

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0601

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #72318). Claimant filed a timely request for hearing. On March 24, 2014, ALJ Frank conducted a hearing, and on April 2, 2014 issued Hearing Decision 14-UI-13992, affirming the Department's decision. On April 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) OEEO, LLC employed claimant from January 5, 2011 to February 14, 2014 as a prototype specialist.

(2) The employer expected claimant to follow its code of conduct, which included refraining from providing false reasons for being absent from work. Claimant understood the employer's expectation.

(3) Claimant missed 246 hours of work during the six months preceding October 21, 2013. Claimant told the employer his absences were due to a medical condition. The employer's human resources assisted claimant with completing paperwork to request FMLA leave for his medical condition. On November 25, 2013, the employer granted claimant intermittent FMLA leave.

(4) On February 12, 2014, claimant was scheduled to work. Before work, he called and left a message for his supervisor falsely stating that he could not report to work because he had lost electricity and could not take a shower. Claimant did not report to work on February 12, 2014 due to back pain.

(5) On February 13, 2014, claimant reported to work. The employer's director of human resources contacted Portland General Electric (PGE), the electricity provider for claimant's area, and was told that there were no reported outages in claimant's area on February 12, 2014. The director of human resources asked claimant for more details about his absence on February 12, 2014. Claimant told her his electricity was provided through a different company, not PGE. Claimant also told the director of human resources that the power outage occurred because a tree had fallen down. The director of human resources called the other company and was told that it did not provide electricity service, only internet and telephone, and that PGE provided electrical power for the Molalla area.

(6) On February 14, 2014, the employer discharged claimant because he violated its code of conduct by providing false information about the reason for being absent from work on February 12, 2014.

CONCLUSIONS AND REASONS: We agree with the Department and 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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 create irreparable breaches of trust in the employment relationship make a continued employment 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had a right to prohibit employees from providing false reasons for being absent from work. Claimant understood that expectation. At hearing, claimant conceded that he gave a false reason to his employer for his absence on February 12, 2014. Transcript at 12. He told the employer he was absent from work because his power went out on February 12, 2014, preventing him from taking a shower before work. When claimant returned to work on February 13, 2014, claimant again told human resources he had been absent due to a local power outage, caused by a fallen tree. Transcript at 20-21. Claimant testified at hearing that he was truthful about losing power on February 12, 2014, although the power outage was not due to a local outage, but, rather, occurred because "one of [his] breakers broke" in his house. Transcript at 13. However, claimant testified that back pain, and not the power outage, was the reason he was absent, and that his inability to take a shower would not prevent him from going to work. *Id.* Claimant testified that he did not tell the employer about his back pain because he was not sure how the employer would respond if he said he had to miss work due to back pain. Transcript at 15. However, claimant failed to show the employer would have been likely to discipline him for missing work due to back pain, where the employer had previously assisted him with applying for FMLA and had approved intermittent FMLA for claimant in the past.

Claimant also argued that he did not lie about losing power in his house, and that he had a valid reason for missing work due to his extreme back pain. Transcript at 15. Claimant's argument misses the point, however, because the question is not whether the claimant missed work for a valid reason, but rather, whether claimant's act of providing a false reason for being absent from work was misconduct. The preponderance of the evidence establishes that claimant intentionally provided a false reason to the employer for his absence from work, knowing the employer expected him to be truthful. Claimant therefore willfully violated the employer's expectation that he refrain from providing a false reason for an absence from work.

Claimant's falsehood on February 12, 2014 was not the result of an isolated instance of poor judgment. Claimant also exercised poor judgment in perpetuating his initial falsehood by telling the employer again on February 13, 2014 that he missed work due to a power outage. Claimant's exercise of poor judgment in providing a false reason for his absence was not, therefore, a single or infrequent occurrence. In addition, claimant's decision to give a false reason for his absence on February 12, 2014 was an act of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible, and exceeded mere poor judgment. Claimant's conduct therefore does not fall within the exculpatory provisions of OAR 471-030-0038(3).

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-13992 is affirmed.

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

DATE of Service: May 9, 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>.

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