

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0391

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 1, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115611). Claimant filed a timely request for hearing. On January 2, January 14 and February 25, 2014, ALJ Shoemake conducted a hearing, and on March 5, 2014 issued Hearing Decision 14-UI-11708, affirming the Department's decision. On March 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**. We write only to further address whether the employer discharged claimant for misconduct, and not an isolated instance of poor judgment.

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). For an act to be isolated, the exercise of poor judgment must be 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). Acts that are tantamount to unlawful conduct or that create irreparable breaches of trust in the employment relationship 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).

In Hearing Decision 14-UI-11708, the ALJ concluded that the employer discharged claimant for willfully violating the employer's reasonable expectations by intentionally reporting working more time than he actually did on September 11, 2013.¹ The ALJ further concluded that the employer discharged claimant for misconduct because his "time card fraud" was "tantamount to theft," and therefore exceeded mere poor judgment.² We agree with the ALJ's finding that claimant intentionally reported

¹ Hearing Decision 14-UI-11708 at 4.

² *Id.*

working more time than he actually did, and her implicit finding that he did so with the intent of being paid for time that he did not work. We therefore agree with the ALJ's conclusion that claimant's conduct was tantamount to theft, or at least attempted theft.³ Intentionally reporting that he worked more hours than he actually did in order to receive pay to which he was not entitled also was an act of dishonesty sufficient to create an irreparable breach of trust in the employment relationship, and therefore exceeded mere poor judgment. Regardless, claimant also exercised poor judgment on prior occasions, in repeatedly failing to follow the employer's call in procedures when he was absent from work, and failing to follow the employer's policy requiring him to notify the employer that he was taking a prescription medication that could impair his ability to work safely.⁴ Claimant also exercised poor judgment in being dishonest with the employer during the September 12, 2013 investigatory meeting, and failing to follow the employer's instruction to leave work immediately after the September 19, 2013 investigatory meeting.⁵ Claimant's exercise of poor judgment in intentionally reporting working more time than he actually did on September 11, 2013 therefore was part of a pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence. The employer therefore discharged claimant for misconduct, and not an isolated instance of poor judgment.

DECISION: Hearing Decision 14-UI-11708 is affirmed.

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

DATE of Service: April 3, 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.

³ ORS 164.015 provides that a person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person takes, appropriates, obtains or withholds such property from an owner thereof. ORS 161.405 provides that a person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.

⁴ *Id.* at 2.

⁵ *Id.*