

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0196

*Reversed
Disqualification*

PROCEDURAL HISTORY: On November 20, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92904). Claimant filed a timely request for hearing. On January 17, 2014, ALJ Clink conducted a hearing, and on January 24, 2014 issued Hearing Decision 14-UI-09207, reversing the Department's decision. On January 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument.

FINDINGS OF FACT: (1) Peco Inc. employed claimant as a production employee with lead responsibilities from September 9, 2011 to October 30, 2013.

(2) The employer had a written policy stating that employees were subject to immediate discharge without a previous warning for committing a major infraction, including dishonesty or the inappropriate use of the employer's email system. Claimant was aware of the employer's policy.

(3) From September 17 to October 23, 2013, claimant sent a female employee with whom he had a personal relationship approximately 180 personal emails at while he was on duty at work, and not on break. On October 24, 2013, the employer's human resources manager interviewed claimant to investigate the matter, and informed claimant that it was imperative for him to tell the truth because being dishonest in an investigation was grounds for termination. Claimant understood the employer expected him to answer the human resources manager's questions honestly.

(4) The human resources manager asked claimant if he had a personal relationship with the female employee. Claimant stated that he did not. The human resources manager asked claimant about the amount of time he spent sending personal emails at work. Claimant stated that he only sent emails to his wife, and spent only seconds per day doing so. The human resources manager asked claimant if he sent personal emails to the female employee. Claimant denied doing so.

(5) The human resources informed claimant that the female employee admitted having a personal relationship with claimant. Claimant again denied having a personal relationship with the female employee, and again denied sending her personal emails. The human resources manager showed claimant copies of the 180 personal emails he had sent the female employee, and claimant then admitted he spent approximately 20 minutes per day on personal emails. However, claimant continued to deny having a personal relationship with the female employee.

(6) The employer discharged claimant for dishonesty.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, that 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. 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).

In Hearing Decision 14-UI-09207, the ALJ concluded that to the extent the employer discharged claimant for dishonesty, the discharge was not for misconduct because the employer did not have “the right to know the claimant’s personal affairs or . . . require him to share such personal details.”¹ However, the employer was investigating whether claimant violated its policy against the inappropriate use of its email system, and therefore had the right to expect him to be honest during the investigation. Claimant knew that lying to the human resources manager violated the employer’s expectations, and willfully violated those expectations.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. Acts that create irreparable breaches of trust in the employment relationship make a continued relationship impossible, 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). Claimant’s repeated failure to answer the human resources director’s questions honestly was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible.² His conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

¹ Hearing Decision 14-UI-09207 at 3.

² See accord *Morgan J. Wichman* (Employment Appeals Board, 13-AB-1101, July 26, 2013) (dishonesty exceeded mere poor judgment when lied about internet searches); *Brenda D. Barnes* (Employment Appeals Board, 11-AB-0651, March 11, 2011) (dishonesty exceeded mere poor judgment when falsified a time card entry); *Joseph A. Brucken* (Employment Appeals

Claimant's conduct cannot be excused as a good faith error. Claimant willfully violated the employer's expectation that he be honest during its investigation. His conduct therefore was not the result of an error in his understanding of those expectations.

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

DECISION: Hearing Decision 14-UI-09207 is set aside, as outlined above.

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

DATE of Service: March 4, 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.

Board, 11-AB-0614, March 9, 2011) (dishonesty exceeded mere poor judgment when falsified a computer record); *Tara R. Pape* (Employment Appeals Board, 10-AB-3851, December 30, 2010) (dishonesty exceeded mere poor judgment when falsified a certification card and lied that card was stolen); *Rhonda M. Gosso* (Employment Appeals Board, 10-AB-1294, June 7, 2010) (dishonesty exceeded mere poor judgment when lied during an investigation); *Robert M. Bien* (Employment Appeals Board, 09-AB-0319, February 23, 2009) (dishonesty exceeded mere poor judgment when falsified job application); *Romaldo G. Munoz* (Employment Appeals Board, 08-AB-2007, November 3, 2008) (dishonesty exceeded mere poor judgment when lied about whether work was performed); *Richard T. Christie* (Employment Appeals Board, 08-AB-1566, August 28, 2008) (dishonesty exceeded mere poor judgment when falsified job application); *Jacob W. Smith* (Employment Appeals Board, 08-AB-1586, August 27, 2008), *Oregon Court of Appeals aff'd w/o opinion September 9, 2009* (dishonesty exceeded mere poor judgment when lied about whether work was performed).