

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1271

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134715). Claimant filed a timely request for hearing. On July 3, 2014, ALJ Triana conducted a hearing, and on July 11, 2014 issued Hearing Decision 14-UI-21343, affirming the Department's decision. On July 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wal-Mart employed claimant as a customer service manager from May 16, 2012 until May 2, 2014.

(2) The employer expected all employees, including managers, to clock out and take a thirty minute uninterrupted meal break during any shift in which they worked more than six hours. If claimant's management duties prevented him from leaving the floor to take this break, the employer expected claimant to contact his immediate supervisor to arrange for floor coverage and, if he was unable to reach his supervisor, to contact the store manager or the zone manager for coverage. The employer also expected claimant to respond honestly when asked to explain his behavior in the workplace.

(3) Sometime in approximately late 2012, claimant worked three to five minutes longer than six hours during a shift and did not take a thirty minute meal break. The employer issued a warning to claimant for failing to take the required meal break even though his time working had only slightly exceeded six hours.

(4) On March 12, 2014, the employer's computerized timekeeping system issued a report stating that, on March 11, 2014, claimant had worked a shift exceeding six hours and had not clocked out for a thirty minute meal break. The timekeeping system issued a "rest break and meal investigation" form for

management to complete about claimant's March 11, 2014 failure to clock out for a meal break. Transcript at 11. On March 12, 2014, the assistant manager spoke to claimant about his failure to clock out for a meal the day before. Claimant told the assistant manager that he had clocked out for a thirty minute meal break on March 11, 2014 at the time clock located on the "CSM podium." Transcript at 11. Claimant estimated that he was clocked out that day for lunch from 9:30 a.m. until 10:00 a.m. After the assistant manager completed the investigation form with the information that claimant had supplied, claimant reviewed the form, initialed the part of the form that stated claimant had taken his required meal break and signed it. At that time, the assistant manager accepted claimant's statement and did not investigate whether claimant had actually taken the required meal break.

(5) Shortly after March 17, 2014, the employer's timekeeping system issued a report stating that, on March 17, 2014, claimant had again worked a shift exceeding six hours and had again not clocked out for a meal break. When the assistant manager spoke with claimant about his failure to clock out for the required meal break on March 17, 2014, claimant told the assistant manager that he had clocked out for that meal break at the CSM podium, had taken a thirty minute lunch break, and estimated that he had taken the break between 12:15 p.m. and 12:45 p.m. Claimant also told the assistant manager that the time clock at the CSM podium was not working correctly and that another manager could corroborate this explanation. As he had on March 12, 2014, claimant reviewed the "rest break and meal investigation" form that the assistant manager had completed with a summary of claimant's statements. Claimant initialed and signed the form stating that he had taken the required break.

(6) After March 17, 2014, the employer investigated whether claimant had actually taken his meal breaks on March 11, 2014 and March 17, 2014. The assistant manager viewed the surveillance videotapes of the CSM podium taken on March 11, 2014, between 9:00 a.m. and 10:30 a.m., and on March 17, 2014, between 11:45 a.m. and 1:15 p.m. and did not observe that claimant had clocked out during those times. The assistant manager also determined that no computer reports had been generated about problems with the time clock located at the CSM podium and determined that no employees had reported problems with the CSM podium time clock. The assistant manager also spoke with the manager that claimant had identified as having information about the malfunctioning of the time clock at the CSM podium, and that manager stated that she was not aware of any problems with that time clock.

(7) On May 2, 2014, after completing its investigation, the employer discharged claimant for failing to take his required meal break on March 17, 2014 and for dishonestly telling the assistant manager that he had clocked out for meal breaks on March 11, 2014 and March 17, 2014.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, claimant agreed he was aware that the employer expected him to clock out and take a thirty minute uninterrupted meal break during any shift when he worked over six hours, however short that time was. Transcript at 28. As a matter of common sense, claimant was also aware that the employer expected him to supply honest information when it was investigating his workplace behavior, including whether he had taken breaks on certain work days. Although claimant raised several different contentions about why he was unable to take the required meal breaks on March 11, 2014 and March 17, 2013, these contentions do not explain why he was allegedly not truthful with the employer's assistant manager when that manager questioned him about whether he had taken meal breaks on both of those days.

Claimant contended that the summary of his statements that the assistant manager included on the "rest break and meal investigation" form was inaccurate, and that he had not told the manager either that he had taken his full meal breaks on those days or that he had clocked out for those breaks at the CSM podium. Transcript at 11, 13, 47, 51. However, it is unlikely that, after reviewing them, claimant would have initialed and signed the forms as accurate unless they included the information he had actually given to the assistant manager. It is equally unlikely that the assistant manager would have spent time reviewing surveillance videos to determine the honesty of claimant's statements to him if claimant had candidly admitted that he did not know whether he had taken meal breaks on those days and, if he had, how long the breaks were. It also unlikely that the assistant manager would have looked for reports issued by the employer's timekeeping system indicating a malfunction, and would have interviewed another customer service manager about problems with the time clock unless claimant had attributed his apparent failure to clock out to a faulty time clock rather than his actual failure to clock out. Transcript at 54. The most reasonable explanation for the information contained in the "rest break and meal investigation" forms is that claimant told the assistant manager that he had taken his full meal breaks on both days and that he had clocked out before doing so. Since the assistant manager spoke to claimant shortly after both the days at issue, it is not plausible that claimant was merely confused about his behavior during those workdays or did not remember whether he had actually taken the required breaks. More likely than not, absent any reasonable alternative explanation to the contrary, claimant intended to deceive the assistant manager in the statements he gave about his meal breaks on March 11 and March 17, 2014. Claimant willfully violated the employer's expectations by his intentional dishonesty.

Claimant's behavior on March 17, 2014 in deceiving the assistant manager was not excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant knowingly and willfully deceived the assistant manager in the two statements he gave for the "rest break and meal investigation" forms, the first about whether he had taken a meal break on March 11, 2014 and the second about whether he had taken a meal break on March 17, 2014. Because claimant's dishonest statements occurred during investigations of two separate meal break violations, his willful violations of the employer's expectations were repeated rather than isolated. For this reason, claimant's behavior on March 17, 2014 is not excused as an isolated instance of poor judgment.

Nor was claimant's behavior on March 17, 2014 excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not assert or contend that he thought the employer would excuse his dishonesty about his behavior on March 17, 2014. Moreover, it is simply not plausible that claimant

mistakenly believed that the employer would condone his dishonesty in making statements in the course of an investigation of his workplace behavior.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-21343 is affirmed.

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

DATE of Service: September 2, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.