

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0680

Affirmed
Disqualification
Wage Credits Canceled

PROCEDURAL HISTORY: On December 24, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct and canceling all benefit rights based on wages earned prior to November 4, 2013 (decision #71753). Claimant filed a timely request for hearing. On April 8, 2014, ALJ Sime conducted a hearing, and on April 9, 2014 issued Hearing Decision 14-UI-14730, affirming the Department's decision. On April 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB on April 24, 2014. Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider claimant's April 24, 2014 argument when reaching this decision.

Claimant submitted additional written argument to EAB on May 1, 2014. Claimant's May 1, 2014 argument 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. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Rite Aid employed claimant from December 9, 1999 to November 4, 2013 as a pharmacy technician.

(2) The employer prohibited employees from stealing the employer's products. Exhibit 1. Claimant understood the employer's expectation.

(3) Medication was missing from the pharmacy where claimant worked, so the employer installed cameras in the pharmacy. The employer's asset protection manager reviewed video from October 17,

2013 to November 1, 2013 and saw video of two occasions when claimant tipped pill bottles into her hand, put her hand in her pocket, and returned the pill bottles to the area where hydrocodone was stored.

(4) From October 17, 2013 to November 1, 2013, claimant removed a total of 199 hydrocodone tablets from the employer's pharmacy by putting the tablets in her pants pocket throughout the day and then leaving the pharmacy with the tablets. Exhibit 2. Claimant took the tablets for personal use. Exhibit 1.

(5) On November 1, 2013, claimant met with the employer's asset protection district manager, and told him she had taken 199 hydrocodone tablets from the employer. A female manager was also present during the meeting.

(6) At the end of the meeting, claimant wrote and signed a statement stating, "I sat down with [the employer representative]. He asked me if I ever caused a loss. I told him I had taken some hydrocodone. I want to apologize for my mistake, and for the loss I caused [the employer], and to my fellow coworkers who I let down. I took approximately [199] hydrocodone. Total cost is \$120.43. I put the hydrocodone in my pants pocket during the day and then leave [sic] the pharmacy with them."

(7) On November 4, 2013, the employer discharged claimant for theft.

(8) On November 20, 2013, claimant filed an initial claim for unemployment insurance benefits. On November 26, 2013, the Department sent the employer a Form 220, or "Notice of Claim Filed." On December 5, 2013, the employer returned the completed Form 220 to the Department, stating that it discharged claimant for theft. The employer gave the Department claimant's November 1, 2013 statement admitting she took hydrocodone from the employer.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant for theft, that she is disqualified from receiving benefits, and that her wage credits based on wages earned prior to November 4, 2013 are canceled.

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 had a right to prohibit claimant from stealing its products. Claimant understood the employer's expectation as a matter of common sense. The preponderance of the evidence shows that, during October 2013, claimant took hydrocodone from the employer's pharmacy for her personal use. Claimant argued at hearing that she did not take the hydrocodone, and that she admitted to doing so on November 1, 2013 because the employer's asset protection district manager "harassed and bullied" her so that she "felt [she] had no other choice to be able to get out of there away from him." Transcript at 11. Claimant did not allege the manager yelled, used foul language, or threatened her physically, but testified that the manager told her "things were gonna get ugly," if she did not admit to taking the hydrocodone. Transcript at 11. The employer's evidence showing claimant admitted to taking the hydrocodone outweighs claimant's testimony that she was coerced. The employer's asset protection

manager testified at hearing, and denied having said “things were gonna get ugly,” or making threats or promises to claimant. Transcript at 22, 20. Moreover, there was a female manager present as a witness during the entire meeting, and neither manager prohibited claimant from leaving the meeting. Transcript at 24. Claimant did not leave the room or stop the conversation, and did not complain to the employer about how she was treated during the meeting. Transcript at 24, 31. Moreover, claimant did not merely sign her statement, but wrote it herself. Exhibit 1. The evidence is persuasive that claimant admitted to taking the hydrocodone because she took the hydrocodone, and not because she was coerced. Claimant also argued that the videos showing her putting items into her pocket were videos of her putting gum and spare change into her pocket. Transcript at 12, 15. Claimant made no such assertion when she met with the employer on November 1, 2013. The weight of the evidence shows claimant willfully violated the employer’s expectation that she not steal its products.

Claimant’s conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant had no reasonable basis to believe the employer would condone her theft of its products.

Claimant’s conduct cannot be excused as 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 conduct, and it must not exceed mere poor judgment by being unlawful or tantamount to unlawful conduct. OAR 471-030-0038(1)(d). Claimant’s conduct was not isolated, because it involved at least two separate incidents when claimant took hydrocodone. Moreover, claimant’s conduct cannot be excused because it exceeded mere poor judgment under OAR 471-030-0038(1)(d)(D). Theft is defined, in pertinent part, as taking property from its owner with the intent to deprive the owner of the property. ORS 164.015(1). Here, claimant took the hydrocodone for her own use. Claimant committed unlawful conduct, theft, and unlawful conduct cannot be excused as an isolated instance of poor judgment. Because claimant’s conduct was not isolated and exceeded mere poor judgment, it cannot be excused as an isolated instance of poor judgment. The employer discharged claimant for misconduct. Claimant is, therefore, disqualified from receiving unemployment insurance benefits because of his work separation.

Theft. ORS 657.176(3) states that an individual’s benefit rights based on wages earned prior to discharge shall be canceled if the individual admits to an authorized representative of the Department that she committed a felony or theft leading to her discharge, signed a written admission of a felony or theft that has been submitted to the Department, or has been convicted of a felony or theft by a court. Claimant was discharged for theft, and the employer responded in a timely manner to the Department’s Form 220. The employer provided the Department with claimant’s signed, written admission of conduct that constitutes theft. Specifically, claimant admitted she “put the hydrocodone in her pants pocket” and then “[left] the pharmacy with them.” Exhibit 1. Claimant’s benefit rights based on wages earning prior to November 4, 2013 are canceled under ORS 657.176(3)(b).

DECISION: Hearing Decision 14-UI-14730 is affirmed.

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

DATE of Service: May 28, 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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