

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0030

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151242). Claimant filed a timely request for hearing. On December 23, 2015, ALJ Wyatt conducted a hearing, and on December 28, 2015 issued Hearing Decision 15-UI-50039, affirming the Department's decision. On January 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Vacation Rental Directory Inc. employed claimant from March 28, 2015 to August 21, 2015 as a housekeeper to clean vacation rental properties.

(2) The employer's laundry policy permitted housekeepers to launder linens off site from the rental properties they cleaned if the housekeepers did not have time to finish laundering the linens on site while cleaning the properties. The employer expected housekeepers to inform their managers if they removed linens from the properties, and to return the linens to the employer or the properties within 24 hours of having removed the linens. As a matter of common sense, claimant understood the employer expected her to return the linens she removed from the properties in a timely manner, or inform the employer if she was unable to do so. The employer expected claimant to respond completely and honestly to the employer's questions about workplace matters. Claimant understood this expectation as a matter of common sense.

(3) On July 8, 2015 and other dates in July, claimant removed linens from at least three properties while she was cleaning them. She did not tell her manager she had removed the linens, or return the linens to the employer or the properties within 24 hours. During July, claimant had transferred the linens to a third party's storage unit to which she did not have independent access. The third party was not employed by the employer. Claimant subsequently had a disagreement with the third party, and had difficulty communicating with her.

(4) By August 3, 2015, the employer had received three complaints from property owners who stated that linens were missing from their properties after the linens had been removed for cleaning, and the

linens had not been returned. On August 3, the employer's manager asked the housekeepers during a meeting if any of them had taken and failed to return linens to the properties. Claimant did not tell the manager she had any of the linens at that time.

(5) On August 17, 2015, the manager met with claimant and told her it had determined that claimant was the last housekeeper to clean the properties of the three owners before they reported their items were missing. Claimant told the manager she did not know where the items were. Later on August 17, claimant sent the manager a text message stating she would look in her personal storage unit for the items. The storage unit was not provided by the employer, and only claimant had access to it. Claimant was able to retrieve the items she had put in the third party's storage unit, and she moved them to her own storage unit. She contacted the manager and told her she had found some items from work in her personal storage unit.

(6) The manager and a property manager met claimant at her storage unit to inspect the items in it. They found the linens that were missing from the three owners' properties, along with other linens and cleaning supplies that belonged to the employer.

(7) On August 21, 2015, the employer discharged claimant for failing to tell the employer she had taken linens from the properties she cleaned, and failing to return the linens and the employer's cleaning supplies in a timely manner.

CONCLUSIONS AND REASONS: We agree with the Department and 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to inform it if she took linens from owners' properties, and to return the items within 24 hours. Claimant testified that she did not know she was expected to tell her manager at the time she took the linens, and did not acknowledge that she knew the employer expected her to return items within 24 hours. Audio Record at 27:40 to 28:13. However, claimant understood, if only as a matter of common sense, that the employer expected her to tell the employer if she was unable to return owners' property within a reasonable time, or at all. Claimant admitted that she put linens from the rental properties in a third party's personal storage locker, to which she did not have access, and left them there until after the manager asked her about the items on August 17. It was not until then that claimant pursued the steps apparently necessary to regain the items from the third party. Claimant also

admitted that she had kept cleaning supplies belonging to the employer in her personal storage locker. Although claimant asserted that the employer no longer used that brand of cleaning supplies, she did not dispute that she had removed them from the properties. The record does not show claimant had permission to take, much less keep and store, those supplies. The preponderance of the evidence establishes that claimant failed to retain control of the owners' linens by giving them to a third party, then failed to recover and return them and the cleaning supplies in a timely manner. Claimant's conduct was, at best, a wantonly negligent violation of the employer's expectation that she inform the employer when she took property belonging to the owners and employer, and return it reasonably promptly thereafter.

The employer had a right to expect claimant to be honest during workplace investigations. We infer claimant understood that expectation as a matter of common sense. Claimant failed to tell the employer she had taken items from work home with her when she first took the items. On August 3, 2015, claimant did not tell the manager she had owners' linens when the manager specifically asked about the items. Even on August 17, 2015, claimant initially told the manager she did not know what happened to the items, before she sent the manager a text about the items later that day. The preponderance of the evidence shows claimant tried to conceal that she had the items from the employer. In failing to be truthful to the employer, claimant willfully violated the standards of behavior that an employer has the right to expect of an employee.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant exercised poor judgment when she wantonly disregarded the employer's reasonable expectations by not returning items taken from work in a timely manner, and again by not telling the employer that she had taken them. Claimant's exercise of poor judgment therefore was not a single or infrequent occurrence. Moreover, acts that create irreparable breaches of trust in the employment relationship 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). Viewed objectively, claimant's failure to tell the employer about having taken the items when pointedly and specifically asked on August 3, and again on August 17 were acts of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor was claimant's behavior in failing to return the items or truthfully state that she had taken them excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that she thought the employer would excuse her failure to return the items or her subsequent dishonesty about having possession of them. Moreover, it is not plausible that claimant sincerely, but mistakenly believed that the employer would condone her conduct.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-50039 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 1, 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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