

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0951

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 170815). The employer filed a timely request for hearing. On April 16, 2014, the Office of Administrative Hearings (OAH) served a notice of a hearing for April 29, 2014 at 8:15 a.m. On April 29, 2014, ALJ Shoemake postponed the hearing until May 15, 2014 at 8:15 a.m. On May 16, 2014, ALJ Shoemake issued Hearing Decision 14-UI-17831, concluding the employer discharged claimant for misconduct. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Fred Meyer, Inc. employed claimant from July 21, 2009 to February 27, 2014 as a forklift operator.

(2) The employer expected forklift operators to operate its forklifts in a safe manner. The employer also had an incident reporting policy requiring forklift operators to report every accident involving injury or property damage to a supervisor immediately after the incident occurred. Claimant understood the employer's expectations.

(3) Two weeks prior to the separation, the employer suspended claimant for three days after claimant lost a thermometer inside a one-ton batch of dough resulting in a financial loss of over \$10,000 to the employer. At that time, claimant's supervisor warned him that any future policy violations could result in discharge.

(4) On February 17, 2014, while driving a forklift in the warehouse, claimant drove his forklift in an unsafe manner and collided with a wall resulting in an additional financial loss of over \$10,000 to the employer. Claimant did not report the incident because he believed the employer would discharge him based on the warning given to him two weeks prior. A coworker reported the incident to claimant's supervisor. On February 18, 2014, the employer referred claimant to a post-accident drug test.

(5) On February 27, 2014, claimant participated in a meeting with his supervisor and his union representative. Claimant admitted to the supervisor that he caused the accident and failed to report the accident to his supervisor.

(6) On February 27, 2014, the employer discharged claimant for failing to operate a forklift in a safe manner, and for failing to immediately report the February 17, 2014 accident.¹

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because he did not operate a forklift in a safe manner and he failed to follow the employer's incident reporting policy. Claimant understood the employer's policies. Claimant admitted hitting the wall with the forklift, he did not dispute his supervisor's assessment of financial damage to the employer, nor did he dispute the employer's allegation that he was driving unsafely in the final incident.

The employer also discharged claimant because he failed to report the incident on February 17, 2014 to a supervisor immediately after it occurred. Claimant acknowledged he failed to report the incident because he believed the employer would discharge him based on the warning given to him two weeks prior for the financial loss it incurred due to claimant's loss of a thermometer inside a batch of dough. The employer reasonably expected employees to report incidents immediately to ascertain damage, injury and safety concerns. When claimant failed to report the February 17 incident, he willfully violated a reasonable employer expectation.

Claimant's failure to report the February 17 incident cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Some conduct is so egregious that it is considered to exceed mere poor judgment, regardless whether or not the conduct is isolated. Among that conduct are acts that cause an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). Claimant not only drove his forklift in an unsafe manner in the final incident, even though he had just been warned two weeks earlier that policy violations could result in loss of his employment, after

¹ During the hearing, claimant's supervisor initially said the employer also discharged claimant for testing positive for marijuana on February 18, 2014. However, the supervisor later stated the employer discharged claimant "basically for creating the damage and not reporting it and... the test results were just added information to that action." Audio at 28:30.

claimant collided with the wall he deliberately and willfully withheld that information from the employer, disregarding the employer's interests in ascertaining any damage, injury or safety concerns, in favor of his own self-interest in avoiding any potential consequences of his unsafe driving. As a result, the employer could no longer trust claimant to comply with its rules, act in its interests, or report damage and safety concerns to the employer. Claimant's deliberate decision not to report the accident caused an irreparable breach of trust in the employment relationship. Accordingly, claimant's conduct exceeded mere poor judgment and cannot be excused.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not sincerely believe, or have a factual basis for believing, the employer would condone his failure to report the forklift incident immediately after it occurred. His conduct therefore was not the result of an error in his understanding of those expectations.

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

DECISION: Hearing Decision 14-UI-17831 is affirmed.

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

DATE of Service: July 3, 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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