

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1792

Reversed
Disqualification

PROCEDURAL HISTORY: On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 111705). The employer filed a timely request for hearing. On October 28, 2014, ALJ R. Frank conducted a hearing, and on October 31, 2014 issued Hearing Decision 14-UI-27983, affirming the Department's decision. On November 20, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based in information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Goodwill Industries of the Columbia and Willamette employed claimant from September 19, 2013 to August 21, 2014, last as a senior employment specialist in the employer's job connection department in Salem, Oregon.

(2) The employer's employee handbook contained a written policy stating that unless approved in advance by the employer's human resources department, employees were prohibited from engaging in any activity that created or appeared to create a conflict of interest with their employment or with any business function performed by the by the employer. Claimant read the employee handbook when hired, and understood he was prohibited from engaging in any unauthorized activity that created, or appeared to create, a conflict of interest with the employer.

(3) In or about June 2014, claimant and a subordinate employee began developing a website that performed a business function similar to the employer's public website. They did not have the employer's authorization to do so.

(4) On June 26, 2014, claimant registered and reserved the internet domain names “goodwilljc.com” and “salemjc.com” in his own name. Claimant did not have the employer’s authorization to do so.

(5) On July 7, 2014 claimant and a subordinate employee filed articles of incorporation for American Job Connection, a for-profit corporation, with the Oregon Secretary of State. Claimant and the subordinate employee were the corporation’s shareholders. They did not have the employer’s authorization to register the corporation with the State of Oregon.

(6) On August 12, 2014, claimant and the subordinate employee launched the website they had developed, “Salem Job Connection,” under the “salemjc.com” domain name. Transcript at 30. They did not have the employer’s authorization to do so.

(7) The employer discharged claimant for violating its policy and expectations regarding conflicts of interest.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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) (August 3, 2011).

In Hearing Decision 14-UI-27983, the ALJ determined that the employer had a right to expect claimant to abide by the terms of any policy prohibiting any activity conflicting with the interests of the employer, or giving the appearance of such a conflict, and that claimant understood that expectation.¹ However, the ALJ ultimately determined that the record failed to show that claimant violated the employer’s policy, or therefore willfully violate its expectations, regarding conflicts of interest, reasoning as follows:

Although [claimant] “went live” with his website during the days preceding the work separation, it remains plausible that, as he contends, he did so in an effort to test the system’s efficacy with the intent of eventually donating it to the employer’s business.

¹ Hearing Decision 14-UI-27983 at 4.

Likewise, there is no evidence to suggest that claimant actually rendered services under the name of his company while still employed.²

We agree with the ALJ that claimant understood the employer's reasonable policy and expectation that he refrain from engaging in any unauthorized activity that created, or appeared to create, a conflict of interest with the employer. However, we disagree with the ALJ's determination that claimant did not violate the employer's policy. Claimant's development of a website that performed a business function similar to the employer's public website appeared to create a conflict of interest with the employer, as did registering and reserving two internet domain names, one comprised of the employer's name and the initials of claimant's department, and the other comprised of the initials of claimant's department and his work location. Claimant's registration of a for-profit corporation with a name similar to his department's name also appeared to create a conflict of interest with the employer, as did launching the website he developed. Claimant's engagement in those activities without the employer's authorization therefore violated the employer's policy, regardless of whether claimant intended to eventually donate the site to the employer, or rendered services under the name of his company while still employed. Although claimant may not have willfully violated the employer's expectations, he knew or should have known that engaging in such activities without the employer's authorizations probably violated those expectations. His conscious decisions to engage in such activities without the employer's authorization demonstrated indifference to the consequences of his actions, and therefore were, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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 engaged in activities that appeared to create conflicts of interest with the employer on four separate occasions over a period of approximately three months. Claimant's exercise of poor judgment therefore was a repeated act or pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant understood he was expected to refrain from engaging in any unauthorized activity that appeared to create a conflict of interest with the employer. Although claimant asserted that his activities did not create an actual conflict of interest,³ he did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, they did not appear to create a conflict of interest.

DECISION: Hearing Decision 14-UI-27983 is set aside, as outlined above.

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

DATE of Service: December 31, 2014

² *Id.*

³ Transcript at 30.

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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