EO: 200
BYE: 201449

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

783
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0597

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 131155). The employer filed a timely request for hearing. On March 26, 2014, ALJ Vincent conducted a hearing, and on April 4, 2014 issued Hearing Decision 14-UI-14370, reversing the Department's decision. On April 10, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Excell Fitness employed claimant as a personal trainer from May 18, 2007 until December 9, 2013. The employer operated a gym where members exercised and participated in other fitness activities.

(2) The employer emphasized good health and living habits to its employees, and expected each personal trainer to "be your own billboard" for the employer's business. Transcript at 12. The employer expected claimant to refrain from behavior that reflected poorly on the employer's image of health and good habits, including refraining from using illegal drugs. Claimant was aware of the employer's expectations.

(3) Sometime before October 2013, the employer's owner received reports that claimant was using cocaine off-duty and that some gym members were aware of this use. The owner spoke to claimant about what he had heard. The owner told claimant to stop using cocaine or any other illegal drugs, even if it was off-duty, because that use reflected poorly on the image the employer wanted to project.

(4) In October 2013, the owner received new reports that claimant was still using cocaine off-duty in a manner that was apparent to gym and other community members. When the owner spoke to claimant

about these new reports, he told claimant that the cocaine use needed to stop or he was going to discharge him. The owner told claimant that he had to "make a decision between his continued use of cocaine and his job." Transcript at 6-7. Claimant apologized, told the owner that he would stop and that he had flushed all his remaining cocaine down the toilet.

(5) On the early morning of Saturday, December 7, 2013, claimant wrecked his truck and was arrested for the crimes of driving under the influence of intoxicants (DUI) and possession of cocaine. To obtain a release from jail on his own recognizance, claimant called the owner at 4:30 a.m. to verify claimant's employment to release officers. In a telephone call later that day, claimant told the owner that the cocaine that the police found in his truck when he was arrested was his.

(6) On Sunday, December 8, 2013, claimant was at his house after he was released from jail and called the employer's office manager, who was also claimant's personal friend, to discuss his concerns over his continued employment. At claimant's request, the office manager came to claimant's house and stayed with claimant for approximately six hours. In front of the office manager, claimant snorted cocaine at least three or four times. The office manager was familiar with the physical characteristics of cocaine and the behavioral effects of its use, and was certain that the substance she had observed claimant using was cocaine.

(7) On Monday, December 9, 2013, the office manager told the owner she had observed claimant using cocaine on December 8, 2013. On December 9, 2013, the employer discharged claimant for using cocaine on December 8, 2013.

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)(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 has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant contended in his written argument that if he used cocaine, as alleged, his behavior was not work connected misconduct since it occurred away from the workplace and during off-duty hours. However, in *Levu v. Employment Department*, 149 Or App 29, 34-35, 941 P2d 1056 (1997), the court held that, for purposes of ORS 657.176(2)(a), behavior that occurs during off-duty hours and away from the workplace is work connected if the ramifications of that behavior negatively impact the morale or atmosphere of the workplace (off duty shoplifting was work-related misconduct where honesty and trustworthiness were integral to claimant's position as an auditor). In *Erne v. Employment Division*, 109 Or App 629, 633-34, 820 P2d 875 (1991), the court held that a claimant's off-duty behavior of assaulting an employee of one of its customers in a bar was work connected misconduct since, among other things, the "employer's business reputations in those locations [where the fight occurred] was important to the employer" and "customer relations in towns where the employer does business are important to the employer's business." In this case, the employer was involved in a business that promoted good health

and healthy living habits. The employer was reasonably concerned that illegal drug use by one of its trainers, even if that behavior occurred off-duty and away from the workplace, would seriously undercut the image the employer was trying to project. Transcript at 12. In addition, the employer was located in a small town. Transcript at 12. It had reasonable concerns that illegal drug use by one of its trainers might be construed by gym members and the general public as the employer condoning that behavior or actively participating in it. Transcript at 12. In either case, claimant's alleged behavior would reasonably have an impact on the employer's business reputation and its relations with its members and potential members. Claimant's alleged behavior was sufficiently related to the employer's business to be considered work-connected. On this record, it is undisputed that the employer clearly informed claimant that it was prohibiting all illegal drug use both on and away from the work premises. *See* Transcript at 6, 7, 23-24. This is not a case where claimant was not reasonably aware that the employer had prohibited the off-duty behavior of using illegal drugs.

At hearing, the employer's owner testified about admissions claimant had made to him about his illegal drug use before December 7, 2013 and claimant's admission to him that the cocaine that was found in claimant's truck on December 7, 2013 was his. Transcript at 6, 7, 8, 9. The employer's office manager testified she had observed claimant using cocaine in her presence on December 8, 2013. Transcript at 16. Claimant denied that he ever admitted to the owner that he had used cocaine or that the cocaine in the truck was his, and he also contended that the office manager's testimony at hearing was false. Transcript at 21, 22, 23, 24. Claimant offered no explanations for why the owner and the office manager would present fabricated testimony at hearing. Claimant's testimony denying the accounts of the owner and the office manager also was not persuasive. Claimant's testimony evaded pointed questions and was vague when he apparently did not want supply an answer and could not skirt the question. Transcript at 22, 23, 24, 27. Claimant's testimony quibbled over details and demanded documentation from the owner about admissions that the owner contended claimant had made, as if the lack of a written document memorializing a conversation was, somehow, a fatal evidentiary flaw. Transcript at 22, 24, 25, 26, 28. Based on the weight of the reliable evidence, it is more likely than not that the testimony of the employer's witnesses was accurate and we based our findings of fact on that testimony.

Claimant did not dispute that the owner warned him twice before December 7, 2013 that the employer expected him to refrain from cocaine use either in the workplace or away from it. Transcript at 23-24. The employer met its burden to show that claimant used cocaine on December 8, 2013. When claimant used that cocaine, he willfully violated the expectations of the employer.

Claimant's behavior in using cocaine on December 8, 2013 was not excused from misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, 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). After he received the first warning from the owner, claimant knew that he was prohibited from using cocaine away from the workplace. When he used cocaine in October 2013, claimant willfully violated the employer's expectations. Accordingly, claimant's use of cocaine on December 8, 2013 was a second willful violation of the employer's standards. Because it was a repeated act, claimant's behavior on December 8, 2013 was not isolated. As such, it falls outside the type of behavior that is excused from constituting misconduct as an isolated instance of poor judgment. Nor was claimant's behavior on December 8, 2013 excused as a good faith error under OAR 471-030-0038(3)(b). Given the clarity of

the owner's two warnings to claimant before December 8, 2013, claimant could not have believed that the employer would condone his activity on December 8, 2013 in using cocaine.

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

DECISION: Hearing Decision 14-UI-14370 is affirmed.

Tony Corcoran and J.S. Cromwell, pro tempore;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 14, 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.