

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0776**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101720). Claimant filed a timely request for hearing. On July 26, 2018, ALJ Seideman conducted a hearing, and on July 30, 2018 issued Order No. 18-UI-114015, affirming the Department's decision. On August 7, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Atrium Hospitality LLC employed claimant as a bartender at a hotel bar from March 7, 2014 until May 10, 2018.

(2) The employer expected claimant to ring up all cash sales on the cash register and to place all cash received from sales in the till and deposit it with the employer. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Sometime before May 8, 2018, the employer became concerned that claimant was not accurately accounting for all cash she received from sales and might be misappropriating it.

(4) On May 8, 2018, the employer conducted an audit of claimant's cash handling during her shift. Claimant was not informed of the audit in advance or when it was happening. The auditor ordered an \$8 glass of wine from claimant and gave claimant \$20 to pay for it. Claimant rang up "no sale" on the cash register, returned \$12 in change to the auditor and served the wine. Claimant did not give the auditor a receipt for the wine she had purchased. The next day, the auditor checked with the employer and learned that the cash sale of the \$8 glass of wine was not recorded in the employer's system and there

was no record that \$8 in cash had been received for the glass of wine. There was no cash overage recorded on claimant's shift on May 8, and the \$8 was unaccounted for.

(5) Sometime after May 8, 2018, the general manager asked the director of accounting to prepare a report comparing the cash sales recorded on claimant's shift with those of the employer's two other bartenders. For the period of March 24 through May 8, 2018 cash sales accounted for 10.67 percent and 16.72 percent, respectively, of the other two bartenders' total sales as compared to 1.05 percent of claimant's total sales.

(6) On May 10, 2018, after claimant reported for work, she was called to a meeting with the general manager and a human resources representative. The employer representatives told claimant she was being discharged because of her handling of the cash transaction with the auditor on May 8, 2018 and the employer's belief that she had stolen the \$8, and gave a document to her notifying her that she was discharged. Claimant became upset, threw the notice of discharge back at the general manager and said she "just wanted to get it over with." Transcript at 51. Claimant did not give an explanation for the May 8, 2018 transaction.

(7) On May 14, 2018, after she was discharged, claimant called the director of accounting and told him that there was an envelope with \$11 cash in it that she had placed in the lottery drawer because her till had been over \$11 after her May 8 shift. Claimant asked the director to retrieve the envelope while she waited on hold. Although he searched for that envelope, the director told claimant that he was not able to locate it.

**CONCLUSIONS AND REASONS:** 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 connected with work. 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. The employer carries the burden to prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not challenge the accuracy of what the auditor observed on May 8, 2018 or that she failed generate a cash receipt for the transaction with the auditor. Absent evidence to the contrary, the auditor's observations and the results of her contact the next day with the employer's accounting department strongly suggest that claimant deliberately misappropriated \$8 from the employer on May 8, 2018.

Claimant did not give any explanation, let alone an innocent explanation, for how she could have rung up the transaction with the auditor as "no sale" or why she would have failed to give a receipt to the auditor for the auditor's cash purchase. Claimant also did not explain why the lack of a cash receipt being generated did not operate to alert her that she had failed to ring up the auditor's transaction as a cash purchase. While claimant contended that her till was over \$11 on May 8, 2018 and she put that overage in an envelope that she left in the lottery drawer, which implies that she did not misappropriate the \$8 from the cash sale to the auditor, the accuracy of that contention is doubtful. First, it would be

expected that claimant would bring up this explanation for the missing \$8 at the meeting when she was being discharged if it were true, which she did not do. Second, it would be expected that, if the envelope existed, claimant would have alerted the employer to it soon after her discharge, rather than waiting four days to do so. Third, the director of accounting was not able to locate this envelope when claimant finally told him about it, which further suggests that the envelope never existed. The auditor's observations on May 8, 2018, the auditor's follow up with the employer on May 9, 2018 and claimant's lack of a persuasive explanation for her actions on May 8, 2018 show that the most likely explanation for claimant's behavior that day was that she willfully misappropriated from the employer the \$8 received from the auditor for the glass of wine.

Claimant's willful behavior in violation of the employer's standards may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be considered an "isolated instance of poor judgment" if, among other things, that behavior did not violate the law or was not tantamount to unlawful conduct. OAR 471-030-0038(1)(d)(D). Here, claimant's behavior on May 8 was undertaken with intent to deprive the employer of cash that belonged to it and, as such, was, at best, tantamount to the crime of theft in the third degree. ORS 164.015(1), ORS 164.043. Because claimant's behavior was unlawful, it may not be excused as an isolated instance of poor judgment.

Nor may claimant's behavior be excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that her actions on May 8, 2018 arose from a misunderstanding of the employer's standards or a sincere belief that the employer would condone them. There is insufficient evidence in the record to show a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

**DECISION:** Order No. 18-UI-114015 is affirmed.

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

**DATE of Service:** September 10, 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](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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