EO: 700
BYE: 201508

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-0805

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150139). Claimant filed a timely request for hearing. On April 23, 2014, ALJ Triana conducted a hearing, and on April 25, 2014 issued Hearing Decision 14-UI-16149, affirming the Department's decision. On May 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument. Claimant alleged that the employer's primary witness bullied him or somehow took advantage of claimant's depression disability during the hearing, and the ALJ allowed the bullying to occur. We have reviewed the record in its entirety, including the audio recording, and conclude claimant's allegation of bullying is unsubstantiated. There was no appreciable difference in the tone or style of the employer's witness's testimony whether responding to the ALJ or claimant, and the record fails to show that claimant complained of the alleged conduct to the ALJ or asked the ALJ to intervene.

Claimant argued that he should not be disqualified from benefits because he did not know he was not permitted to respond to traffic calls, or was confused about what he could and could not do. Claimant averred that the Board must distinguish between a "call," to which he was prohibited from responding, and a "stop," to which he was never instructed to refrain from responding. However, the employer's evidence does not distinguish between stops and calls. The evidence shows, rather, that claimant was repeatedly prohibited from responding or showing up to "police related calls" or "police officer related calls," or from engaging in any "police related activities." *See e.g.* Exhibit 1. Moreover, the record shows that after claimant responded to a traffic stop in March 2010, claimant was specifically instructed by his supervisor he was not permitted to do respond to traffic stops. The preponderance of the evidence shows that claimant knew the employer had prohibited him from responding to traffic stops.

Claimant also alleged that the employer's stated reasons for discharging him were a pretext, and the employer actually discharged him because he had taken time off work to spend time with and care for

his cancer-stricken child or because the employer wanted to assign someone else to perform his code enforcement duties. The record does not contain evidence supporting those allegations.

We considered claimant's remaining written arguments when reaching this decision, to the extent they were relevant and based on the record.

FINDINGS OF FACT: (1) The City of Pendleton employed claimant as a code enforcement officer from July 1, 2007 through February 18, 2014.

(2) Claimant had previously worked for the employer for 17 years as a police officer. He was transferred out of that position for unknown reasons and placed in the code enforcement officer position. As a code enforcement officer, claimant did not have law enforcement duties such as making traffic stops or running warrant checks. He was told that he was prohibited from engaging in police officer-related activities.

(3) The employer expected claimant to obey lawful orders or instructions from supervisors. Claimant understood the expectation.

(4) On March 17, 2010, claimant showed up to a traffic stop during which a corporal had requested backup. Claimant's supervisor subsequently told claimant "he was not to respond to or be involved in Police Officer related duties." Exhibit 1, "February 178, 2014" memo from Jackson to Caldera.

(5) On June 4, 2010, claimant's supervisor instructed claimant he was not permitted to use the radio or computer system to check the "LEDS" database to see if community members had outstanding warrants.

(6) On August 18, 2010, claimant reported to a domestic violence call to act as a backup officer. His supervisor later warned claimant he was not to respond to or be involved in police officer related duties.

(7) On August 19, 2010, claimant's supervisor told claimant again he was not permitted to have LEDS access. On September 11, 2010, claimant ran a registration check. On October 19, 2010, claimant used a computer another employee had logged into to run a LEDS check. On October 20, 2010, claimant's supervisor again warned claimant not to access LEDS "for any reason." *Id.* On February 16, 2012, claimant used his phone to access LEDS. On February 14, 2014, claimant ran a warrants check on another individual, and insisted he did not see anything wrong with having done so.

(8) On February 24, 2012, the employer placed claimant on a last chance agreement for insubordination.

(9) During an unspecified period of claimant's employment as a code enforcement officer, at least three supervising officers told claimant "at least 10 times" that he was not permitted to show up at police related calls. Exhibit 1, February 20, 2014 memo to police chief from Caldera. Claimant understood he was not permitted to show up at police related calls.

(10) Between January and February 2014, claimant reported to two traffic stops. He was not asked to do so, or ordered to do so, but stopped of his own volition. Claimant knew that he was not supposed to respond to traffic stops, and at one of the stops told a police officer that the officer's safety meant more to claimant than claimant's job. Audio recording at ~1:39:00. Claimant understood the employer

prohibited him from reporting to traffic stops, but felt it was more important to continue stopping at and interfering with those traffic stops than to follow the repeated orders he had received from sergeants, a lieutenant and the police chief to refrain from doing so.

(11) On February 11, 2014, a police officer made a traffic stop and asked for assistance from another officer. Claimant knew he was prohibited from stopping or interfering in the traffic stop, but nevertheless reported to the scene and approached the stopped vehicle.

(12) Claimant subsequently, of his own volition, reported to one officer that he had "been told numerous times in the past by a number of supervisors that you [claimant] are not to make any police officer related contacts and/or engage in police related activities." Exhibit 1, February 20, 2014 memo from claimant to Caldera. Claimant repeatedly apologized for his interference to the police officers involved in the stop, and told one, Caldera, that he had been written up for similar incidents in the past and was going to be fired. Claimant approached his supervisor and told the supervisor that he "messed up" or "screwed up," needed to "tell on" himself, and stated, "I should not have stopped," "I should not have been there," admitted he had been told by several sergeants, a lieutenant and the chief of police that he was not supposed to be "responding to or even showing up at any Police related contacts," and that, had a senior sergeant been in charge of the February 11, 2014 traffic stop, claimant would not have stopped. Exhibit 1, "February 178, 2014" memo from Jackson to Caldera.

(13) On February 28, 2014, the employer discharged claimant for insubordination for failing to obey repeated direct orders to refrain from responding to police related activities.

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.

The employer expected claimant to obey lawful orders. Claimant understood that expectation. Between 2007 and 2014, the employer repeatedly instructed claimant he was not permitted to respond to or show up to police related activities. Claimant understood the instruction. He understood he was prohibited from responding to traffic stops. On February 11, 2014, claimant willfully violated the employer's expectation when he responded to a traffic stop.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). The record shows that immediately after responding to the February 11th traffic stop claimant apologized to the police officers that were involved, felt he had to "tell on" himself to his supervisor, admitted he should not have stopped at the traffic stop, and told at least one officer that he was going to be fired for his conduct. Claimant did not make the February 11th stop because he believed in good faith that the employer would condone the conduct. Rather, he knew his conduct was wrong at the time he made the stop and chose to do so anyway. His conduct was not the result of a good faith error.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered "isolated," it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant testified at the hearing that he had repeatedly responded to traffic stops during the months preceding the final incident. Based on the repeated instructions not to do so that he had received prior to each of those incidents, claimant's conduct in each of those instances constituted a separate willful violation of the employer's expectations. Claimant also had a history of other repeated instances of insubordination, including recurring incidents in which he willfully violated instructions to refrain from inserting himself in police officer related matters, and other incidents where he repeatedly and willfully violated the employer's specific instructions to refrain from running LEDS or warrant checks. The record shows claimant had an extensive history of repeated willful insubordination. Therefore, his conduct in the final incident cannot be considered isolated, and cannot be excused as an isolated instance of poor judgment.

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-16149 is affirmed.

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

DATE of Service: <u>June 17, 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 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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