

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0546

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 135904). Claimant filed a timely request for hearing. On April 13, 2017, ALJ Seideman conducted a hearing, and on April 19, 2017, issued Hearing Decision 17-UI-81325, affirming the administrative decision. On May 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Deanz Greenz, a marijuana dispensary, employed claimant as a bud tender from September 28 through November 11, 2016. Claimant's duties as a bud tender included selling marijuana to customers for medical and recreational use.

(2) Sometime prior to November 2016, the employer discovered through a review of video surveillance footage that employees were "overweighing" marijuana sold to other employees, *i.e.*, giving the employee purchasers more marijuana than the purchasers had paid for. Because this "overweighing" resulted in a substantial loss of product for the employer, the employer sent a memorandum to all staff members informing them that they must stop "overweighing" marijuana sold to other employees. Audio recording at 27:12.

(3) On November 10, 2016, claimant sold a bag of marijuana to an employee customer that contained 4 grams of marijuana; the customer had paid for only 3.5 grams of marijuana. Claimant's manager observed the "overweighing," and removed the additional .5 grams of marijuana from the customer's purchase. The manager then contacted the employer's general manager, and, as instructed by the general manager, told claimant to go home and return the following day to talk with the general manager about his situation.

(4) When claimant returned home on November 10, he checked the employer's work schedule for the upcoming two weeks. Claimant noticed that the employer had taken him off the schedule.

(5) On November 11, 2016, claimant returned to the workplace to speak with the employer's general manager. The general manager told claimant that she was going to fire him for theft on account of the November 10 "overweighing" incident, that she needed to report the incident to the Oregon Liquor Control Commission (OLCC) and Oregon Health Authority (OHA), and that she was going to file a police report. After speaking with the general manager, claimant left the workplace and never returned to work for the employer.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant for misconduct.

Nature of the work separation: If the employer could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

At hearing, the employer's witness asserted that claimant quit his job because he left the workplace after his November 11 discussion with the general manager. Claimant, however, argued that the employer discharged him because of his November 10 marijuana sale to a fellow employee in which claimant attempted to give the employee more marijuana than the employee had paid for. The record shows that after this November 10 incident, the employer removed claimant's name from the work schedule. In addition, the employer's general manager told claimant that he was going to be discharged for theft for the November 10 incident, that she would report the incident to the OLCC and OHA, and that she was going to file a police report. The employer's action in removing claimant from the schedule and the general manager's statements to claimant clearly indicate that the employer was unwilling to allow claimant to continue working. Claimant's work separation was therefore a discharge.

Discharge: 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) 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, we conclude that claimant's testimony regarding the practice of "overweighing" marijuana sold to employee customers was not credible. Claimant testified that when he was trained for the job of bud tender, the trainer told him that for each gram of marijuana sold to an employee, he could provide the employee with an additional .1 or .2 grams of marijuana. Audio recording at 21:13. According to claimant, his provision of .5 grams to the employee who purchased 3.5 grams of marijuana was therefore within the limits he believed to be permissible (*e.g.*, .2 grams x 3.5 grams = .7 grams). Audio recording at 21:42. Claimant's assertion – that a "trainer" whom he did not identify by name – told him he could give employees substantially more marijuana than the employees

had paid for is improbable. In addition, claimant provided contradictory testimony regarding the amount of “overweight” he believed the employer allowed. Although he initially stated that he understood he could provide employees with up to .2 grams of additional marijuana for each gram sold, he also testified that for the employee’s purchase of 3.5 grams of marijuana, he believed he could “overweigh” the amount sold by giving the employee an additional .2 or .3 grams of marijuana. Audio recording at 19:54. Because claimant’s testimony was implausible and inconsistent, we find him not to be a credible witness. Accordingly, we have based our findings on facts in dispute on the employer’s evidence. That evidence consisted of testimony from the employer’s general manager, who stated that employees were specifically informed that they could not “overweigh” the amounts of marijuana sold to other employees.

The employer had a right to expect that claimant would perform his duties as a bud tender honestly and in compliance with the law. On November 10, 2016, a fellow employee purchased 3.5 grams of marijuana from claimant. After claimant attempted to give this customer 4 grams of marijuana, a manager who observed the transaction removed the additional .5 grams of marijuana from the customer’s purchase. Under Oregon law, an individual 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...” ORS 164.015(1). A person engages in an attempt to commit a crime “when the person intentionally engages in conduct which constitutes a substantial step toward commission of a crime.” ORS 164.405(1). Based on this record, we conclude that by “overweighing” the marijuana his coworker was purchasing, claimant engaged in conduct that was either unlawful or tantamount to unlawful conduct: he intentionally took a “substantial step” toward the commission of a theft by seeking to appropriate the employer’s property to a third person, and did so with an intent to deprive the employer of that property. Claimant’s actions were therefore at least a wantonly negligent violation of the employer’s expectations that act honestly and lawfully in performing his job duties.

Claimant’s actions cannot be excused as an isolated instance of poor judgment. Isolated acts exceed mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3) if, among other things, they violate the law or are tantamount to unlawful conduct. As discussed above, by attempting to give an employee marijuana that the employee had not paid for, claimant committed the crime of attempted theft or engaged in conduct that was tantamount to commission of that crime.

Nor can claimant’s conduct be excused as a good faith error. For the reasons explained above, we do not find credible claimant’s assertion that he sincerely believed, based on what he had been told by another employee, that the employer permitted him to provide an employee with .5 grams of marijuana that the employee had not paid for.

In sum, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Decision 17-UI-81325 is affirmed.

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

DATE of Service: May 31, 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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