

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1365

*Reversed
Disqualification
(Descalificación)*

PROCEDURAL HISTORY: On July 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 101942). The employer filed a timely request for hearing. On August 6, 2014, ALJ Murdock conducted a hearing, and on August 8, 2014 issued Hearing Decision 14-UI-23087, affirming the Department's decision. On August 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Great American Entertainment Company LLC employed claimant from February 14, 2014 to May 28, 2014 as a laborer.

(2) The employer expected claimant to follow instructions. The employer also expected claimant to refrain from being dishonest at work.

(3) One of claimant's duties was to weed the area in front of a house on the employer's animal farm. On the morning of May 28, 2014, the managing owner instructed claimant to weed that area. Claimant asked the managing owner if he could use an area located at the back of the employer's property, behind a trailer, to plant a personal tomato garden. The area contained rosemary bushes planted there by a professional landscaper, and had no weeds. The managing owner told claimant that she would ask the other owners if claimant could use the area. Claimant began his shift.

(4) Later that day, the managing owner saw that, during his shift, claimant had removed the rosemary bushes from the area behind the trailer. The managing owner reminded claimant that he was instructed to weed the area in front of the house. Claimant initially asserted that she had told him to weed the whole property. The owner responded that she clearly directed him to clear the area in front of the

house. Claimant then falsely asserted that another owner gave him permission use the area behind the trailer to plant tomatoes.

(5) Claimant did not ask another owner for permission to plant tomatoes on the employer's property, and was never given permission to do so.

(6) On May 28, 2014, the employer discharged claimant for insubordination and dishonesty.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude 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. 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 had a right to expect claimant to follow the managing owner's work instructions, and to be truthful at work. The employer also had a right to expect claimant to refrain from destroying its property and engaging in personal projects while working. Claimant knew or should have understood the employer's expectations as a matter of common sense. In Hearing Decision 14-UI-23087, the ALJ concluded that claimant's discharge was not for misconduct, reasoning that the employer did not show, by a preponderance of evidence that claimant consciously or intentionally violated its standards, but, rather, that the employer only showed that claimant "misunderstood instructions or communications with the members and committed a good faith error."¹ However, claimant did not participate in the hearing, and the record fails to show that claimant misunderstood the managing owner's instructions to weed the area in front of the house or her statement implicitly denying his request to plant a personal garden on May 28. The employer's managing owner and its director testified that the employer's instructions to claimant that he weed in front of the house were clear, and that claimant did not ask for or receive permission from the owner claimant asserted gave him permission to plant a personal garden. Audio Record at 10:54 to 11:22; 11:45 to 11:50; 14:29 to 15:07. In using work time to remove the employer's plants from the employer's property for a personal garden, and in falsely asserting that the owners told him to weed the entire property, and that he could use the area behind the trailer for a personal garden, claimant consciously engaged in conduct he knew violated the employer's expectations. Claimant therefore willfully violated the employer's expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that create irreparable breaches of trust in the employment relationship make a continued relationship impossible, exceed mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's insubordinate behavior and his act of dishonesty when he lied about having obtained permission to use the area behind the trailer for a personal garden, viewed

¹ Hearing Decision 14-UI-23087 at 3.

objectively, were sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's conduct therefore exceeded mere poor judgment.

Claimant's conduct also cannot be excused as a good faith error. Claimant consciously engaged in conduct he knew violated the employer's expectations. The record fails to show that his conduct was the result of a good faith error in his understanding of the employer's expectations.

DECISION: Hearing Decision 14-UI-23087 is set aside, as outlined above. *Decisión de la Audiencia 14-UI-23087 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: September 19, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en court.oregon.gov. En este sitio web, haga clic en "Help" para acceso a información en español.

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