without the waters and reported the cash register "was down." Transcript at 19. Shortly thereafter, claimant went to the company store, removed two bottles of water from the cooler and returned to his work area without attempting to scan the water bottles at the register because he believed it "was down." Claimant intended to return to the store at his break and pay for the water at that time if the register was operating.

(5) At his break, claimant went to the company store, returned a bottle of water he had taken earlier to the cooler and selected another, along with an ice cream and an orange soda. He scanned the three items at the register, believed he had scanned the water bottle twice to pay for the one taken earlier and returned to his work area. Sometime that morning, a Quail Mountain representative noticed an inventory discrepancy and notified the employer. The employer reviewed video of the company store and observed that claimant had not paid for the two waters initially taken but had paid for the three items taken at his break, including a water, as well as an energy drink taken at a break later that day.

(6) On January 14, 2015, the employer discharged claimant for theft of the two bottles of water initially taken on January 13. Claimant had no history of discipline for a similar act.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment, and not 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision Hearing Decision 15-UI-36314, the ALJ concluded that claimant's January 13 conduct was a wantonly negligent violation of the employer's expectation regarding workplace behavior, and not a good faith error. Hearing Decision 15-UI-36314 at 3, 4. The ALJ further concluded that claimant's conduct on January 13 was not an isolated instance of poor judgment, reasoning,

> …claimant was, at least, wantonly negligent when he took the bottles of water without paying for them. Claimant returned twice during the day and failed to ensure that he paid for them at that time either. Therefore, I am persuaded that claimant's conduct was not isolated…claimant was discharged for misconduct.

Hearing Decision 15-UI-36314 at 4. We assume that claimant's conduct on January 13 was at least wantonly negligent because he demonstrated indifference in ensuring the water bottles taken initially

were paid for, for example by scanning the bottles at another register or leaving a note that he had taken two bottles without scanning. We also agree, as a matter of common sense, that his conduct was not the result of a good faith error in his understanding of the employer's expectation that store items be paid for. However, we disagree with the ALJ's conclusion that claimant's conduct was not an isolated instance of poor judgment. Even if claimant had returned to the store twice that day without ensuring the water bottles had been paid for, as the ALJ concluded, his conduct involved a single policy violation, and under Oregon case law interpreting OAR 471-030-0038(1)(d)(A), constituted an isolated instance. *See, e.g., Perez v. Employment Dept*, 164 Or App 356, 992 P2d 460 (1999) ("isolated instance" of poor judgment may consist of a series of acts arising from the same episode); *Bunnell v. Employment Division*, 304 Or 11, 741 P2d 887 (1987) (refusal to comply with supervisor's directive and subsequent vulgar response to second request constituted a single instance of poor judgment).

Some acts, even if isolated, such as those that violate law or are tantamount to unlawful conduct are so serious that they exceed mere poor judgment and cannot be excused because they create an irreparable breach of trust or make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The employer asserted it discharged claimant for theft. Transcript at 5. "Theft" under Oregon law requires that an individual take or obtain the property of another *with the intent* to permanently deprive the owner of either the property or its value.[1] On this record, we cannot conclude the employer established that claimant acted with the requisite intent.

The production manager did not dispute that the company store cash register occasionally "was down" and that the employer did not have a policy in place regarding its expectations for employee conduct in those instances. Transcript at 32. He also testified that he was unaware if it was "common practice" for employees to take items from the store without paying, when the register "was down", intending to pay later when it was again operating. Transcript at 32-33. Although he asserted that the video did not show that claimant returned a bottle of water to the cooler just before he scanned the three items at his break, that testimony was not corroborated by the other employer witness, claimant was not allowed to view the video and the employer did not offer it into evidence as an exhibit. Transcript at 17. Weighing the evidence as a whole, there seems to be no reason to believe the employer's testimony, based on hearsay (the video) over the testimony of claimant, leaving the evidence, at best, equally balanced. Because the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden to establish that claimant had the intent to commit theft, *i.e.*, to permanently deprive the employer of the water bottles or their $2.70 retail value. Consequently, his conduct was not tantamount to theft or sufficient to cause an irreparable breach of trust in the employment relationship.

In a discharge case, the employer bears the burden to establish misconduct under ORS 657.176(2)(a) by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because claimant engaged in a single wantonly negligent act on January 13, and that act did not exceed mere poor judgment, the employer failed to satisfy its evidentiary burden. The employer discharged claimant for an isolated instance of poor judgment and not misconduct. Claimant is not subject to disqualification from unemployment insurance benefits on the basis of his work separation.

[1] ORS 164.015(1).

DECISION: Hearing Decision 15-UI-36314 is set aside, as outlined above.[2]

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

DATE of Service: <u>June 18, 2015</u>

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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[2] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.