

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0681

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On March 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143412). Claimant filed a timely request for hearing. On April 8, 2014, ALJ Clink conducted a hearing, and on April 9, 2014 issued Hearing Decision 14-UI-14648, affirming the Department's decision. On April 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Keith Manufacturing Company employed claimant as a floor lead from March 26, 2013 to February 18, 2014.

(2) The employer expected claimant to report to work as scheduled, and maintain regular attendance. Claimant understood the expectations as a matter of common sense.

(3) In mid-2013, claimant was convicted of misdemeanor assault. As part of his sentence he was placed on probation, the terms of which prohibited claimant from consuming alcohol.

(4) On January 16, 2014, claimant knowingly consumed alcohol. He was upset about a personal matter, had a mental health condition, and decided to "self-medicate" even though he knew doing so violated his probation. On January 18, 2014, claimant was incarcerated for violating the terms of his probation. He was incarcerated until February 16, 2014.

(5) Between January 18, 2014 and February 16, 2014, claimant was expected to work his usual Monday through Thursday schedule, 40 hours a week. He did not report to work because of his incarceration. Claimant's wife reported claimant's absences, but the employer did not excuse them.

(6) On February 18, 2014, the employer discharged claimant for failing to attend work for the month he had been incarcerated.

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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The employer discharged claimant for repeated instances of absenteeism. Claimant's absenteeism was the result of his incarceration. The relevant inquiry is whether claimant willfully created the situation that led to his incarceration and resultant absenteeism. *See Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991).

Claimant knowingly consumed alcohol despite knowing that doing so constituted a violation of the terms of his probation, and knowing that violating probation could result in his incarceration and inability to report to work. Claimant consumed alcohol because he was upset over a personal matter and had a mental illness which he treated by "self-medicating" with alcohol. While those issues were a factor in claimant's decision to consume alcohol, claimant did not claim or show that he was unable to control his conduct because of his personal matter or mental illness. In the absence of such evidence, we conclude that claimant's decision to consume alcohol was volitional. By consuming alcohol, knowing that by doing so he risked a probation violation, incarceration, and absences from work, claimant willfully created the situation that led to his incarceration, and caused his absenteeism.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not claim or show that he sincerely believed the employer would condone his repeated absenteeism due to incarceration. Claimant's conduct exceeded mere poor judgment under OAR 471-030-0038(1)(d)(D) because his repeated absences over an extended period of time left the employer unable to schedule claimant to work, or rely on him to report to work or maintain regular attendance, which made a continued employment relationship between them impossible.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-14648 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and D.E. Larson, 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>.

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.