

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1403

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was not for misconduct (decision # 123709). The employer filed a timely request for hearing. On November 21, 2016, ALJ Vincent conducted a hearing, and on November 29, 2016 issued Hearing Decision 16-UI-71839, concluding claimant's discharge was for misconduct. On December 14, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show either how the information was relevant or 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). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Motel 6 Operating LP employed claimant as general manager until August 20, 2016.

(2) The employer expected claimant to report missing funds to her supervisor immediately. Claimant understood the expectation, and, as a general manager, expected her subordinates to report missing funds to her immediately so she could investigate the problem.

(3) On July 3, 2016, claimant briefly left her purse, containing a bank deposit of \$2,300, unattended in her unlocked office. Claimant soon discovered that the money was missing. She believed someone went into her office and took the money during the brief minutes she had stepped away.

(4) Claimant knew she should report the missing money to her supervisor immediately but was afraid she might lose her job if she did. She also thought she might eventually find the missing money, and decided not to report the incident. Claimant did not call the police to report the suspected theft.

(5) Over the following five weeks, claimant frequently thought about the missing money and became increasingly concerned that she had not reported it to the employer. She thought many times about reporting the incident but did not. On August 14, 2016, claimant contacted human resources office to report the incident. She did not report it to her supervisor because he was on vacation at the time.

(6) The employer looked into the matter but could not effectively investigate the matter because the surveillance video from the day of the theft no longer existed and too much time has passed since the incident had occurred. On August 20, 2016, the employer discharged claimant for not immediately reporting that the money was missing.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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.

There is no dispute that claimant violated the employer's expectations when she failed to immediately report the loss of a \$2,300 bank deposit to her supervisor. Claimant had medical problems and took medication that made her feel anxious, and she had heard rumors within the company that made her feel particularly fearful of losing her job. Audio recording at ~ 22:50. It does not appear on this record, however, that claimant was unable to control her conduct or lacked awareness that he conduct violated the employer's expectations for those reasons. Claimant's testimony established that she was, at all relevant times, aware of her need to report the missing money to the employer and was capable of making the report, but chose not to do so. Claimant's conduct was, at a minimum, wantonly negligent.

Claimant's conduct was not excusable as a good faith error under OAR 471-030-0038(3)(b). Claimant did not withhold her report about the missing money from the employer because of a belief doing so was consistent with the employer's expectations. She knew the employer's expectation, held the same expectation of her subordinates, and knew her failure to report the incident deprived the employer of the opportunity to investigate the missing money.

Claimant's conduct was not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For the conduct to be excusable, it must be a single or infrequent exercise of poor judgment. OAR 471-030-0038(1)(d). Claimant's exercise of poor judgment did not occur only once, when she initially discovered the money was missing, nor did it occur infrequently. Rather, it occurred repeatedly over a five month period as she repeatedly thought about the missing money, considered reporting the incident to the employer, made contact with her supervisor with the idea of reporting the incident and

then consciously failed to do so. Every time claimant considered reporting the missing money to the employer and failed to do so was another instance of poor judgment.¹ Because she repeatedly exercised that poor judgment over a five-month period, her exercise of poor judgment was not single or infrequent. Even if we had concluded it was, claimant's conduct also exceeded mere poor judgment under OAR 471-030-0038(1)(d)(D) because it caused an irreparable breach of trust in the employment relationship. Claimant was in charge of the operation of one of the employer's business, its proceeds, the employees, and the employees' adherence to the employer's expectations, including the expectation that they immediately report missing money to her. Claimant's conduct involved her protracted failure to report a significant loss of funds to the employer or police, thereby depriving the employer of the opportunity to investigate the missing money and, likely, of any possibility of recovering the missing money. Objectively considered, no reasonable employer evaluating those circumstances could continue to trust a general manager who had engaged in that conduct to be responsible for overseeing the employer's property or money.

We conclude that the employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-71839 is affirmed.

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

DATE of Service: January 12, 2017

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 Every time claimant made a conscious decision to act or not to act is considered a "judgment." OAR 471-030-0038(1)(d)(B). Every time claimant made a conscious decision to act or not to act that resulted in a wantonly negligent violation of the employer's reasonable standard of behavior is considered a "poor judgment." OAR 471-030-0038(1)(d)(C).