

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0042

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132659). Claimant filed a timely request for hearing. On January 7, 2015, ALJ Seideman conducted a hearing, and on January 8, 2015 issued Hearing Decision 15-UI-31507, affirming the Department's decision. On January 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Accordingly, EAB did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) PS Trucking, Inc. employed claimant as a truck driver from March 4, 2014 until August 22, 2014.

(2) The employer expected claimant to report for work when scheduled. Claimant understood that expectation as a matter of common sense.

(3) On August 7, 2014, claimant was hauling a load for the employer when a police officer stopped her in Washington state for making an illegal lane change. The officer performed a routine check and told claimant that criminal warrants for her arrest had been issued by the State of Virginia. Another police officer arrived and took claimant into custody. At that time, claimant called the employer and told the dispatcher that she had been arrested on warrants from Virginia. Claimant also told the dispatcher that she did not know why any warrants for her arrest had been issued by authorities in Virginia. The police officer transported claimant to the Pierce County Jail in Tacoma, Washington. Claimant remained in the Pierce County Jail. While claimant was incarcerated in Washington, claimant's sister maintained contact with the employer.

(4) On August 22, 2014, the employer discharged claimant for failing to report for work after August 7, 2014. On that day, the employer mailed a letter to claimant notifying her that she had been discharged for an unexcused failure to report for work.

(5) On October 15, 2014, claimant was extradited from Washington to Virginia. When she was in Virginia, claimant learned that she had been charged with seven separate criminal offenses, all involving some manner of computer fraud, identity theft or money laundering. Claimant consulted with an attorney in Virginia and, when she told him she had been "duped" into participating in the acts underlying the criminal charges, he advised her that a jury probably was not going to believe her and likely would convict her. On approximately October 29, 2014, claimant entered an Alford guilty plea to the felony charges of computer fraud and identity theft, in exchange for which the prosecutor in Virginia dismissed all other pending charges against claimant and agreed to recommend that claimant be placed on probation and allowed to return to Oregon. Claimant also agreed to pay restitution to the victims of the crimes to which she entered pleas. The Virginia court accepted the plea bargain and the Alford plea.

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. 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).

It is not disputed that claimant was unable to report for work and comply with the employer's attendance expectations because she was incarcerated. Claimant did not contend that she was not aware that the employer expected her to report for work as scheduled. In *Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) the court confronted a situation similar to claimant's, and held that a claimant's inability to attend work due to incarceration was work-related misconduct if claimant willfully or with wanton negligence created the situation that made it impossible for her to report for work. The issue in this case is therefore whether claimant's willful or wantonly behavior gave rise to the Virginia criminal charges which resulted in her incarceration and prevented her from attending work.

Claimant's principal contention was that she did not engage in any criminal acts in Virginia, and that she entered Alford guilty pleas to two of the Virginia felony charges only to secure her ability to return promptly to Oregon. Audio at ~11:24, ~16:37. The effect of an Alford guilty plea in Virginia is that a defendant concedes only that there is sufficient evidence to convict him or her of the charged crimes, but does not admit that he or she participated in the acts underlying the criminal charges. See *Patterson v. Commonwealth*, 551 SE2d 332, 333 (Va Sup Ct 2001). At hearing, other than stating that she was "duped" into the behaviors that led to the Virginia criminal charges, that she "got caught up in this whole thing [in Virginia]" and that "I'm paying for someone else's crime," claimant did not detail the nature of the prosecution's evidence in Virginia, how she became misled to participate in the crimes with which she was charged or the actual extent of involvement in the behaviors underlying those crimes. Audio at ~17:01, ~17:14, ~17:28. Given this lack of explanatory information, claimant's conclusory denials of any criminal participation is insufficient to convince us that there was no wantonly negligent behavior

on her part that led to her involvement in the events underlying the criminal charges in Virginia. Based on the nature of her Alford guilty plea, that sufficient evidence existed to convict her beyond a reasonable doubt of the crimes to which she plead guilty, the logical conclusion is that, more likely than not (or by a preponderance of the evidence), claimant engaged in the crimes of computer fraud and identity theft.

In Virginia, the crime of identity theft, to which claimant entered an Alford plea, requires an intention to defraud. Va Code Ann §18.2-186.3. The crime of computer fraud, to which claimant also entered an Alford plea, requires an intention to deceive or to obtain the property or services of another by false pretenses. Va Code Ann §18.2-152.3. The state of mind required for those crimes is sufficient to show, more likely than not, that claimant that claimant willfully or with wanton negligence engaged in the behaviors underlying those crimes. As a result, claimant willfully or with wanton negligence created the situation that led to her incarceration and which prevented her from attending work after August 7, 2014. Under *Weyerhaeuser*, unless it is otherwise excused, claimant's failure to report for work was misconduct.

Claimant's failure to report for work after August 7, 2014 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is excused from misconduct under this exception only if it was, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. In this case, claimant failed to report for work for more than two weeks, comprising several repeated acts in violation of the employer's expectations. Because it was repeated over several days, claimant's wantonly negligent behavior was not isolated and cannot be excused as a single instance of poor judgment. Claimant's failure to report for work may also be excused from amounting to misconduct if it resulted from claimant's good faith error. OAR 471-030-0038(3)(b). However, claimant did not assert or present evidence showing that she failed to report for work due to a mistaken understanding of the employer's attendance expectations. Because she did not make this threshold showing, claimant's repeated absences from work were not the result of a good faith error and are not excusable under this exculpatory provision.

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

DECISION: Hearing Decision 15-UI-31507 is affirmed.

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

DATE of Service: March 2, 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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