

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0754

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 103524). The employer filed a timely request for hearing. On July 9, 2018, ALJ Amesbury conducted a hearing, and on July 12, 2018, issued Order No. 18-UI-112979, concluding the employer discharged claimant for misconduct. On August 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Applebee's Neighborhood Grill – Bar employed claimant as a bartender in one of its restaurants from June 21, 2016 to May 7, 2018.

(2) Claimant's job involved preparing alcoholic beverages and serving both food and beverages to customers in the bar area. It involved entering alcoholic beverage sales in the employer's electronic point of sale system by entering drink orders using precisely matched tabs on one of several electronic pages prior to preparing the drink and serving the drink along with the resulting check to the customer. In order to generate a customer check for an alcoholic beverage, the employee was expected to "ring, review and then send" prior to the check being processed through the system, which meant that the employee would have to ring, or select, the correct drink tab or tabs, review the result, check what was on the screen for accuracy, and then enter the drink orders into the system, which would then generate a matching customer check. Transcript at 16-17. When a customer paid a check electronically by card, if the customer added a tip greater than 30% of the total on the card slip, the employee was required to get a manager to swipe for the tip at that point in time.

(3) The employer expected its bartenders to charge customers the price it set for any alcoholic beverages ordered, and it considered an intentional under charge for beverages a fraudulent act resulting in a loss of its profit and grounds for immediate termination. Claimant was trained regarding the employer's policy and processes in charging customers for drinks, was aware of its expectations and understood that he was not permitted to sell drinks to customers at discounted prices on his own initiative.

(4) The employer offered several different types of margarita drinks. Most of the margaritas were individually mixed by the bartender and ranged in price from \$6.50 to \$8.50, but the employer also had a premixed "house" margarita that cost only \$1.00. Transcript at 9-10. The preparation and appearance of a \$1.00 margarita was significantly different from the individually mixed margaritas. The employer also offered various tequilas that sold for between several dollars and \$8.50 or more per shot. The employer did not sell any tequila shots for \$1.00. Individually mixed margaritas, house margaritas and tequila shots were each entered on separate screens on the employer's point of sale system terminals so it was not possible to select one instead of the other accidentally by simply tapping the wrong button on a single screen.

(5) On May 3, 2018, claimant was working behind the bar when a guest, whom he recognized as a friend of a coworker, ordered two drinks – a flavored margarita drink and a straight shot of "Patron" tequila. Transcript at 14. Claimant entered the beverages ordered into the employer's system as two premixed "house" margaritas, but then personally prepared a "Blue Agave Mucho Margarita," which the employer sold for \$8.50, and poured a shot of Patron tequila, which the employer also sold for \$8.50, and served both drinks to that guest. He presented the guest a check for \$2.00 and the guest paid for it electronically by card with a tip for \$8.00, a 400% tip, which claimant eventually received. The coworker who was the friend of the guest learned of the transaction and reported it to the employer.

(6) The employer later investigated the transaction by obtaining a copy of the guest check for \$2.00 with an \$8.00 tip that was generated that day, and then reviewing video recordings of claimant at work at the time indicated. The video recordings reviewed showed claimant preparing the drinks in question and presenting them to the guest in question along with the check, which confirmed the coworker's report.

(7) On May 7, 2018, the employer's area director, the restaurant's general manager and a human resources employee met with claimant, advised him why they were meeting with him, viewed the recordings and guest check with him, and requested an explanation for the discrepancies shown. Claimant admitted that he had rung in the wrong drinks and that he recognized the guest in question as the friend of a coworker, but offered no explanation for his conduct. That day the employer discharged claimant for fraudulently giving away alcohol at a discounted price to a known customer.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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) (January 11, 2018) 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). In a discharge case, the employer has the

burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to charge its customers the price it set for any alcoholic beverages he served and to follow its processes and procedures for accurately entering drink orders into its POS system. Claimant acknowledged he was aware of the employer's expectations in that regard, and that he knew he was not allowed to intentionally undercharge customers for drinks. Transcript at 21-23.

The employer discharged claimant for under-charging a known customer for two drinks on May 3, 2018. The employer's general manager testified that when claimant was confronted with the videos and guest check on the day he was discharged, he explained that "the guest was having...a difficult day and he was trying to help him out." Transcript at 10. Although at hearing claimant denied making that statement, he admitted that he observed that the guest "did not seem happy and good" on the day in question, and that he entered the wrong drink information into the employer's system and undercharged the guest for the drinks he ordered. Transcript at 24. Moreover, claimant did not dispute that he received an \$8.00 tip from the guest for the \$2.00 bill he presented to him. Claimant's explanation at hearing that he mistakenly entered the drink information into the employer's system because he was confused due to some medical issues he was experiencing that day was not credible considering that both the general manager and area director testified that he did not offer that explanation to the employer when he was discharged. Moreover, claimant did not dispute that it would have been difficult for him to mistakenly enter the information he did for the drinks he prepared given the separate screens he would have had to navigate to, the "ring, review and then send" confirmation he had to have gone through, and the tip authorization he would have had to have obtained. More likely than not, claimant intentionally failed to follow the employer's expectations and procedures regarding alcoholic beverage sales to benefit both the guest in question and himself at the expense of the employer's profit margin.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Although claimant's conduct may have been isolated, his conduct was tantamount to theft in the third degree¹ and under OAR 471-030-0038(1)(d)(D), acts which that are tantamount to unlawful conduct exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

¹ ORS 164.015 defines theft:

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:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof;

* * *

A person commits the crime of theft in the third degree if the person commits theft as defined in ORS 164.015 and the total value of the property in a single or aggregate transaction is under \$100. ORS 164.043.

Nor can claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or show at hearing or before the employer at discharge that he misunderstood the employer's expectations or that he sincerely believed, or had a factual basis for believing, that the employer would tolerate him using his own discretion in deciding what to charge a customer for drinks.

The employer discharged claimant for misconduct under ORS 657.176(2)(a), and claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-112979 is affirmed.

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

DATE of Service: September 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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