

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0126

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 21, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125657). On August 31, 2013, claimant filed a timely request for hearing. On October 21, 2013, the Office of Administrative Hearings (OAH) mailed notice to the parties of a hearing scheduled for October 29, 2013. On October 29, 2013, claimant did not appear at the scheduled hearing, and ALJ Frank issued Hearing Decision 13-UI-03484, dismissing claimant's request for a hearing. On November 13, 2013, claimant filed a request to reopen the hearing. On January 8, 2014, ALJ Holmes-Swanson conducted a hearing and on January 13, 2014 issued Hearing Decision 14-UI-08457, allowing claimant's request to reopen and concluding the employer discharged claimant but not for misconduct. On January 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant as a produce clerk from June 25, 2010 until July 26, 2013.

(2) The employer expected claimant to answer all questions on its employment application honestly. Claimant was aware of the employer's expectations.

(3) The employer had a progressive disciplinary policy that allowed employees to receive in one year a verbal warning, a written warning and a suspension before they were discharged for the next disciplinary infraction. The employer also had an attendance policy under which employees accumulated points for unexcused absences regardless of the reason for the absence. Employees were allowed 15 attendance points in a rolling year before they were subject to disciplinary sanctions. Claimant was aware of the employer's disciplinary and attendance policies.

(4) In approximately early May 2010, claimant was paroled from prison after serving a five year sentence for a felony crime. After his release, claimant applied for many jobs and disclosed his criminal convictions on those job applications. Claimant did not receive any responses from those potential employers. When claimant applied for a position with the employer in June 2013, he intentionally did not complete the section of the application that inquired about his criminal convictions because he thought it would prevent him from being hired. In the application, claimant left blank a section that asked him to list his criminal convictions. Claimant signed an authorization allowing the employer to conduct a search of his criminal background. The employer hired claimant. The employer did not research claimant's criminal record.

(5) In approximately May 2013, a police detective came to the workplace to speak with claimant. The detective told claimant he was investigating an "old case" and asked claimant to call him at a convenient time so they could talk. Transcript at 23. The detective gave his card to claimant. Claimant had not engaged in any criminal activity since he was paroled, and did not contact the detective.

(6) By July 17, 2013, claimant had received a verbal warning and a written warning in the past year for accumulating points under the employer's attendance policy. The absences from the workplace for which claimant had accumulated attendance points were for illness, injury and medical appointments.

(7) On July 17, 2013, the police detective who had contacted claimant in May 2013 came to the workplace accompanied by two officers. The officers took claimant into custody. The detective told claimant, "This is what happens when you don't call me." Transcript at 24. The officers removed claimant from the workplace. Claimant was not charged with any crime, and was released from police custody on that same day approximately two hours after he had had been taken from the workplace. As a result of this detention, claimant was not able to complete his scheduled work shift.

(8) The employer considered claimant's absence from the workplace after the police took him to custody on July 17, 2013 to be an unexcused failure to complete his shift for which he accumulated two attendance points. As a result of accruing these additional attendance points, claimant had accumulated sufficient attendance points under the employer's policy to be subject to the next level of disciplinary action. On July 17, 2013, the employer suspended claimant for attendance violations. Because claimant had already received verbal and written warnings under the employer's progressive disciplinary policy, the next disciplinary sanction available for an attendance violation was suspension.

(9) After July 17, 2013, the employer investigated claimant's criminal record since it thought he had been arrested on July 17, 2013. The employer discovered that claimant had at least one criminal conviction which he did not disclose on his initial job application. The employer considered claimant's failure to disclose that conviction to be a violation of its disciplinary policy. Because the employer had already suspended claimant for violating its attendance policy, it thought it had no choice other than to proceed to the next disciplinary stage, which was discharging claimant. If claimant had not already been suspended for attendance violations, the employer would not have discharged claimant for failing to disclose his criminal convictions on the initial application.

(10) On July 26, 2013, the employer discharged claimant under its progressive disciplinary policy.

(11) On approximately October 8, 2013, claimant's house was foreclosed on and he was forced to move. At that time, claimant had not received notice of any scheduled hearing on his claim for unemployment benefits. Claimant was temporarily homeless and then, in late October 2013, he arranged to stay with his girlfriend's brother. During this time, claimant completed a change of address form with the United States mail Service (USPS) to direct his mail to "General Delivery," which would allow him to pick up his mail at the business counter in the post office because he did not have a stable address. Claimant did not have a car and his girlfriend's brother lived approximately four to five miles from the post office. Claimant arranged for his girlfriend or his sister to take him to the post office for his mail. Because general delivery mail could only be picked up during the post office's business hours and his sister and girlfriend worked, claimant was only able to retrieve his mail once or twice per week.

(12) On October 21, 2013, claimant called OAH to ask if a hearing had been scheduled on his unemployment claim. The OAH representative with whom claimant spoke told him a hearing had not yet been scheduled but, given the date he had filed the request for hearing, it might be scheduled soon. Claimant did not think a hearing would be scheduled as quickly as a week after he called OAH. On October 21, 2013, the same day claimant had called, OAH mailed to claimant the notice scheduling the hearing eight days later, on October 29, 2013.

(13) On October 31, 2013, claimant picked up his mail at the post office and received the notice scheduling the hearing for October 29, 2013. Because the hearing had already been held when he received the notice, claimant immediately called OAH to determine the steps he might take to remedy his failure to appear at the hearing. Claimant filed his written request to reopen on November 13, 2013.

CONCLUSIONS AND REASONS: Claimant showed good cause to reopen the hearing and his request is allowed. The employer discharged claimant but not for misconduct.

The Request to Reopen. ORS 657.270(5) allows an ALJ to reopen a hearing if the party requesting the reopening failed to appear at the hearing, the request is made within twenty days of the mailing of the hearing decision and the party shows good cause for failing to appear at the hearing. OAR 471-040-0040(2) (February 10, 2012) states that "good cause" exists when the party's failure to appear results from an excusable mistake or factors beyond the party's reasonable control. In this case, claimant filed his request to reopen on November 13, 2013, which was sixteen days after the mailing of the October 29, 2013 hearing decision. Because claimant's request to reopen was filed within the twenty day period following the mailing of the hearing decision, it was timely.

In view of the circumstance of losing his house and not having a stable address, claimant took the reasonable action of having his mail forwarded to "general delivery" at the post office. Because claimant did not have his own transportation, was not staying within reasonable walking distance of the post office and could only pick up general delivery mail during the post office's normal business hours, it was reasonable for claimant to retrieve his mail only once or twice per week since the people he relied on to transport him worked during post office business hours. That OAH allowed only eight days between the day it mailed the hearing notice to claimant and the date of the hearing was a factor beyond claimant's reasonable control. Claimant reasonably should not have foreseen so short a timeline for the scheduling of the hearing and increased the frequency with which he picked up his mail. At worst, claimant's belief that his once or twice weekly trips to the post office were sufficient to receive timely

notice of his hearing was an excusable mistake. On these facts, claimant has shown good cause to reopen the hearing.

The Work Separation. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

The store manager testified that the employer discharged claimant for not disclosing his criminal record on his initial application because, when the employer learned of that infraction, it had already issued oral and written warnings and had suspended claimant for attendance violations, and the next step in the employer's policy of progressive discipline policy required discharge. Transcript at 19, 20. The store manager conceded that the employer would not have discharged claimant for allegedly falsifying the application without claimant having had already proceeded through all lesser disciplinary sanctions as a result of alleged attendance policy violations. Transcript at 20. Although the employer might have discharged claimant because it was the only sanction remaining available under its policy, EAB nonetheless must evaluate the incident for which the employer discharged claimant to determine whether, on its own, it involved claimant's disqualifying misconduct under OAR 471-030-0038(3)(a). *See e.g. Jody M. Mitchell* (Employment Appeals Board, 10-AB-2293, August 24, 2010) (while claimant was discharged for accruing her third violation of employer's attendance policy, to disqualify claimant from benefits, it must be determined whether that third violation involved misconduct under OAR 471-030-0038(3)(a)); *see generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, to find that the individual is disqualified from benefits, the last occurrence must still be evaluated to whether it was misconduct within the meaning of OAR 471-030-0038(3)(a)). Accordingly, the issue before EAB is whether claimant's behavior in not disclosing his criminal conviction on his initial application for employment was willful or wantonly negligent behavior that was not excused under the exculpatory provisions of OAR 471-039-0038(3)(b).

Claimant intentionally left blank the section of his job application that inquired into his criminal background in order to keep the employer unaware of his criminal convictions. Transcript at 23, 34. Claimant did so despite his awareness that the employer expected him to provide complete and accurate information on the application. Even though claimant misled the employer because he thought full disclosure of his criminal background would cause the employer not to consider hiring him, his actions were intentional and with conscious awareness of what he was doing. Claimant's failure to disclose his criminal background on the employer's application was a willful violation of the employer's expectations.

Claimant's willful violation of the employer's expectations must be excused from constituting misconduct if it was an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). An "isolated instance" of poor judgment means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-

0038(1)(d)(A). To qualify as excusable behavior, a claimant's conduct must also not have exceeded mere poor judgment by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

The employer presented evidence at hearing of claimant's past attendance violations which, if accompanied by the requisite mental state, might show that claimant's behavior in misleading the employer on the employment application was not isolated. Claimant contended that, with the exception of his failure to complete his shift on July 17, 2013, the absences for which he accrued attendance points were for illness, injury or doctor's appointment. Transcript at 24, 25, 31. The store manager's testimony largely corroborated claimant's contention. Transcript at 18. Even though they might violate the employer's point-based attendance policy, absences due to illness or for other medical reasons are not wantonly negligent violations of the employer's expectations and are not misconduct. *See* OAR 471-030-0038(3)(b). Although claimant accrued a few attendance points for leaving his shift early, he contended that he had either a supervisor or lead worker's permission when he had done so. Transcript at 28, 31, 33. Leaving the workplace early with permission is not a wantonly negligent violation of the employer's expectations. The employer did not present direct evidence that any of claimant's absences before July 17, 2013 resulted from his willful or wantonly negligent behavior. The employer failed to meet its burden to establish that claimant's behavior in accruing attendance points before July 17, 2013 was a willful or wantonly negligent violation of its attendance expectations.

On July 17, 2013, claimant accrued attendance points for an unexcused failure to complete his shift after police officers took him into custody. Claimant was not charged with any crime, but was taken into custody for failing to contact a police detective for an interview about an "old case" in which claimant was apparently not a suspect. Given what the detective told claimant, claimant reasonably did not think contacting the detective was an urgent matter, and reasonably did not anticipate the police would take him into custody for failing to do so. Because the events that led to claimant's removal from the workplace, and his violation of the employer's attendance policy, were not reasonably foreseeable, claimant's failure to complete his shift was not the result of his willful or wantonly negligent behavior. Viewed in sum, the employer did not demonstrate by a preponderance of the evidence that any of claimant's past violations of its attendance policy were misconduct. Therefore, claimant's behavior in violating the employer's expectations when he completed his initial employment application was isolated and is excused under OAR 471-030-0038(3)(b) if it did not exceed mere poor judgment.

The employer did not contend that claimant's behavior in not disclosing his criminal past fundamentally breached the employment relationship. Indeed, the store manager candidly testified that, if claimant had no attendance violations and a lesser disciplinary sanction had remained available, claimant would not have been discharged for failing to disclose his criminal record on employment application. Transcript at 19, 20. We interpret the store manager's statement to mean that the employer did not consider claimant's misrepresentation about his past to exceed mere poor judgment or that, based on that misrepresentation, the employer could no longer trust claimant's behavior in the workplace. The store manager's position establishes that claimant's behavior in failing to disclose his criminal background on the initial employment application did not cause an irreparable breach of trust in claimant's employment relationship with this employer or otherwise make a continued employment relationship impossible. Because claimant's violation of the employer's standards by the manner in which claimant completed the employment application was an isolated violation, and his behavior did not exceed the employer's

definition of mere poor judgment, that violation is excused from constituting misconduct under OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-08457 is affirmed.

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

DATE of Service: February 25, 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>.

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