

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1263

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122034). Claimant filed a timely request for hearing. On June 25, 2014, ALJ Wipperman conducted a hearing, and on July 7, 2014 issued Hearing Decision 14-UI-21167, affirming the Department's decision. On July 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Black Butte Ranch employed claimant as a maintenance manager from October 13, 1994 to April 15, 2014. Claimant supervised the maintenance staff and managed the employer's facilities.

(2) The employer's ethics policy, included in its employer handbook, required that employees "not engage in conduct or activity that may raise questions as to Black Butte Ranch's honesty, impartiality or reputation or otherwise cause embarrassment to the company." Exhibit1. Claimant signed for receipt of the handbook on September 28, 2012, acknowledging he understood the employer's policy and expectations.

(3) On March 24, 2014, the facilities director instructed claimant to find the owner of a homeowner's abandoned boat and "make it disappear." Transcript at 23. Claimant "thought that we had – that this employee thought he had management approval to – to just take the boat." Transcript at 32. The other employee removed the boat from a locked maintenance yard on the employer's property after his shift on or about March 24, 2014. Claimant subsequently identified the boat owner through the Oregon Marine Board, and the owner appeared at the maintenance yard on March 28, 2014. After questioning

the crew about the missing boat, a crew member informed the facilities director privately that a fellow crew member had towed the boat to his home and that claimant knew which crew member had removed the boat.

(4) Claimant denied any knowledge of the boat's whereabouts when questioned by the facilities director on March 28, 2014. Claimant then contacted the crewman who had removed the boat and assisted him by towing the boat back to the employer's maintenance yard with claimant's personal vehicle.

(5) Twelve days later, on April 8, 2014, during an investigative meeting with the facilities manager and the employer's president regarding the return of the boat, claimant again denied any knowledge of the boat's disappearance and re-appearance in the employer's maintenance yard. When confronted by the employer's president about the tip the facilities director received from another crew member, claimant admitted he had lied to the facilities director and the employer's president regarding his knowledge of the boat's whereabouts. Claimant contended he did so to protect the crewman.

(6) On April 15, 2014, the employer discharged claimant for being untruthful throughout the employer's investigation, and concluded that because of claimant's role as a manager, it could no longer trust him.

CONCLUSIONS AND REASONS: We agree with the Department and 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 connected work. 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 discharged claimant for being untruthful during its investigation of the disappearance of a homeowner's boat. The employer had a reasonable ethics policy that expected employees to respond truthfully to questions from supervisors. In addition, in his management role, claimant acted on the employer's behalf. Claimant acknowledged at hearing he understood the employer's expectation that he provide truthful information to the employer in business matters.

A crewman, supervised by claimant, removed the homeowner's boat from the employer's locked facility after his shift after suggesting to claimant that he would like to "make it (the boat) disappear". After the homeowner appeared for the missing boat, claimant assisted the crewman in returning the boat to the employer's locked facility without informing the facilities director or any manager. On April 8, 2014, claimant admitted lying to both the facilities director on multiple occasions and to the employer's

president. We agree with the ALJ that, at the very least, claimant demonstrated an indifference to the consequences of his conduct, and should have known that being untruthful about the removal and return of the homeowner's boat would violate the employer's expectations regarding truthfulness.

At hearing and in his written argument, claimant argued that his conduct was an isolated instance of poor judgment, and therefore not misconduct. Transcript at 36. In his written argument claimant asserted that the ALJ's conclusion that claimant's conduct during the investigation "cannot be an isolated instance of poor judgment if it creates an irreparable breach of trust in the employment relationship" is "illogical" because "a single incident is just that, irrespective of its consequence." Written argument at 3.

However, where, as here, over the course of a twelve day investigation, claimant, a manager with the authority to act on the employer's behalf, repeatedly lied to the employer's facilities director and to the employer's president about a potential theft of property the employer was charged with protecting for one of its clients, all the while conspiring with the crewman to return the boat to the employer's locked maintenance facility using his own vehicle, it is hardly "illogical" to conclude that multiple incidents of dishonesty over the course of a twelve day investigation "irrespective of its consequence" would create an irreparable breach of trust in the employment relationship. Moreover, claimant subsequently admitted to the employer that he had been repeatedly dishonest.

Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that claimant sincerely believed, and had a rational basis for believing, that his conduct complied with the employer's expectations. Claimant's contention that the employer's facilities director's comment "make it (the boat) disappear" was an open invitation to commit theft, or for claimant to repeatedly lie about an employee's potential theft of property, is implausible. During the hearing, claimant did not dispute the fact that he was instructed by the employer's facilities director to find the boat's owner through the Oregon Marine Board.

- Q Right. Now, you keep referring to this make it disappear comment. Didn't Mr. Unzueta say find the owner and make it disappear?
- A Actually, I don't think he told me to find the owner. I - I felt that an attempt should be made and I made that comment to him. And then he provided me with the add- - the e-mail address for the Oregon Marine Board.
- Q So as part of that conversation, you contemplated finding the owner?
- A Exactly.
- Q And there was never a direction from Mr. Unzueta to go ahead and take homeowner property, was there?
- A No. Other than the comment about making stuff disappear.
- Q And any time there is something that is allowed to "disappear from the ranch," like you said, construction materials. There's a process for that, isn't there?
- A Yeah. Exactly.

Transcript at 32. Notwithstanding any comment with respect to Mr. Unzueta's comment(s) about making unwanted items "disappear," the record fails to show that claimant believed or had reason to believe, on the basis of his conversation(s) with Mr. Unzueta, that he or any employee could simply take the employer's or its clients' property, or that the employer would tolerate his dishonesty about it.

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

DECISION: Hearing Decision 14-UI-21167 is affirmed.

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

DATE of Service: August 22, 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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