

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0209

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 74054). Claimant filed a timely request for hearing. On February 16, 2016, ALJ Seideman conducted a hearing, and on February 19, 2016 issued Hearing Decision 16-UI-53375, affirming the Department's decision. On February 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wal-Mart Associates, Inc. employed claimant from June 5, 2010 until June 11, 2015, last as an assistant store manager.

(2) The employer expected claimant to refrain from taking merchandise or other property from the store without permission or without paying for it. The employer also expected claimant, as a store manager, to refrain from close personal relationships or romantic involvements with associates she managed. Claimant was aware of the employer's expectations.

(3) Sometime in approximately early 2015, when she was cleaning out the store security room in preparation for taking inventory, claimant removed miscellaneous electronics items from the store without permission and without paying for them and took them to her home. Some of these items had been used in store displays. Also sometime in approximately early 2015, claimant kissed a store associate she supervised while on the store premises and invited the associate to go home with her. Exhibit 12 at 2.

(4) On March 30, 2015, a physician's assistant (PA) diagnosed claimant with a generalized anxiety disorder and depression. Exhibit 12 at 2. That PA referred claimant for mental health counseling. Exhibit 12 at 2. Claimant told the PA she needed to take a leave 30 day leave from work for health reasons. Exhibit 12 at 2. The employer subsequently authorized a leave for claimant from April 1, 2015 through April 30, 2015. Exhibit 11 at 1. Claimant later sought treatment from her primary care

physician and on May 5, 2015 he adopted the diagnosis of the PA. Exhibit 14 at 2. The employer extended claimant's leave from May 1, 2015 through May 31, 2015. Exhibit 13 at 1. Sometime around May 8, 2015, claimant was admitted to a crisis center on an inpatient basis. Exhibit 15 at 1. On May 22, 2015, a mental health professional evaluated claimant and diagnosed her with depression, anxiety, attention deficit/hyperactivity disorder (ADHD) and post-traumatic stress disorder (PTSD). Exhibit 15 at 1. That provider recommended that claimant continue with counseling and psychotherapy. Exhibit 15 at 6. Sometime before June 1, 2015, claimant was discharged from the crisis center.

(5) On June 2, 2015, claimant went to the workplace and asked to meet with an assistant store manager. On that day, claimant met with the assistant store manager and the asset protection manager. Claimant told them that she had made "some mistakes" when she was preparing the store for inventory. Exhibit 2 at 1. Claimant stated that she had removed some electronics display items stored in the security room and, rather than taking them to a recycling center as she had intended, she had taken them to her home. Exhibit 2 at 1; Exhibit 3 at 1. Claimant also stated that these items were no longer at her home, and they had "probably been taken" by her son or visitors to the home. Exhibit 2 at 1; Exhibit 3 at 1. At the meeting, claimant identified some of the items she removed from the store as a display television, some iPads and some electronic tablets that had been on display in the store. Exhibit 3 at 1. On June 3, 2015, claimant prepared and signed a handwritten statement in which she repeated what she had told the employer the previous day and supplied more detail. In this statement, claimant said that she thought the items she had taken to her house had been removed from the house by her son, and at least one electronic table had been sold by a person she identified by name who had been a guest in claimant's home at that time. Transcript at 22-23.

(6) On approximately June 3, 2015 or shortly after, claimant signed a partial list of the items she had removed from the store. These items included an iPad 2, an original iPad, an iPad mini, an HP tablet, a Hisense tablet, a Straight Talk iPhone, a Samsung Galaxy tablet and a Microsoft Surface. Exhibit 6 at 1.

(7) On June 11, 2015, the employer discharged claimant for taking electronics items from the store without permission and without paying for them.

(8) On June 25, 2015, claimant signed an agreement to reimburse the employer \$1,700 as the value of the electronics she had taken from the store.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to demonstrate claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute her awareness that removing items from the store, whether or not those items were merchandise for sale to customers or items used only for display purposes, was contrary to the employer's standards unless she had permission or paid for them. Claimant's principal defense at

hearing was that she had removed the items from the store with the intention of discarding them at a recycling center, that the items she removed apparently had no value to the employer, and that she never took the items from the van in which she transported them away from the store into her home. Transcript at 13, 14-16. However, claimant's hearing testimony was contradicted by her oral admissions to the employer, the handwritten statement she composed and signed and her agreement to reimburse the employer for the value of the items she took from the store. Claimant testified that at the time she took the items from the store, she was experiencing no problems with her mental health, insisting that her "psychotic breakdown" and admission to the inpatient crisis center occurred after she took the items from the store. Transcript at 13-14. Claimant appeared to specifically contend that the oral and written statement she gave to the employer were not reliable as admissions because they were "crazy things," "random things" and she "obviously was not in a right frame of mind [when she made the statements]." Transcript at 13, 14, 18, 19, 28. However, claimant was unable to explain how, if her thought processes were disorganized or somehow impaired, she was able to recall with specificity some of the items she took, was able to give oral statements to the employer that were consistent with her later handwritten statement, and chose to sign an agreement under which she assumed an obligation to reimburse the employer for the items she removed from the store. It is unlikely the employer fabricated both the oral statement claimant gave to its representatives or claimant's statement in her own handwriting, particularly since claimant conceded at hearing that the person she identified in that statement as having sold one of the tablets taken was staying at her home at the time. It is also highly unlikely the employer would have known about claimant's house guest or his identity. Transcript at 22. If for no other reason than their recitation of such consistent and specific detail, the statements that claimant made appear to have indicia of high reliability about the events surrounding the removal of the employer's items and to show claimant's possession of adequate mental faculties.

By removing the items she did from the store and taking them home without permission and without paying for them, claimant knew, if only as a matter of common sense that she was violating the employer's standards. Claimant's behavior was at a minimum wantonly negligent.

Although claimant's behavior was wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). To qualify as an isolated instance of poor judgment, claimant's behavior must have "exceeded mere poor judgment" by being, among other things, an act that violated the law or was tantamount to unlawful behavior or caused an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(D)(C). Here, by taking the employer's property to her home without permission and without paying for it, claimant violated Oregon criminal statutes prohibiting theft of another person's property. ORS 164.015(1) provides that a person commits theft when, with the intent to deprive another of property or to appropriate the property to a third person one "takes, appropriates, obtains or withholds such property from the owner thereof." Notably, claimant did not contend that, when she took the property, her mental state did not allow her to appreciate that she was prohibited from taking the property of another person without permission. Specifically, claimant did not contend that she honestly believed that that she was entitled to the property and that the employer would allow her to take it into her home. *See* ORS 164.035(1)(a); ORS 164.035(1)(b). It is no defense to the crime of theft claimant might have thought the property she took was of no market value to the employer and was destined for the trash. *See* ORS 164.115(4). Applying these statutes, claimant committed the crime of theft when she took the employer's property and assumed ownership of it. As such, claimant's behavior exceeded

“mere poor judgment” and falls outside that which may be excused as an isolated instance of poor judgment.

Claimant’s behavior also was not excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). A good faith error generally involves a situation where a claimant misunderstood the employer’s standards and sincerely thought the employer would condone such noncompliant behavior. Here, claimant did not contend she thought the employer would allow her to take its property home without permission and without paying for it. Moreover, any such contention would have been implausible. This record does not support the existence of a good faith error.

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

DECISION: Hearing Decision 16-UI-53375 is affirmed.

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

DATE of Service: March 11, 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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