

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1121

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93056). Claimant filed a timely request for hearing. On September 4, 2015, ALJ R. Davis conducted a hearing, and on September 8, 2015 issued Hearing Decision 15-UI-44047, affirming the Department's decision. On September 22, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his 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, the outcome would remain the same. Claimant's only argument was that, because he did not receive the exhibits the employer submitted until the night before the hearing, the "case should be thrown out or at least re-heard." However, claimant did not tell the ALJ that he had been given inadequate time to review the employer's evidence, ask for more time, object when the ALJ admitted the documents into evidence, or explain in his argument what in the employer's exhibit he would have refuted had he had additional time to review it before the hearing. The record therefore fails to show that the ALJ erred by admitting the employer's documents into evidence, that claimant was prejudiced by the admission of the exhibit, or that he was entitled to submit new evidence.

FINDINGS OF FACT: (1) Capers Café & Catering Co. employed claimant as a wine server from December 29, 2009 to June 19, 2015.

(2) Oregon law prohibits employees from consuming alcohol while performing work "that involves the mixing, sale or service of alcoholic beverages, checking identification or controlling conduct on the premises." Exhibit 3. Claimant was required to undergo training prior to obtaining a server's permit, and the training included the prohibition against consuming alcohol while on duty. The employer

required claimant to hold an alcohol server's permit from the Oregon Liquor Control Commission and comply with OLCC law as a condition of employment.

(3) Throughout claimant's employment, the employer's owner regularly invited claimant to participate in wine tastings with the owner during claimant's work hours. The tastings always occurred away from the bar. Claimant and the owner tasted the wine, but did not swallow it. Claimant was permitted to perform work as a wine server before and immediately after the tastings.

(4) On June 12, 2015, claimant sold a bottle of wine to a customer. The customer gave claimant a one-ounce portion of the wine to sample. Claimant went behind the wine bar with the sample. He consumed half the sample almost immediately and let the other half sit behind the bar for an hour before he consumed it. The owner was not present and had not invited claimant to sample the wine. Claimant swallowed the wine rather than spitting it out as he usually did during the owner's tastings.

(5) An individual who worked in the facility that housed the employer's business observed claimant as he consumed alcohol on June 12, 2015 and, on June 16, 2015, reported it to the employer's owner. On June 16, 2015, the employer discharged claimant for consuming wine while on duty behind the wine bar.

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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). Isolated instances of poor judgment, defined to include, among other things, single or infrequent willful or wantonly negligent conduct that does not violate the law, are not misconduct. OAR 471-030-0038(1)(d) and OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to refrain from violating the law by consuming alcohol in the performance of his duties. On June 12, 2015, claimant violated that expectation and state law.

Claimant argued, in essence, that he should not be disqualified from benefits because his violation was the result of a good faith error. We disagree that claimant acted in good faith. First, claimant underwent training and held a permit issued by OLCC, and knew or should have known as a result that he was prohibited by state law from consuming alcohol on duty. For this reason, he could not reasonably have sincerely believed that it was acceptable to violate state law. Second, while it is undisputed that the owner invited claimant to participate in wine tastings at work, those tastings occurred under different circumstances than those that existed when claimant consumed alcohol on June 12th. The authorized tastings occurred at the invitation of the owner, away from the service area, and involved tasting wine

without swallowing it or consuming it. On June 12th, claimant was not invited or authorized by the owner to taste the wine, claimant was behind the bar during business hours while responsible for serving alcohol to customers, and claimant was consuming the alcohol that he was tasting. Therefore, even though the record shows that claimant had participated in wine tastings with the owner prior to June 12th, those tasting were dissimilar to claimant's conduct in the final instance and could not reasonably have formed the basis of a sincerely held belief that the employer would condone claimant consuming alcohol without authorization while behind the bar. For those reasons, we conclude that claimant's conduct was not the result of a good faith error, but was the result of claimant's conscious indifference to the standards of behavior the employer had the right to expect of him, and, therefore, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because it violated the law and therefore exceeded mere poor judgment. Claimant argued that whether or not standing behind the bar while on duty and consuming wine violated the law would be open to interpretation by whichever OLCC agent who observed his conduct. We disagree. OAR 845-006-0345, prohibits consuming alcohol while on duty, and defines the term "on duty" in clear terms. On this record, claimant's conduct constituted a law violation. Because claimant was discharged for conduct that violated the law, the conduct exceeded mere poor judgment and cannot be excused.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-44047 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 13, 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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