

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0536

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 165805). The employer filed a timely request for hearing. On March 19, 2014, ALJ Murdock conducted a hearing, and on March 21, 2014 issued Hearing Decision 14-UI-13187, reversing the Department's decision. On March 27, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Shiloh Inn and Suites employed claimant to work in maintenance and security from November 12, 2013 until December 3, 2013.

(2) The employer expected claimant to refrain from using tobacco products, including chewing tobacco, while working. The employer permitted claimant to chew tobacco only during his breaks and only when he was in a designated smoking area. The employer did not have a written policy about tobacco use and claimant initially thought that, different from cigarette smoking, the employer allowed him to chew tobacco on the work premises so long as it was not visible to others.

(3) At times after November 12, 2013, claimant chewed tobacco while working and spit the juice from that chewing into disposable coffee cups or empty pop bottles. Sometime around November 27, 2013, claimant's coworker was in the maintenance office and spilled a cup that claimant had left behind containing some spit tobacco juice. The coworker complained to the manager. On November 27, 2013, the employer issued a written warning to claimant telling him to discard any cups into which he had spit tobacco juice, and to chew his tobacco only when he was on break. Exhibit 1 at 2.

(4) On December 3, 2013, claimant's overnight security shift ended. During that shift, claimant had chewed tobacco in the security office and spit the tobacco juice into a cup or bottle. Claimant neglected to remove that spit receptacle when his shift was over and left it behind on a desk. Shortly after claimant's shift ended, claimant's coworker discovered the bottle or cup and reported it to management.

(5) On December 3, 2013, the employer discharged claimant for chewing tobacco in the security office during the shift that ended on December 3, 2013.

CONCLUSIONS AND REASONS: The employer discharged claimant but not 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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant agreed that he chewed tobacco during his overnight work shift ending on December 3, 2013 and forgot to discard the cup or bottle into which he had spit the tobacco juice. Audio at ~30:12, ~30:34, ~32:33. Given the clarity of the warning the employer gave to claimant on November 27, 2013, claimant knew he was prohibited from chewing tobacco unless he was on break and in the area that the employer had designated for tobacco use. *See* Exhibit 1 at 2; *see also* Audio at ~32:33. By chewing tobacco inside the security office, and when he was not on break, claimant willfully violated the employer's standards.

Despite claimant's willful violation of the employer's standards, it must nonetheless be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior and is not a type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). The employer's witness contended that the employer gave claimant a verbal warning about the scope of its tobacco use policy in early November 2013. Audio at ~17:52. Claimant contended that he was given no such verbal warning, and the first communication to him of that policy was in the November 27, 2013 written warning. Audio at ~29:22. There is no reason in the record to believe or disbelieve the testimony of either party. When the evidence on a disputed issue is evenly balanced, we are required to resolve the uncertainty against the employer, who is the party that carries the burden of proof in discharge cases. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because, more likely than not, claimant was not clearly informed of the scope of the employer's tobacco policy until he received the November 27, 2013 written warning, the behavior giving rise to that warning was not a willful or wantonly negligent violation of the employer's expectations. Since the behavior underlying that warning was not misconduct, claimant's willful violation of the employer's tobacco policy on December 3, 2013 was an isolated act of misconduct. It is therefore excusable if it did not cause an irreparable breach of trust in the employment relationship. Claimant's explained that his behavior in chewing tobacco in the

security office during his shift ending on December 3, 2013 was due to working all night and "not thinking." Audio at 30:34. Under this circumstance, although not encouraged, claimant's behavior was understandable. It does not appear that such a violation, viewed objectively, was so serious as to cause a rupture in the employment relationship. Because claimant's knowing violations of the employer's policy were isolated to December 3, 2013 and claimant's behavior on December 3, 2013 did not cause an irreparable breach of trust in the employment relationship, it 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-13187 is affirmed.

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

DATE of Service: April 22, 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.