

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0738

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On January 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72714). Claimant filed a timely request for hearing. On April 10, 2014, ALJ M. Davis conducted a hearing, and on April 14, 2014 issued Hearing Decision 14-UI-15098, affirming the Department's decision. On May 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he asserted for the first time that he was "heavily medicated" and not in his "right mind" when he allegedly falsified the document that ultimately led to his work separation. Written Argument at 1. It is highly unlikely that, were this the case, claimant would not have mentioned such an important mitigating factor during his hearing testimony. Because claimant's argument contained information that was not part of the hearing record, and claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing, EAB did not consider claimant's new assertion when reviewing his work separation. Under ORS 657.275(2) and OAR 471-041-0090(2) (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Federal Public Defender employed claimant as a receptionist from July 21, 2008 until December 5, 2013.

(2) The employer expected claimant to refrain from dishonesty in seeking employer-provided benefits for members of his household when the employer limited those benefits to employees, only. Claimant was aware of the employer's expectations as a matter of common sense.

(3) Approximately every year, the employer offered free influenza vaccinations to its employees at the workplace. The vaccinations were provided through a federal government program. The free

vaccinations were only available to employees, and family and household members were excluded. Each year during his employment, claimant checked in the nurse who gave the vaccinations and from his work station at the employer's front desk observed people signing up for the vaccinations and entering a conference room to receive them.

(4) In approximately October 2013, the employer sent a communication to all employees telling them that influenza vaccinations were going to be administered free to any employees who wanted them. On October 22, 2013, claimant filled out a form for his male partner to receive an influenza vaccination. Claimant's partner did not work for the employer, but was employed elsewhere. In capital letters and bold-face font, the form asked for "**EMPLOYEE INFORMATION.**" Transcript at 30. Under this title, for "employee name," claimant wrote in the name of his partner. Transcript at 29. In the section of the form asking for the employee's work address and telephone number claimant wrote in the employer's address, the employer's federal agency number and the employer's telephone number rather than accurate contact information for the partner. Claimant's partner came to the workplace, signed the form that claimant had completed and received a vaccination.

(5) In early November 2013, the employer received reports that claimant had arranged for his partner to receive a free influenza vaccination through the vaccination program. On November 18, 2013, the employer spoke to claimant about the circumstances under which his domestic partner received a free vaccination. Claimant explained that the nurse administering the vaccinations had given permission for the domestic partner to receive a vaccination. On November 18, 2013, the employer suspended claimant while it investigated his explanation. Sometime later, the employer interviewed the nurse. The nurse said she was aware that the vaccinations were only available to employees and she did not remember anyone asking her if a non-employee could receive a vaccination at around the time she was giving the vaccinations on the employer's premises. The employer again spoke with claimant. Claimant said, at that time, that the nurse must have misunderstood what he had asked her when she gave permission for the domestic partner to receive a vaccination.

(6) Sometime in December 2013, the employer told claimant it was going to discharge him for dishonesty unless he resigned. Also sometime in December 2013, claimant submitted a resignation to the employer that stated he had quit effective December 5, 2013. On December 5, 2013, claimant voluntarily left work.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). Leaving work without good cause includes resigning from work to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). The standard for determining whether good cause exists is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

Claimant resigned from work after the employer told him that, if he did not resign, it was going to discharge him. Although the employer was not willing to allow claimant to continue working, claimant's work separation was a voluntary leaving because he agreed to quit and the employer did not need to discharge him. *See Employment Department v. Shurin*, 154 Or App 352, 354, 959 P2d 637 (1998) (when a claimant agrees to end his employment, the work separation is treated as a voluntary leaving and not as a discharge even if the employer would not have allowed claimant to continue working). However, to determine whether claimant's voluntary leaving was with or without good cause under OAR 471-030-0038(5)(b)(F), we must still evaluate whether the employer's threatened discharge of claimant would have been 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.

Claimant did not dispute at hearing that he knew that the employer expected him not to engage in intentional dishonesty for the purpose of allowing his partner to receive a benefit that the employer made available only to its employees. Moreover, it is a matter of common sense that an employer reasonably does not expect intentional deception from an employee in the employer's distribution of work-related benefits. More likely than not, claimant was aware of the employer's expectation of honesty. The issue is whether, by the manner in which he filled out the form that allowed his partner to receive a free influenza vaccination, claimant was intentionally deceitful.

Claimant's first explanation for his behavior, that he did not know that the influenza vaccinations were only available to employees, is unlikely. Transcript at 15. By his own admission, claimant had observed the nurse in previous years giving vaccinations, and he made no contention that had ever observed non-employees receiving vaccinations. Transcript at 16. Nor did claimant explain how he might have overlooked the employer's communications stating that the free vaccinations were available only to employees. Transcript at 8. The manner in which claimant filled in the form to enable his partner to receive a free vaccination also most strongly suggests an intention to deceive. Claimant's contention that he did not notice that the form was directed to "employees" is belied by the conspicuous capital letters and bold-face font in which the form made reference only to "employees" when it sought information. Transcript at 29, 30, 31. Even if claimant's contention that he overlooked the significance of the references to "employees" on the form is accepted, it does not appear to have been a mistake on claimant's part that wrote in on the form the employer's contact information as the partner's work information and included the employer's federal agency number. There is no reasonable explanation for why claimant wrote in that information for his partner on a form that the partner would give to the nurse other than that he was trying to ensure that his partner qualified for a free influenza vaccination through the employer's program and knew that the partner could not receive a vaccination unless he deceived the nurse about the partner's true workplace. Claimant's purported reason for listing the employer's information on the form, that he "assumed" that the nurse's records needed to reflect where she had administered the vaccination, is simply not plausible, appears to be an after-the-fact rationalization and, from its contents, the form appears to be intended to record basic biographical information about the patient and does not appear to be intended to record any medical information about the administration of the vaccine. Transcript at 33. Claimant's further contention, that he asked the nurse if his partner could receive a free vaccination and the nurse gave her permission is also unlikely since the nurse told the employer she was well aware that only employees could receive the free influenza vaccinations and she

did not recall anyone making such an inquiry of her. Transcript at 28. Viewing the record as a whole, the most likely explanation for the manner in which claimant filled out the form for his partner is that he consciously intended to deceive the employer and the nurse about his partner's employment in order to obtain a free vaccination for the partner. More likely than not, claimant willfully violated the employer's expectations that he exercise honesty in seeking benefits through the employer.

Claimant's behavior on October 22, 2013 in dishonestly completing the form to allow his partner to receive a free influenza vaccination was not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and are not excusable. OAR 471-030-0038(1)(d)(D). EAB has previously held that even single instances of intentional dishonesty and deceit are sufficient to create an irreparable breach of trust in the employment relationship because an employer reasonably and fundamentally relies on the integrity of its employees in the workplace. *See e.g., Luis E. Gonzalez* (Employment Appeals Board, 2014-EAB-0196, March 4, 2014) (dishonesty exceeded mere poor judgment when lied in an employer investigation); *Patricia M. Jensen* (Employment Appeals Board, 2013-EAB-2464, January 17, 2014) (dishonesty exceeded mere poor judgment when took a greater employee discount than that to which entitled); *Morgan J. Wichman* (Employment Appeals Board, 13-AB-1101, July 26, 2013) (dishonesty exceeded mere poor judgment when lied about internet searches); *Joseph A. Brucken* (Employment Appeals Board, 11-AB-0614, March 9, 2011) (dishonesty exceeded mere poor judgment when falsified a computer record). Claimant's intentionally dishonest behavior exceeded mere poor judgment. Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant willfully violated the employer's expectation that he be honest in seeking benefits through the employer. Claimant's behavior was not the result of an error in his understanding of the employer's expectations.

Because claimant's behavior on October 22, 2013 was a willful violation of the employer's standards that was not excused under any of the exculpatory provisions of OAR 471-030-0038(3)(b), it was misconduct. The discharge that claimant sought to avoid by his resignation therefore would have been a discharge for misconduct. Under OAR 471-030-0038(5)(b)(F), a resignation under those circumstances is not for good cause. Claimant is disqualified from receiving benefits based on his work separation.

DECISION: Hearing Decision 14-UI-15098 is affirmed.

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

DATE of Service: June 6, 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.