

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0765

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #141103). The employer filed a timely request for hearing. On April 23, 2014, ALJ Holmes-Swanson conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16182, concluding the employer discharged claimant for misconduct. On May 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) American Medical Response employed claimant from August 29, 1999 to February 12, 2014 as a dispatcher.

(2) The employer expected claimant to refrain from providing false or misleading information to the employer regarding workplace investigations. Claimant understood the employer's expectations.

(3) On January 9, 2014, claimant alleged to the employer that her supervisor had violated the employer's drug policy. The employer initiated an investigation regarding claimant's allegations. To support her allegations, claimant provided the employer with an email dated January 5, 2013, that was allegedly sent by claimant's supervisor at 5:59:35. Exhibit 1. The email, if genuine, appeared to show the supervisor had used marijuana with another employee, and contained a photograph of a hand holding a pipe.

(4) Claimant was on medical leave from January 9, 2014 until January 28, 2014. Exhibit 1. On or about February 6, 2014, the employer met with the supervisor implicated in claimant's email, and showed her the email claimant had provided. The supervisor denied having sent the email and gave the employer access to her email account. The supervisor found an email she had sent claimant on January 5, 2013, at 5:59:35 p.m. with entirely different content and no photograph of a pipe. The employer did not notify the supervisor before the meeting that it was going to ask for access to her email account.

(5) The employer met with claimant on February 12, 2014, and asked claimant to access her email account and to find the email discussing marijuana use, allegedly sent by the supervisor. Claimant was unable to find the email she had given the employer. The employer found an email in claimant's account that was sent from the supervisor to claimant on January 5, 2013, at 5:59:35 p.m. The email matched the email the supervisor provided when the employer met with her on February 6, 2014. The email did not discuss drug use or contain a photograph of a pipe.

(6) On February 12, 2014, the discharged claimant for providing false information during a workplace investigation.

CONCLUSIONS AND REASONS: We agree with 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to provide trustworthy information during workplace investigations. Claimant understood the employer's expectations. The employer discharged claimant because she provided a falsified email to show a supervisor had used marijuana with a coworker and violated the employer's drug policy. Claimant testified at hearing that the email she provided the employer was from her supervisor, and was not altered, and that she found the email in her own email account when asked to do so during the February 12, 2014 meeting. Transcript at 55, 59, 79-80. However, we find it implausible, and claimant's testimony therefore not credible, that the email claimant provided was genuine, where the supervisor denied having sent the email and was able to produce an email from her email account matching the exact date and time of the email claimant provided, but containing entirely different content. In addition, the employer's manager and claimant's union representative were both present at the February 12 meeting, and provided detailed, credible testimony at hearing that claimant tried, but was unable to locate the email in her email account when asked to do so at that meeting. The preponderance of the evidence shows claimant provided the employer a falsified email during a workplace investigation. In giving the employer false information during a workplace investigation, claimant consciously engaged in conduct she knew violated the employer's expectations. Claimant therefore willfully violated those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that create irreparable breaches of trust in the employment relationship make a continue 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). Claimant's act of providing a falsified email to support a serious allegation that a supervisor engaged in drug use with an employee and violated the employer's drug policy, was an intentional act of dishonesty sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Her conduct therefore exceeded mere poor judgment, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error. Claimant willfully violated the employer's expectation that she be honest during its investigation. Her conduct therefore was not the result of an error in her understanding of the employer's expectations.

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

DECISION: Hearing Decision 14-UI-16182 is affirmed.

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

DATE of Service: June 16, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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