

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1526

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 10, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 111341). The employer filed a timely request for hearing. On December 10, 2015, ALJ Wyatt conducted a hearing, and on December 18, 2015 issued Hearing Decision 15-UI-49684, concluding that claimant's discharge was for misconduct. On December 22, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with her application for review, and on December 26, 2015. However, claimant failed to certify that she provided a copies of her arguments to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The arguments also contained information that was not part of the hearing record, and failed to show that the new information is material to EAB's determination, and that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing, as required by OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider claimant's arguments, and considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), we **adopt** the hearing decision under review and add the following:

Claimant's intentional, and therefore willful, violations of the employer's reasonable expectations cannot be excused under OAR 471-030-0038(3)(b) (August 3, 2011) as a good faith error or an isolated instance of poor judgment. Claimant did not assert she sincerely believed, in good faith, that taking the employer's money complied with its expectations. To be isolated, the exercise of poor judgment must be a single or infrequent occurrence. OAR 471-030-0038(1)(d)(A). In addition, 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). OAR 471-030-0038(1)(d)(D). Here, claimant took the employer's money on

two separate occasions within 26 days. Claimant's conduct also was tantamount to theft,¹ and therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3). We therefore agree with the ALJ that claimant's discharge was for misconduct, and that she is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-49684 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 21, 2016

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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¹ ORS 164.015 provides that 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 takes, appropriates, obtains or withholds such property from an owner thereof.