

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0563

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73130). Claimant filed a timely request for hearing. On April 24, 2017, ALJ S. Lee conducted a hearing, and on April 27, 2017 issued Hearing Decision 17-UI-82008, affirming the Department's decision. On May 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Timber Products Co. employed claimant, last as a hot press operator, from February 12, 1997 to January 20, 2017.

(2) The employer sometimes allowed employees to take the employer's property for their personal use. The employer required employees to use a local sales invoice, and have it approved by a supervisor, prior to taking the employer's property off the employer's premises. Claimant understood the employer's procedures and had complied with them numerous times during his employment.

(3) On January 16, 2017, a coworker told claimant about some available "stickers," a wood scrap product the employer used as packing material but sometimes also allowed employees to take for firewood. Claimant was interested in the stickers, but had to return to work. Claimant did not tell the coworker he would take the stickers or otherwise take any steps to claim the stickers as his own. He did not obtain a local sales invoice for the stickers or ask a supervisor to approve it. Thereafter, claimant's coworker loaded the stickers into claimant's truck without telling claimant that he had done so. Claimant had not asked his coworker to load the stickers into his truck, did not authorize the coworker to load his truck, and worked the remainder of his shift without knowing that the coworker had done so.

(4) After claimant clocked out on January 16, 2017, he went to his vehicle to leave work and saw that the stickers had been loaded into his truck. Claimant could not unload the stickers by himself and lacked help. Claimant knew he needed an approved local sales invoice before removing the stickers from the employer's premises, and knew he did not have one. Claimant returned to the office to obtain

one, but the supervisors were on the mill floor. Claimant did not have his safety gear with him so he could not go onto the mill floor to find them, and he felt too tired to retrieve his safety gear so he could go onto the mill floor. Claimant decided to leave the employer's premises with the stickers even though he did not have an approved local sales invoice.

(5) On January 17, 2017, claimant reported to the workplace and promptly approached his supervisor to request a local sales invoice for the stickers he had taken home the previous night. The supervisor was new to the employer's business and was unable to assist him. During the subsequent events related to the stickers claimant had taken, the employer learned that claimant had removed the stickers without first having an approved local sales invoice. On January 20, 2017, the employer discharged claimant for removing the employer's property from its premises without an approved local sales invoice.

(6) Claimant had been subject to serious discipline in the workplace prior to the January 16, 2017 incident, but had not disciplined for any policy violation for at least a year prior to his discharge.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant's discharge was not 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. However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that claimant acted willfully or with wanton negligence in removing the stickers from the workplace on January 16, 2017, and concluded that claimant's conduct was "isolated" because he had never before removed products from the employer's premises without an approved local sales invoice and his prior discipline was "too remote in time" to form part of a pattern of willful or wantonly negligent conduct. Hearing Decision 17-UI-82008 at 3-4. We agree with the ALJ with respect to those conclusions. However the ALJ also concluded that claimant's conduct amounted to theft under Oregon law, and since unlawful acts cannot be excused as isolated instances of poor judgment claimant's conduct could not be excused. *Id.* at 4. We disagree with the ALJ as to that conclusion, and conclude that claimant's conduct was excusable as an isolated instance of poor judgment.

In order for claimant's conduct in removing the stickers from the employer's premises to have constituted theft, or been tantamount to theft, he must have removed the stickers with the "intent to deprive" the employer of the property. See ORS 164.015. An individual acts with "intent" if he "acts with a conscious objective to cause the result or to engage in the conduct so described." ORS 161.085. Although there is no factual dispute that claimant removed the stickers from the employer's premises without having the right to do so, we cannot say based on the evidence adduced at the hearing that he

removed them with a conscious objective to deprive the employer of the property. There is no evidence suggesting that claimant refused to return the stickers to the employer or that he would have refused had he been asked to return them. Rather, he acted because, without his knowledge or consent, another person had placed him in the position of having possession of the stickers at a time when claimant found himself unable to rectify the matter without taking the stickers off premises. Although claimant certainly wanted the stickers for his own, he did not ask for them to be placed in his truck, and he did not want or intend to take them off the premises without first obtaining an approved local sales invoice, as demonstrated by his efforts to find a supervisor and obtain approval prior to leaving the premises on January 16th. Claimant's conduct demonstrates that, although he did in fact remove the stickers from the employer's premises, it does not appear that he did so with the conscious objective of either depriving the employer of its property or engaging in theft. In the absence of evidence suggesting it is more likely than not that claimant acted with such intent, his act of taking the stickers without first obtaining an approved local sales invoice was not theft or tantamount to theft.

Lawful acts or acts that are not tantamount to unlawful conduct might, under certain circumstances, still be considered to exceed mere poor judgment if the acts "create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible." OAR 471-030-0038(1)(d)(D). The standard is objective, meaning the employer must prove that it is more likely than not that any reasonable employer would also have considered the conduct at issue to have exceeded mere poor judgment. Here, however, the employer did not make the necessary showing. Had claimant, for example, asked his coworker to load the stickers in his truck, found out earlier that the coworker had loaded the stickers in his truck and not taken any action to either remove the stickers or obtain an approved local sales invoice prior to taking the stickers off the premises, or taken the stickers without promptly approaching a supervisor for an approved local sales invoice the following day, we would likely conclude that claimant's act of removing the stickers without first getting approval to do so had caused an irreparable breach of trust in the employment relationship. Here, however, claimant did not do anything to cause the situation that resulted in the stickers being loaded into his transportation home after work, sought to rectify it before leaving work, and although he exercised poor judgment in choosing to leave work without approval to take the stickers with him, there is no dispute that he promptly tried to rectify the matter the following day. It is not clear whether the situation would even have come to the employer's attention had claimant not taken steps, of his own volition, to rectify his breach of procedure the following day. While there is no dispute that claimant took the stickers, and no dispute that his exercise of judgment in doing so was poor, claimant's conduct both before and after he took the stickers established his trustworthiness and his desire to comply with the employer's expectation. Objectively considered, his exercise of poor judgment did not irreparably breach the trust that any employer would have in him or make a continued employment relationship impossible; his conduct therefore did not exceed mere poor judgment.

For the reasons explained, the employer discharged claimant for an isolated instance of poor judgment. Because isolated instances of judgment are not misconduct, claimant may not be disqualified from receiving unemployment insurance benefits because of his discharge.

DECISION: Hearing Decision 17-UI-82008 is set aside, as outlined above.¹

¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.

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

DATE of Service: June 5, 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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