

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0056

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On November 5, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 150030). The employer filed a timely request for hearing. On December 30, 2013, ALJ Seideman conducted a hearing, and on January 7, 2014 issued Hearing Decision 14-UI-08052, affirming the Department's decision. On January 9, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Classic Lube Service Center employed claimant as a lube technician from November 20, 2007 to October 10, 2013.

(2) The employer did not have a written drug and alcohol policy. However, the employer expected employees to refrain from illegal drug use while at work. Claimant understood that expectation.

(3) On October 10, 2013, claimant illegally smoked marijuana while at work. The employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer had a right to expect claimant to refrain from illegal drug use while at work. Claimant understood that expectation. The primary issue in this case is whether claimant smoked marijuana at work on October 10, 2013. In Hearing Decision 14-UI-08052, that ALJ concluded there was “absolutely no evidence” that claimant did so, only the employer’s “suspicion” that he did so.<sup>1</sup> However, the ALJ’s analysis overlooks the fact that the employer’s manager testified that after he discharged claimant for smoking marijuana at work, claimant apologized, stating the he was “sorry for letting [the manager] down.” Transcript at 6, 17. Claimant did not refute that testimony, or assert that he was not apologizing for smoking marijuana at work.

The ALJ’s analysis also overlooks the employer’s service technician’s testimony that claimant admitted smoking marijuana at work on October 10, 2013. Transcript at 25. The ALJ’s analysis also overlooks the assistant manager’s testimony that a week prior to October 10, 2013, he found a glass marijuana pipe at work, and that claimant admitted the pipe was his, and promised that it would never happen again. Transcript at 21. Although claimant denied making those admissions, we find the combined testimony of the employer’s manager, assistant manager, and service technician sufficient to show, more likely than not, that claimant smoked marijuana at work on October 10, 2013.

Claimant therefore willfully violated the employers’ expectation that he refrain from illegal drug use while at work. Claimant’s use of marijuana at work cannot be excused as an isolated instance of poor judgment because it violated the law, or was tantamount to unlawful conduct, and therefore exceeded mere poor judgment. *See* OAR 471-030-0038(1)(d)(D). Claimant’s conduct cannot be excused as a good faith error because the record fails to show claimant believed, or had a rational basis for believing, the employer allowed employees to engage in illegal drug use at work.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

**DECISION:** Hearing Decision 14-UI-08052 is set aside, as outlined above.

Susan Rossiter and D. E. Larson;  
Tony Corcoran, not participating.

**DATE of Service:** February 5, 2014

**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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

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<sup>1</sup> Hearing Decision 14-UI-08052 at 3.