EO: 300
BYE: 201504

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0708

Reversed
Disqualification

PROCEDURAL HISTORY: On February 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133332). Claimant filed a timely request for hearing. On April 24, 2013, ALJ Wyatt conducted a hearing, and on April 24, 2014 issued Hearing Decision 14-UI-15958, reversing the Department's decision. On April 29, 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) Schryver Medical, Inc. employed claimant as a mobile x-ray technician working out of its Eugene, Oregon office from October 1, 2011 until January 23, 2014. Claimant's duties required him to use the employer's van to carry x-ray equipment and administer x-rays to patients at various locations away from the employer's offices.

(2) The employer expected claimant to refrain from using the employer's van for personal trips without the permission of the employer's upper management or claimant's direct manager. Claimant was aware of the employer's expectations.

(3) Before approximately 2014, claimant had asked for and received express permission from his past three managers to use the employer's van for the personal purpose of weekend trips from Eugene, Oregon to Portland, Oregon to visit with his daughter in Portland. Claimant's daughter often stayed with

claimant's parents in Portland. After claimant's current manager assumed his position, claimant did not ask that manager for permission to use the employer's van to travel to visit his daughter in Portland.

(4) Before approximately December 15, 2013, the employer's dispatchers occasionally called claimant to administer x-rays or perform other work after he was off shift, including on Saturday nights and on weekends. At this time, the employer rotated its regular employees in to cover weekend calls for services. In December 2013, the employer hired a technician specifically to provide mobile x-ray services on weekends. Starting in December 2013, calls that the employer received for a technician's services on weekends after the weekend technician was off duty were usually not handled until the next day when another technician was on regular duty. After December 15, 2013, claimant stopped being called in to provide weekend services for the employer. Exhibit 2 at 30.

(5) On Saturday, January 18, 2014, the weekend x-ray technician arranged to take the day off and claimant agreed to work her shift. Claimant worked on-call that day from 9:00 a.m. until 9:00 p.m., when the shift was over. On January 18, 2014, claimant was not required to remain on-call after his shift ended and was not scheduled to be on call on Sunday, January 19, 2014. Claimant was next scheduled to work on Monday, January 20, 2014 at 8:00 a.m.

(6) At approximately midnight on January 18, 2014, claimant drove the employer's van from Eugene to Portland to visit his parents and his daughter. Claimant arrived in Portland at his parents' house at approximately 2:00 a.m on January 19, 2014. Claimant did not ask his manager for permission to use the van for this personal purpose. On January 19, 2013, claimant drove the employer's van back to Eugene, arriving at his house in Eugene at approximately 8:00 p.m. after stopping in Beaverton, Woodburn and Salem on the way to Eugene. Exhibit 1 at 19-21. At approximately 8:30 p.m., claimant returned the employer's van to the employer's workplace in Springfield, Oregon. Exhibit 1 at 21.

(7) On January 23, 2014, the employer discharged claimant for using the employer's van for the personal purpose of traveling to and from Portland without the permission of a manager.

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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-15958, the ALJ concluded that claimant's behavior in using the employer's van to travel to and from Portland was excused from constituting misconduct as a good faith error. The ALJ reasoned that an "employee's sincere belief that the employer would condone his actions is all that is necessary to trigger the exculpatory application of the provision [OAR 471-030-0038(3)(b)]" and determined that claimant's behavior was excused because "I am persuaded that claimant's belief was sincerely held, even if not objectively reasonable." Hearing Decision 14-UI-15958 at 4. We disagree.

At the outset, claimant agreed that he drove the employer's van to Portland for the personal purpose of visiting with his daughter on Sunday, January 19, 2014. Transcript at 45. Claimant also conceded that he was aware that the employer expected him to have permission from a manager to use the van for personal travel, and that awareness was the reason he had obtained "explicit" authorization from his past three managers to use the van for weekend trips he made to Portland to visit his daughter. Transcript at 57, 59-60. As well, claimant did not dispute that he did not ask his current manager for permission to use the van and had not informed his manager that he intended to do so on January 19, 2014. In light of claimant's subjective awareness of the employer's policy, and his admitted practice of seeking management approval before using the van for personal trips, claimant's behavior in not obtaining the permission of his manager was a willful or wantonly negligent violation of the employer's standards as he understood them.

With respect to whether claimant's behavior on January 19, 2014 was excused from constituting misconduct as a good faith error, we disagree with the employer's argument that *Goin v. Employment Department*, 204 Or App 758. 126 P3d 734 (2006), requires the application of an "objective element," and that a claimant's mistaken belief must have been objectively reasonable in order to qualify as a good faith error. Employer's Written Argument at 2. Fairly read, *Goin* states only that a good faith error may excuse what would otherwise be misconduct if a claimant's mistaken belief about the employer's requirements was "honest and not entirely groundless." *Goin*, 126 P3d at 739. Although *Goin* does not mandate that a claimant's mistaken belief must have been an objectively reasonable belief to qualify as a good faith error, it also does not require, as the ALJ appears to have assumed, that a claimant's mere assertions that his behavior was the product of a sincere error must be accepted. Hearing Decision 14-UI-15958 at 4. At a minimum, claimant's contention that he was operating under a mistaken belief about the employer's standards must be plausible under the circumstances and, more likely than not, the proximate cause of his violation of the employer's standards.

On this record, claimant's contention that he sincerely thought he did not need his manager's approval to use the van to drive to Portland on personal business was not plausible. Transcript at 60. That claimant insisted he had obtained "explicit" approval from his previous three managers to use the van to travel to personal visits with his daughter suggests, more than anything else, that he knew that he needed his current manager's permission and that he consciously chose not to seek it for his trip on January 19, 2014. Transcript at 48, 57, 59-60, Significantly, although claimant testified that the "precedent was set" by the permission of his prior three managers, claimant never explicitly stated that he had thought his current manager would approve of his use of the employer's van on a weekend when he was off-duty for a personal trip or that he thought he did not need to ask his current manager for such permission. Transcript at 60. Claimant's explanation for not seeking permission from his current manager, that "there had been so many managers," also did not suggest he was operating under any mistaken belief that the current manager would approve of his personal trip to Portland using the employer's van. Transcript at 60. Claimant's further contention, that he sincerely believed that he needed to take the van with him to Portland because he might be required to perform services for the employer when he was off-duty, was also not supported by the facts in this record. Transcript at 53. While claimant contended repeatedly he was often called by dispatch to work on weekends, all of his evidence appeared to be from the period before the employer hired an x-ray technician specifically to work on weekends. Transcript at 40, 42, 47, 48, 51, 66; Exhibit 2 at 28-30. After the weekend ending December 15, 2013, the time records that claimant submitted into evidence show that the employer stopped calling claimant in to work during the weekends. Exhibit 2 at 30. Claimant did not dispute that dispatch stopped calling him

to work weekends after the weekend technician was hired. When asked to explain why he nonetheless thought that the employer might call him in to work on Sunday, January 19, 2014 in light of the hiring of the weekend technician, claimant testified that "it's a very nebulous thing" and that, because of high turnover, the dispatchers on duty might not be aware of the change in the employer's scheduling for on-call duty work. Transcript at 52. However, in view of the unbroken pattern of the dispatchers after December 15, 2013 in not calling claimant in for weekend work, claimant's explanation that he thought the dispatchers would begin calling him again on weekends was not persuasive. Claimant's further contention that he took the van without permission to Portland because he believed that on the weekend of January 18-19, 2014 there was a "very great potential that I could have got called" was, for the same reason, not plausible. Transcript at 66. Viewing the record as a whole, it appears, more likely than not, that claimant was not under a mistaken belief that his current supervisor would approve of his personal use of the employer's van on January 19, 2014 and that, more likely than not, claimant did not mistakenly believe that there was a realistic possibility that he might be called to perform work for the employer on January 19, 2014 for which he needed access to the employer's van. Claimant's personal use of the employer's van on January 19, 2014 did not arise from a good faith misunderstanding of the employer's standards or from a good faith misunderstanding of the employer's work needs. On the facts in this record, it can most reasonably be inferred that claimant consciously and willfully chose to use the van for personal travel to Portland when he knew that he did not have the required permission from the employer to do so.

Claimant's personal use of the van on January 19, 2014 was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0039(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior, and must not have been the 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). In this case, given that claimant did not take the van to Portland as a result of a mistaken understanding that his manager would condone it or a mistaken understanding of the employer's needs, the only plausible inference left for claimant's behavior is that claimant consciously intended to avoid using his personal vehicle for that travel, whatever his reasons might be for doing so. Consciously using an employer's property for personal purposes without permission, when a claimant is aware that such permission is necessary, is at a minimum a type of misappropriation that implicates a claimant's honesty. A reasonable employer could objectively conclude that, based on this single incident, it could not trust claimant in the future to act with integrity and honesty in the workplace. Claimant's behavior caused an irreparable breach of trust in the employment relationship and, as such, cannot be excused as an isolated instance of poor judgment.

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

DECISION: Hearing Decision 14-UI-15958 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: <u>June 4, 2014</u>

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.