

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0830

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 91355). The employer filed a timely request for hearing. On May 1, 2014, ALJ Wyatt conducted a hearing, and on May 7, 2014, issued Hearing Decision 14-UI-16997 concluding that claimant's discharge was for misconduct. On May 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the parties' written arguments. With its written argument, the employer submitted documents that it did not offer into evidence at the hearing, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from doing so. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB did not consider the employer's documents, and considered only information received into evidence at the hearing when reaching this decision.

In his argument, claimant asserts the ALJ erred in allowing the employers' witnesses to testify regarding information contained in the employer's security system time logs and claimant's time sheets, which were not part of the hearing record. However, OAR 471-040-0025(5) states that only irrelevant, immaterial or unduly repetitious evidence shall be excluded, that all other evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs shall be admissible, and that erroneous rulings on evidence shall not preclude the ALJ from entering a decision unless shown to have substantially prejudiced the rights of a party. The employer's witnesses' testimony regarding the information contained in the employer's security system time logs and claimant's time sheets was not irrelevant, immaterial or unduly repetitious. Sworn testimony under oath is evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs. The ALJ therefore

did not err in allowing the employer's witnesses to testify regarding the content of the employer's security system time logs and claimant's time sheets.

The ALJ allowed claimant an opportunity to cross-examine the employer's witnesses regarding the information contained in the employer's security system time logs and claimant's time sheets, and claimant chose not to do so. Transcript at 32-34, 41. Claimant testified after the employer's witnesses, and did dispute the accuracy of their testimony regarding the information contained in the employer's security system time logs and his time sheets. Nor did claimant dispute the accuracy of their testimony in his written argument. Thus, even if the ALJ had erred in allowing the employer's witnesses to testify regarding the information contained in the employer's security system time logs and his time sheets, claimant failed to show the error substantially prejudiced his rights.

FINDINGS OF FACT: (1) Salem of the 1st Church of the Nazarene employed claimant as a custodian from May 15, 2000 to February 23, 2014.

(2) The employer paid claimant based on the amount of time he worked. The employer expected claimant to accurately record on his timesheets the times he reported for and left work each day. During the course of claimant's employment, his supervisors reminded him of the employer's expectations on at least two occasions. Claimant understood the employer's expectations.

(3) The employer's security system recorded the times claimant reported for work by entering the employer's facility. The security system also recorded the times claimant left work by setting the security alarm and exiting the facility. During the last three months of claimant's employment, he repeatedly, and consistently, recorded on his time sheets that he reported for work earlier and left work later than the security system showed he did.

(4) Claimant recorded on his time sheet for On February 2, 2014 that he reported for work 18 minutes earlier and left work 21 minutes later than the security system showed he did. Claimant recorded on his time sheet for February 3 that he reported for work 16 minutes earlier and left work 9 minutes later than the security system showed he did. Claimant recorded on his time sheet for February 4 that he reported for work 20 minutes earlier and left work 14 minutes later than the security system showed he did. Claimant recorded on his time sheet for February 5 that he reported for work 23 minutes earlier and left work 17 minutes later than the security system showed he did. Claimant reported on his time sheet for February 6 that he left work 38 minutes later than the security system showed he did.

(5) Claimant did not work for the employer on February 7, 8 or 9, 2014.

(6) Claimant reported on his time sheet for February 10, 2014 that he reported for work 31 minutes earlier and left work 5 minutes later than the security system showed he did. Claimant reported on his time sheet for February 11 that he reported for work 36 minutes earlier and left work 32 minutes later than the security system showed he did. Claimant reported on his time sheet for February 12 that he reported for work 20 minutes earlier and left work 26 minutes later than the security system showed he did. Claimant reported on his time sheet for February 13, 2014 that he reported for work 24 minutes earlier and left work 27 minutes later than the security system showed he did.

(7) Claimant did not work for the employer on February 14 or 15, 2014. Claimant reported on his time sheet for February 16 that he reported for work 22 minutes earlier and left work 4 minutes later than the security system showed he did. Claimant did not work for the employer on February 17.

(8) Claimant reported on his time sheet for February 18, 2014 that he reported for work 17 minutes earlier and left work 20 minutes later than the security system showed he did. Claimant reported on his time sheet for February 19 that he reported for work 22 minutes earlier and left work 17 minutes later than the security system showed he did.

(9) Claimant did not work for the employer on February 21 or 22, 2014.

(10) On February 23, the employer discharged claimant for deliberately falsifying his time sheets.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. 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 accurately record on his timesheets the times he reported for work and left work each day. In written argument, claimant asserted that the ALJ ignored claimant's undisputed testimony that it was the employer's practice to grant up to 15 minutes "leeway" on the times employees recorded reporting for work and leaving work. Claimant also asserted that the ALJ ignored claimant's testimony that after setting the employer's security alarm and leaving the facility, he had to ensure that outer doors were locked, increasing the time claimant was at work. Finally, claimant asserted that the ALJ failed to consider whether, in light of claimant's testimony on those issues, the record shows claimant falsified his timesheets, and that he did so willfully or with wanton negligence.

At hearing, however, claimant testified that he believed he had a 15-minute leeway in the times he recorded reporting for work and leaving based on his experience with *prior* employers, and not the employer. Transcript at 44. The employer disputed claimant's testimony that he had to ensure perimeter doors were locked after setting the security alarm and leaving the facility, asserting that it was not possible to set the alarm unless the doors were locked. Transcript at 54-56. In Hearing Decision 14-UI-16997, the ALJ specifically addressed claimant's testimony on those issues, and his assertion that his time sheets may have been inaccurate due to faulty memory.¹ The ALJ rejected claimant's explanations for the discrepancies between the security system time logs and claimant's time sheets, noting that they

¹ Hearing Decision 14-UI-16997 at 3-4.

failed to explain the larger discrepancies in the times claimant left work, why claimant repeatedly recorded in his time sheets that he reported for work more than 15 minutes before the security system showed he did, or why he consistently recorded working more time than, than the security system showed he did.² We agree with the ALJ that claimant's testimony fails to explain the discrepancies between the security system time logs and claimant's time sheets, and therefore agree with his finding that claimant consciously falsified his time sheets. We therefore conclude that claimant willfully violated the employer's expectations in that regard.

Claimant's conduct cannot be excused as an isolated instance of poor judgment because it was a repeated act, and not a single or infrequent occurrence. *See* OAR 471-030-0038(1)(d) (A). Nor can his conduct be excused as a good faith error. Claimant willfully violated the employer's expectations. His conduct therefore was not the result of a good faith error in his understanding of those expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-16997 is affirmed.

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

DATE of Service: June 24, 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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² *Id.*