

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0327

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On December 4, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91720). Claimant filed a timely request for hearing. On January 27, 2014, ALJ S. Lee conducted a hearing, and on February 21, 2014, issued Hearing Decision 14-UI-10900, affirming the Department's decision. On February 26, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he contended for the first time that he believed his father was not at his parents' house when he visited it on November 2, 2013, and that the ensuing physical altercation between claimant and his father was therefore not foreseeable to claimant. Written Argument at 2. However, claimant did not state any such belief at the hearing, nor did he allude to it, as would be reasonably expected if it was true, when the ALJ asked him to explain why he went to his parents' house and tried to speak to his father when he knew that his father had a propensity for physically fighting with him. Transcript at 21. We discount as self-serving facts asserted for the first time in a written argument prepared after the hearing decision was issued, particularly when they apparently contradict the plain meaning of the party's hearing testimony. Because claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering this new fact during the hearing, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) First Response, Inc. employed claimant as private security officer from May 15, 2012 until November 13, 2013.

(2) As a condition of employment, the employer required all security officers, including claimant to have and maintain certification as a private security professional with the Oregon Department of Public Safety Standards and Training (DPSST). Claimant was aware of the employer's expectations.

(3) In 2012, claimant graduated from college where he pursued a course of study in the field of corrections and private security. At school, claimant received training on the standards for obtaining and maintaining certification through DPSST. Claimant was aware that activities outside of work could affect a DPSST certification. By May 2012, claimant had obtained his DPSST certification in private security.

(4) Before November 2, 2013, claimant had an emotionally volatile and contentious relationship with his father and other family members. During the last twenty years, claimant and his father had often argued, and on several occasions the arguments became physical. Many times, claimant's father had punched claimant during those arguments. Claimant's mother usually intervened to stop the fights. Beginning in approximately 2010, after claimant was married, claimant came to believe his parents were "rude" to his wife and he argued with his parents about their treatment of her. Transcript at 18. Claimant and his parents had ongoing arguments over their treatment of his wife.

(5) On November 2, 2013, claimant decided to go to his parents' house to tell his mother that she needed to call his wife to "make things right." Transcript at 16. Claimant intended to give his wife's phone number to his mother. Claimant had decided that he was "not going to talk to them [his parents] anymore until they made things right with [his] wife." Transcript at 22.

(6) On November 2, 2013, claimant went unannounced to his parents' house. Claimant's mother was not at the house but claimant's father and a nephew were. Claimant tried to give his wife's phone number to his father to pass it on to claimant's mother when she returned. At that point, claimant and his father started arguing about claimant's wife and "calling each other names and stuff like that." Transcript at 16. Claimant's father told claimant to leave, but claimant did not. The argument became physical and claimant injured his father. At some point, claimant left his parents' house. Claimant's father called the police to report the fight. The police came to the house and interviewed claimant's father and the nephew, who had witnessed the fight. The police then went to claimant's house and arrested claimant on charges of burglary in the first degree and assault in the fourth degree.

(7) On November 8, 2013, DPSST notified the employer that claimant's certification as a private security professional was suspended due to the crimes with which he was charged.

(8) On November 13, 2013, the employer discharged claimant as a result of the suspension of his DPSST certification.

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. OAR 471-030-0038(3)(c) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved so long as such failure is reasonably attributable to the individual. In this context, "wanton negligence" means 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 the individual's failure to maintain such a license, certification or other similar authority. *See* OAR 471-030-0038(1)(c).

Claimant testified that was aware that he needed to maintain his DPSST certification to continue to work for the employer as a security officer. Transcript at 14. DPSST regulations state that a denial or suspension of a certification is mandatory if an individual has been convicted within the last ten years of, among other things, any felony or "person class A misdemeanor." OAR 259-060-0300(2)(c)(A), OAR 259-060-0300(2)(c)(B). DPSST regulations also state that DPSST may issue an emergency order suspending an individual's certification if the individual has been charged, but not yet convicted, of any mandatory disqualifying crime. OAR 259-060-0300(3). Burglary in the first degree is a class A felony. ORS 164.225(2). Assault IV is a "person class A misdemeanor." ORS 163.160(2); OAR 213-003-001(15). Based on the crimes with which claimant was charged, DPSST was authorized to suspend claimant's certification. Based on the fact that DPSST's standards for suspension are publicly published in its governing regulations, and the fact that claimant received college training on those standards, claimant should reasonably have been aware of them. Although claimant argued at hearing that he thought his certification could be suspended only if he was convicted of a crime, this position ignores the language of the applicable regulation. Transcript at 15, 23. OAR 471-030-0038(1)(c) requires for wanton negligence only that claimant "should have known" certain behavior was proscribed, and does not require that claimant, in fact, was actually subjectively aware of the proscription.

Claimant argued vigorously at hearing that he did not commit the crimes with which he was charged, and that he neither was at his parents' premises without their permission on November 2, 2013 nor did he physically strike his father that day. Transcript at 16, 17, 21. Claimant's father and his nephew, who witnessed the altercation, did not testify at hearing. However, the police officers who ultimately arrested and charged claimant with the crimes of burglary and assault, were required to have "probable cause" to believe that crimes had been committed and claimant had committed those crimes before they arrested claimant. ORS 133.310. "Probable cause" means that the police, after their interview with claimant's father and claimant's nephew, had a "substantial objective basis for believing that more likely than not that an offense has been committed and [the] person to be arrested has committed it." ORS 131.005(15). Relying on the undisputed fact of claimant's arrest, it appears more likely than not, that claimant did not leave his parents' house after being instructed to do so on November 2, 2013, which resulted in the burglary charge. *See* ORS 164.225(1) and ORS 164.215(1). It also appears more likely than not that claimant intentionally, knowingly or recklessly caused a physical injury to his father on November 2, 2013, which resulted in the assault charge. ORS 163.160.

Regardless of the assertions he makes in his written argument, claimant did not contend at hearing that he believed that his father was not his parents' house on November 2, 2013 when he went to that house. We can only infer from his testimony that claimant did not consider whether his father would be at the house before he went or that claimant wanted to talk with his father as well as with his mother. Although we do not necessarily infer that claimant went to his parents' house with the intention of assaulting his father, based on claimant's account of his past interactions with his father and the ongoing and acrimonious dispute over the treatment of claimant's wife, he knew or should have known there was a distinct possibility that his visit might result in a physical altercation in which he injured his father.

We strongly disagree with the contention in claimant's written argument that, under the circumstances, it was "unlikely anything unpleasant would occur" when he visited his parents' house. Written Argument at 2. Claimant chose to remain on his parents' premises and to physically injure his father when he knew or should have known that such behavior might result in criminal charges against him. Claimant also knew or should have known that if criminal charges were brought against him for his behavior on November 2, 2013 it would probably result in an emergency suspension of his DPSST certification. In light of what he knew and should have known, claimant's behavior on November 2, 2013, at least in assaulting his father, showed a conspicuous indifference to the consequence of his behavior. Claimant's failure to maintain the DPSST credential to perform his job was reasonably attributable to his behavior and his indifference to the consequences of his actions. It was wantonly negligent.

Claimant contended in his written argument that, if he engaged in misconduct on November 2, 2013, it was excusable as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). However, since 2004, the Department has consistently interpreted violations of OAR 471-030-0038(3)(c), the regulatory provision addressing the loss of occupational licenses, as a form of misconduct per se that it not subject to any of the general exculpatory provisions of OAR 471-030-0038(3)(b). See December 27, 2004 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (the exceptions to misconduct under OAR 471-030-0038(3)(b) do not apply to behavior falling under OAR 471-030-0038(3)(c). EAB decisions are in accord with the Department's interpretation. See e.g. *Monica G. Frame* (Employment Appeals Board, 12-AB-3008, November 15, 2012); *Jaqueline A. Linville* (Employment Appeals Board, 12-AB-2665, October 23, 2012); *Steven A. Simpson* (Employment Appeals Board, 11-AB-0602, March 10, 2011); *Suzanne g. Franklin* (Employment Appeals Board, 11-AB-0569, March 7, 2011). Since we have determined that claimant's loss of his DPSST certification falls within OAR 471-030-0038(3)(c), it cannot be excused as either an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-10900 is affirmed.

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

DATE of Service: March 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>.

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.