EO: 200
BYE: 201544

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

868
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0212

Reversed
Disqualification

PROCEDURAL HISTORY: On December 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for misconduct (decision # 110818). The employer filed a timely request for hearing. On February 4, 2015, ALJ M. Davis conducted a hearing, and on February 6, 2015, issued Hearing Decision 15-UI-33072, affirming the Department's decision. On February 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: In written argument, the employer offered documents that were not part of the hearing record, including a Department "Fact Finding" dated December 2, 2014 and court certified records concerning claimant's criminal trial claimant attended on October 9 and 10, 2014, days on which he reported to the Department and employer he was sick. We construe the employer's offer as a request to have EAB consider new information under OAR 471-041-0090(2) (October 29, 2006). Under OAR 471-041-0090:

> Information not received into evidence at the hearing will not be considered on review, except, subject to notice and an opportunity to be heard:
>
> * * *
>
> (2) New information may be considered when the party offering the information establishes that:
>
> > (a) The new information is relevant and material to EAB's determination; and
> >
> > (b) Factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing; * * *

The new information is relevant and material to claimant's credibility and the employer's contention that claimant understood that the company van he drove was to be parked at his residence when not being

used for employer purposes, the latter of which claimant denied. The employer did not become aware of claimant's court proceedings until after the hearing and reasonably could not have anticipated prior to that time that claimant had misrepresented to both the employer and the Department the reason he was absent from work on October 9 and 10. Our consideration of the new information would, ordinarily, require remand. However, the employer certified the documents were served on claimant on March 27, 2015 at his address of record, and claimant to date has not objected to their being considered. Accordingly, the documents, collectively marked EAB Exhibit 1, are admitted into the record. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

FINDINGS OF FACT: (1) Northwest Control Company employed claimant as a service technician from September 13, 1999 to October 14, 2014. As a service technician, the employer provided claimant with a company van to travel between his residence and job assignments.

(2) The employer prohibited its employees from using company vehicles for personal reasons. In December 2006, claimant drove his company van outside of work hours while intoxicated and caused a vehicular accident. Thereafter, the employer's auto insurer denied coverage for the employer against injury claims made against it arising out of the accident because the employer had not granted claimant permission to use its vehicle for personal reasons. The employer did not terminate claimant's employment but made an "extreme exception" and purchased a separate policy for claimant to allow him to continue his employment. Exhibit 1. The employer warned claimant to avoid further violations of the employer's prohibition against using a company vehicle for personal reasons.

(3) On September 4, 2007, claimant acknowledged in writing the employer's adoption of a written policy that stated, "Company owned vehicles are to be driven for Company business ONLY. Personal use of Company owned vehicles are prohibited." Exhibit 1. In July 2013, claimant drove his company van after hours from work to his girlfriend's house. Later that day, while driving the van to his residence, he nearly caused an accident while talking on his cell phone. A citizen complained to the employer. The employer's operation's manager (Meyers) confronted and warned claimant, "Jason, that is personal use. You're driving to your girlfriend's house. That's not company business." Transcript at 19-20. Meyers further explained that it was a requirement of its insurance company and stated, "you need to take your van home, not drive somewhere else on the way home, you need to take your van home." Transcript at 33. Claimant understood the employer's prohibition against use of an employer vehicle for personal reasons.

(4) On October 6, 2014, after leaving his work location, rather than drive home claimant drove his company van to his father's residence, where he parked it and took his father's vehicle. On October 7, 8, 9, 10 and 13, 2014, claimant called in sick to work, although on October 9 and 10 he attended his own DUII trial at which he was found guilty. On October 13, 2014, the employer's owner sent a manager to claimant's residence to determine if the company van was parked at claimant's residence. The manager observed that the van was not there, reported that to the owner, and on October 14, 2014, the employer discharged claimant in part for violating its policy against personal use of a company vehicle.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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. 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 violating its policy against personal use of a company vehicle by taking the company van to his father's residence and leaving it there without a business purpose. In Hearing Decision 15-UI-33072, after finding that claimant understood the employer's prohibition against personal use of company vehicles, the ALJ concluded the employer discharged claimant, but not for misconduct, reasoning,

> The business manager testified that in July 2013, the employer informed claimant that he was not allowed to park the employer's vehicle anywhere but his own residence when he was not using it for work…While claimant may not have met the employer's expectations, the employer failed to establish that claimant willfully, or with wanton negligence, violated the employer's policies or expectations. Claimant's testimony indicated that he did not understand that he violated the employer's policy when he parked the employer's vehicle at his parents' home.

Hearing Decision 15-UI-33072 at 1, 4. We disagree. Claimant's testimony was not credible. Claimant's representations to both the employer and the Department that he was sick on October 9 and 10, 2014 were inconsistent with court certified documents that indicate that claimant attended a two day jury trial as the defendant on those days. EAB Exhibit 1. Because claimant was not a credible witness, his testimony that he did not understand the employer's expectation regarding where he was permitted to park its vehicle did not have any probative value. It is also implausible that, after repeated warnings against using his van for personal reasons, and a specific warning in July 2013 that driving the van somewhere other than his home, even while on the way home , that claimant did not understand that driving the van to his father's residence would violate the employer's expectation. More likely than not, claimant understood that after work, he "need[ed] to take [the company] van home, not drive somewhere else on the way home." By dropping the van off at his father's home without a work purpose and leaving it there until October 13 without notifying the employer of the whereabouts of its property, claimant demonstrated that his violation of the employer's prohibition against personal use of its vehicle was conscious, in disregard of the employer's interests and at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or good faith error. 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). Claimant's personal use of his company assigned van was a "repeated act" having also occurred in

December 2006 and July 2013. Even if the conduct had been isolated, acts that create an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). Here, viewed objectively, claimant's conduct in using his company assigned vehicle for personal reasons and placing the employer at an increased risk for liability for the third time created an irreparable breach of trust making a continued employment relationship impossible.

Claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, that the employer would excuse his personal use of its vehicle after having been warned against it several times.

The employer discharged claimant for misconduct under ORS 657.176(2). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 15-UI-33072 is set aside, as outlined above.

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

DATE of Service: April 17, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.