

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1396

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143146). Claimant filed a timely request for hearing. On July 30, 2014, ALJ Clink conducted a hearing, and on August 5, 2014 issued Hearing Decision 14-UI-22818, affirming the Department's decision. On August 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and the portions of claimant's argument that were based on the hearing record, when reaching this decision.

FINDINGS OF FACT: (1) Frontier Communications Northwest employed claimant from January 9, 2006 to May 30, 2014 as a fiber network field technician.

(2) The employer prohibited claimant from driving a company vehicle home during his work day without management approval. The employer expected claimant to contact dispatch or his supervisor any time he was available for additional work. If there were no service calls available, the employer expected claimant to return to its headquarters to work in the shop. The employer expected claimant to take a thirty-minute lunch break. The employer also expected claimant to be honest during workplace investigations. Claimant understood the employer's expectations.

(3) On May 14, 2014, claimant began his shift at 7:30 a.m. Claimant completed his first job assignment in Wilsonville, Oregon at 10:25 a.m. When he left the first work site, he did not have another job scheduled until 3:00 p.m. Claimant drove the company vehicle to his house in Donald, Oregon, and

remained there until 1:00 p.m. Claimant did not have management approval to drive the company vehicle home. Claimant's supervisor saw claimant's work vehicle parked near his house from 11:30 to 1:00 p.m. Claimant did not work while he was at home. Claimant left his house at 1:00 p.m. when dispatch contacted him and gave him another work assignment. Claimant completed two more job assignments until his shift ended at 6:00 p.m., and reported having worked ten hours on May 14, 2014.

(4) On May 16, 2014, the employer interviewed claimant about his activities on May 14, 2014. The employer's representative asked claimant what time he began and completed his jobs on May 14, 2014. Claimant responded that he did not know or could not recall. The representative asked claimant, "Did you go directly from your first job to your second?" Claimant responded that he did not remember. Exhibit 1. Later during the interview, claimant then told the representative he could have gone home for about fifteen minutes on May 14, 2014 to pick up his blood pressure medicine. Claimant's supervisor told him he saw claimant at his home from 11:30 a.m. until 1:00 p.m. on May 14, 2014. Claimant then told the employer he regularly went home for lunch. Exhibit 1.

(5) On May 30, 2014, the employer discharged claimant because he drove a company vehicle home and took a break for at least 1.5 hours instead of working or contacting the employer for additional work, and because he did not answer the employer's questions truthfully during a workplace investigation.

CONCLUSIONS AND REASONS: We agree 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for taking the company vehicle to his home without authorization, failing to work for at least 1.5 hours during his shift, and for dishonesty during a workplace investigation. Claimant testified at hearing that there were no "specific restrictions" on taking the company vehicle home. Transcript at 18-19. However, claimant attended two technician meetings in March 2014 when the employer explained its expectations. Moreover, claimant did not initially disclose during the workplace investigation that he went home during work on May 14, 2014, although the interview was only two days later. Transcript at 20. Had claimant believed the employer permitted him to take the company vehicle home, more likely than not, he would have disclosed that fact earlier during the interview. We conclude that claimant knew the employer would not condone his conduct when he drove the employer's vehicle home on May 14, 2014.

Claimant understood the employer expected him to take 30-minute lunch breaks, to contact dispatch for additional work when he finished a job, or return to work at the employer's service center. Claimant

asserted at hearing and in his written argument to EAB that the employer knew via its internet tracking system that he was not engaged in a job assignment when he went home on May 14, but did not contact him to give him additional work. Transcript at 23, Claimant's Written Argument. However, claimant knew the employer expected him to perform work at the service center if he was not on an assignment. Nor does claimant's argument explain why he reported having worked ten hours on May 14, 2014, when he worked no more than 8.5 hours that day. On May 14, 2014, claimant made a conscious choice to drive the employer's vehicle home and to take a break of more than two hours, knowing that his conduct would violate the employer's expectations. Claimant's conduct constituted a willful violation of the employer's expectations.

The employer had a right to expect claimant to be honest during workplace investigations. We infer claimant understood that expectation as a matter of common sense. On May 16, 2014, claimant did not initially tell the employer he had driven the company vehicle home on May 14, 2014. When he did admit to doing so, he told the employer he went home for "not long, maybe 10-15 minutes." Exhibit 1. However, claimant went home when he finished a job at 10:25, and did not leave his house until 1:00 p.m. The preponderance of evidence shows claimant tried to conceal his conduct from the employer by not disclosing he went home, and lying about how long he was there. In failing to be truthful to the employer, claimant willfully violated the standards of behavior that an employer has the right to expect of an employee.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant willfully violated the employer's expectations on two occasions in three days. His exercise of poor judgment therefore was not a single or infrequent occurrence. Moreover, acts that create irreparable breaches of trust in the employment relationship 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). Viewed objectively, claimant's acts of going home instead of working and trying to conceal his conduct were acts of dishonesty 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, and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant consciously engaged in conduct he knew violated the employer's expectations. His conduct therefore was not the result of a good faith error in his understanding of those expectations.

DECISION: Hearing Decision 14-UI-22818 is affirmed.

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

DATE of Service: September 30, 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.