

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0234

Reversed
Disqualification

PROCEDURAL HISTORY: On January 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 143238). The employer filed a timely request for hearing. On February 18, 2015, ALJ Murdock conducted a hearing, and on March 2, 2015 issued Hearing Decision 15-UI-34343, affirming the decision. On March 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lanz Cabinet Shop, Inc. employed claimant from October 30, 2001 to December 30, 2014 as an accounts receivable.

(2) The employer prohibited firearms from the workplace. If an employee needed to transport a firearm, the employer required the employee to lock the firearm in his or her car and park the car offsite. Claimant understood the employer's expectations.

(3) In November 2013, claimant showed her gun to the employer's accounts payable coordinator while at work. The coworker told claimant she should not bring her gun to work, and claimant responded, "Don't worry. I won't get caught." Transcript at 17. The coworker did not report the incident to the employer.

(4) On December 30, 2014, claimant forgot she had a gun in her purse and brought the purse containing the gun with her to work. Claimant realized she had the gun with her when she took her hour-long lunch break. After claimant ate her lunch, she went to her car in the employer's parking lot for the remainder of her break. Claimant showed her gun to a coworker when he walked by claimant's car. An employee in the employer's workplace saw claimant showing her coworker the gun, and told the employer about

the incident. Claimant decided to leave the gun in her purse and bring it back into her office with her after her lunch break.

(5) The employer asked claimant if she had a gun in her office, and claimant responded that she did have a gun in her office. The employer discharged claimant for bringing a firearm into the office.

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 her conduct and knew or should have known that 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 because she brought a firearm into the workplace. The employer had a right to expect claimant to refrain from such conduct. Claimant understood that expectation. Claimant testified at hearing that she brought the gun back into the workplace after her lunch break because she did not want to leave it in her unlocked car, because claimant customarily left her car unlocked so her husband, also a coworker, could access the car during his shift. Transcript at 28-29. In doing so, claimant consciously disregarded the employer's expectation that she not bring a firearm into the workplace. Her conduct was, therefore, a willful disregard of the employer's interest.

In Hearing Decision 15-UI-34343, the ALJ concluded claimant's conduct on December 30, 2014 was an isolated instance of poor judgment. We disagree. 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). The ALJ found that claimant's conduct on December 30, 2014 was an isolated because the testimony from claimant's coworker about the November 2013 incident when claimant brought her gun to work was "no more than evenly balanced" with claimant's assertion that December 30, 2014 was the only time she had brought a gun to work.¹ See Transcript at 26. However, that testimony is inconsistent with claimant's prior testimony at hearing that she did not recall, and did not know, if the November 2013 incident occurred as alleged by claimant's coworker at hearing. Transcript at 25, 26. Because claimant's testimony regarding the November 2013 incident is inconsistent, it lacks credibility. The record contains no evidence to show the coworker who testified lacked credibility. We therefore found facts in accordance with the employer's evidence regarding the November 2013 incident when claimant showed her gun to a coworker at work, and stated she would not "get caught." In bringing her gun with her to work in November 2013, claimant consciously

¹ Hearing Decision 15-UI-34343 at 3.

engaged in conduct that she knew violated the employer's expectations, and therefore willfully violated those expectations. Because claimant consciously engaged in the same conduct in November 2013 as the final incident, claimant's exercise of poor judgment was a repeated act, and not an isolated instance of poor judgment.

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, her conduct complied with the employer's expectations. The employer discharged claimant for misconduct. Claimant is thus disqualified from the receipt of unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-34343 is set aside, as outlined above.

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

DATE of Service: April 20, 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.

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