

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1949

Reversed
Disqualification

PROCEDURAL HISTORY: On October 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 25473). Claimant filed a timely request for hearing. On December 9, 2014, ALJ Triana conducted a hearing, and on December 12, 2014 issued Hearing Decision 14-UI-30295, concluding the employer discharged claimant, but not for misconduct. On December 24, 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 on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Securitypros, Inc. employed claimant from February 8, 2013 to October 7, 2014 as a security officer.

(2) The employer expected claimant to notify his supervisor or the owner before leaving work early, and to accurately record the time he worked on his timesheet. Claimant understood the employer's expectations.

(3) On September 28, 2014, claimant was scheduled to work until 8:00 p.m. Claimant became concerned while he was at work because he was unable to contact his girlfriend by telephone, and she had recently begun taking a medication with potentially adverse side effects. Claimant discussed the matter with other security officers at his work site, gave another officer the company cell phone, and left work early at 5:00 p.m. Claimant did not notify his supervisor or the owner before he left work.

(4) Claimant went home and saw his girlfriend was not ill and had merely misplaced her telephone. He called the security officer at his work site and told him that he planned to stay home because work was "slow," and that he would notify his supervisor. Audio Record at 32:23 to 32:38. The officer called claimant's supervisor and told him claimant had left work early.

(5) The supervisor called claimant and told him to return to work. Claimant returned to work at 6:10 p.m. Claimant had taken a lunch break earlier during the day, and had recorded it on his timesheet. Later that day, claimant “whited out” the lunch break entry on his timesheet, wrote “no lunch,” and recorded that he had been working during that time. Exhibit 1.

(6) On October 7, 2014, the employer discharged claimant for leaving work early without permission, and failure to record the actual time he worked on his timesheet.

CONCLUSIONS AND REASONS: We disagree with 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. 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, in part, for leaving work early without notifying his supervisor or the owner. The employer had a right to expect claimant to refrain from such conduct. Claimant understood that expectation. Claimant asserted at hearing that he failed to call his supervisor before he left work because his head was “cloudy” and he was focused on his girlfriend’s condition. Audio Record at 33:12 to 33:44, 35:15 to 35:39. However, claimant discussed the situation with his coworkers and remembered to deliver the company cell phone to another officer before he left work. Moreover, once claimant knew his girlfriend was safe, he called his coworker, and not his supervisor. More likely than not, claimant’s failure to notify his supervisor or the owner before leaving work early was a conscious act. His conduct therefore was, at best, wantonly negligent.

In Hearing Decision 14-UI-30295, the ALJ found that claimant’s failure to request permission to leave work early was an isolated instance of poor judgment, and not misconduct, because “no evidence was presented that claimant had left work without permission previously,” and claimant’s conduct did not exceed mere poor judgment.¹ However, the ALJ’s analysis overlooks the fact that the employer also discharged claimant, in part, for failing to record his lunch break on his September 28, 2014 timecard. The employer had a right to expect claimant to provide an honest, accurate record of the time he worked. Claimant understood that expectation. Claimant testified that he did not take a lunch break other than to go home to check on his girlfriend. Audio Record at 37:48 to 38:10. However, that testimony is inconsistent with claimant’s prior testimony that he did take a lunch break and should have recorded it on his timecard, but removed it from his timecard and wrote “no lunch” when he returned to work at

¹ Hearing Decision 14-UI-30295 at 3-4.

6:10 p.m. “because he was trying to get an even hour going.” Audio Record at 36:14 to 36:48. Claimant’s testimony regarding his timecard is irreconcilably inconsistent, and therefore lacks credibility. We therefore found facts in accordance with the employer’s evidence regarding claimant’s lunch break, which shows that claimant likely falsified his timecard to show that he was working while he took a lunch break. *See* Condition Report of Terry Barge, Exhibit 1. In doing so, claimant consciously engaged in conduct he knew violated the employer’s expectations, and therefore willfully violated those expectations.

Claimant’s conduct cannot be excused as an isolated instance of poor judgment. 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). On September 28, 2014, claimant exercised poor judgment by consciously failing to communicate with a supervisor about or asking permission to leave work, failing to contact his supervisor about leaving work early once any perceived emergency had ended, and again by intentionally removed record of his lunch break from his time card, thus failing to provide an accurate record of the time he worked. Claimant’s exercise of poor judgment therefore was not a single or infrequent occurrence.

Claimant’s conduct cannot be excused as a good faith error. The record fails to show claimant sincerely believed, or had a rational basis for believing, his conduct complied with the employer’s expectations.

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

DECISION: Hearing Decision 14-UI-30295 is set aside, as outlined above.

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

DATE of Service: February 11, 2015

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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