

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1143**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On August 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144900). Claimant filed a timely request for hearing. On September 11, 2017, ALJ Murdock conducted a hearing, and on September 14, 2017 issued Hearing Decision 17-UI-92582, affirming the Department’s decision. On September 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Nel Centro employed claimant from August 22, 2016 until August 2, 2017 as an assistant manager in its restaurant.

(2) The employer had a wine education program that permitted some employees, including claimant, to take home and consume certain wines that were less accessible to the staff to learn about the wines and educate the service staff about the wines. Claimant helped administer the program and understood its purpose was to educate the serving staff about wines that were cost prohibitive for the serving staff to sample themselves. A manager had to ring up the wine for claimant and “comp” it by discounting the wine to no cost. Transcript at 6. Wines that were available by the glass in the restaurant were available to all staff and were thus not eligible for the wine education program. Claimant understood he was not permitted to “abuse” the program. Transcript at 23.

(3) On July 3 and 7, 2017, claimant had a bottle of prosecco “comped” on each date. Exhibit 1 at 2. The prosecco claimant took home both days was not eligible for the employer’s wine education program because it was the employer’s “house prosecco,” was available to all staff by the glass, and was not expensive. On July 12, 2017, the employer’s general manager told claimant that he was not permitted to “comp” more bottles of prosecco because they did not fall under the wine education program. Exhibit 1 at 4.

(4) Before July 27, 2017, claimant was familiar with the taste and quality of the employer’s house prosecco. On July 27, 2017, claimant asked the bar manager to comp a bottle of house prosecco for claimant. The bar manager was authorized to comp purchases for other managers, but did not know the

wine education program rules, and comped the bottle of prosecco for claimant base upon his request. On July 28, the bar manager mentioned claimant's July 27 comped purchase to the general manager.

(5) On August 2, 2017, the employer discharged claimant for taking or "comping" a bottle of house prosecco without permission.

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

Claimant understood the employer expected him to refrain from abusing the wine education program. As a matter of common sense, claimant also knew or should have known that the employer expected him to pay for wine he took from the restaurant to consume at home that did not qualify to be discounted or "comped" under the wine education program. Claimant understood the purpose of the wine education program was for him to taste wine that was not accessible to the serving staff due to the cost of the wine so that he could then educate the serving staff about the wine. The general manager told claimant on July 12 that the employer's house prosecco did not fall under the wine education program. Moreover, claimant should have reasonably understood that the house prosecco did not meet the guidelines for wine under the program because it was available to all staff at a reasonable price by the glass, and because claimant was already familiar with the wine. Claimant's act of taking a bottle of house prosecco on July 27 was a willful violation of the employer's expectation that he not abuse the wine education program, "comp" prosecco, or take wine for personal consumption without paying for it.

Claimant, however, implicitly asserted that he believed in good faith that was permitted to take wine for personal consumption even if he was already familiar with the wine. Claimant testified that he believed he could "comp" the prosecco because the general manager had, on "several occasions" offered for him to take and give to other staff bottles of wine that were "on her desk." Transcript at 23-24. We find it implausible that claimant sincerely believed that the general manager's occasional gift of wine to him and other staff entitled him to take a bottle of house prosecco on July 27 when on that day, neither his general manager or other superior offered him the prosecco and the general manager had specifically told him not to "comp" any more prosecco. Claimant also argued that he believed the general manager intended to limit the serving staff, and not claimant, from tasting the house prosecco when she told him on July 12 that he should not use the prosecco. Transcript at 25. Claimant's assertion is implausible given his understanding of the purpose of the wine education program. Claimant testified that he was encouraged to familiarize himself with the employer's wine list "for [his] own personal education." Transcript at 18, 19. The preponderance of the evidence shows that claimant did not believe in good faith that consuming a bottle of wine that he was already familiar with met that objective. Claimant's

conduct cannot therefore be excused as resulting from a good faith error under the provisions of OAR 471-030-0038(3)(b).

Nor can claimant's actions be excused as an isolated instance of poor judgment under the provisions of OAR 471-030-0038(3)(b). To be considered an "isolated instance" of poor judgment, claimant's willful behavior on July 27, 2017 must have been, among other things, a single or infrequent occurrence of poor judgment rather than a repeated act of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). On this record, claimant's conduct was a single or infrequent occurrence. However, acts that are tantamount to unlawful conduct 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). Here, claimant took the employer's property. Claimant's conduct was tantamount to theft,<sup>1</sup> and therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-92582 is affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 20, 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](http://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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<sup>1</sup> ORS 164.015 provides that a person 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 thereof.