

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1392

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135813). Claimant filed a timely request for hearing. On November 17, 2017, ALJ Griffin conducted a hearing and issued Hearing Decision 17-UI-97186, affirming the Department's decision. On November 30, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Beverage Recycling Cooperative, a corporation that processes containers redeemed in Oregon, employed claimant from March 2015 to September 8, 2017 as a customer service associate.

(2) The employer prohibited theft from the company. The employer considered theft to include redeeming containers left by customers, including but not limited to those that customers abandoned or did not want to process themselves. Exhibit 1. The employer did not permit employees to accept tips. Claimant was aware of the employer's policy regarding theft and tips.

(3) In early September 2017, claimant saw a coworker speaking with another employee who was standing in line. The customer gave the employee a bag of recyclable containers. The employee took the containers into the facility, called another employee, and had that other employee come to the facility to redeem the containers at the facility for money. Claimant knew the employee who had received the containers had called the other employee to redeem the containers. The other employee gave claimant some of the money from the containers she had redeemed. Claimant knew the money was from the containers the employee had redeemed.

(4) On September 8, 2017, the employer discharged claimant because she violated its policy prohibiting theft from the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 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 that the employer expected her to refrain from taking the employer's property, including customer containers. Claimant also understood the employer prohibited employees from accepting tips from customers. We find it likely that, based on those understandings, and as a matter of common sense, claimant also knew she was prohibited from taking money redeemed from customer containers. Claimant's act of knowingly taking container redemption money from a coworker who obtained the money from containers provided by a customer was a willful violation of the employer's expectation that she not take the employer's property.

Claimant's behavior was not excusable from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant asserted that she did not violate the employer's policy because she did not personally redeem any containers and the containers were "given to" the other employee. Audio Record at 19:47-19:53, 21:07-22:12. Claimant's assertion is not persuasive because she understood the employer did not permit employees to accept tips. Moreover, claimant's attempt to find a "loophole" to avoid the employer's rule against theft does not show she believed in good faith that taking money from a customer's containers, even if they were given to an employee, would have been condoned by the employer.

Nor can claimant's conduct 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 of taking the proceeds of containers that belonged to the employer 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,¹ 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 based on this work separation.

DECISION: Hearing Decision 17-UI-97186 is affirmed.

¹ 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.

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

DATE of Service: January 4, 2018

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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