

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0399

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81318). Claimant filed a timely request for hearing. On March 31, 2015, ALJ Clink conducted a hearing, and on April 3, 2015 issued Hearing Decision 15-UI-36306, affirming the Department's decision. On April 6, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered the entire hearing record and claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Transportation Media Inc. employed claimant from December 6, 2009 to January 14, 2015 as a director of team partnerships.

(2) Beginning in 2013, the Oregon Department of Justice (DOJ) required documentation from the employer summarizing the employer's financial involvement and activities relating to each Oregon school it worked with, at the end of each sport season. The employer expected claimant to submit the reports to the DOJ in a timely manner, or notify the employer if he was unable to do so. The documentation process included outlining for each Oregon school client the amounts paid to and funds earned from the school, all business costs, and the employer's gross revenue from that school. Claimant had to deliver the prepared reports to each school for review and obtain notarized signatures before submitting them to the DOJ.

(3) Claimant understood as a matter of commonsense that the employer expected him to complete the reports in a timely manner at the end of each sport season. He did not know what duration of time was considered a "timely manner," or what the consequences of failing to file a report within a "timely manner" might include.

(4) Claimant believed his primary work duty was to establish new contracts with schools in Oregon and Texas each season. From May 2014 to January 2015, claimant continued to prioritize his duty to

establish new contracts, and was unable to complete and file all the DOJ reports in a timely manner due to his workload. Claimant did not tell the employer he failed to file the reports in a timely manner because he was concerned about losing his job, and believed he could catch up on the late reports. The employer did not know, or have a system to track, whether the reports were completed.

(5) On January 13, 2015, the DOJ notified the employer it was “severely delinquent” in submitting the required reports for several months beginning with May 2014. Audio Record at 8:13 to 8:44. The employer learned that failure to submit the documentation in a timely manner could result in fines levied against the employer. The employer first told claimant the consequences of failing to submit the documentation on time on January 13, 2015.

(6) The employer had not disciplined claimant prior to January 14, 2015.

(7) On January 14, 2015, the employer discharged claimant because he failed to ensure the reports were submitted to the DOJ in a timely manner or notify the employer the reports were late.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not 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, good faith errors, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-36306, the ALJ concluded that claimant was discharged for misconduct because his failure to submit the reports to the DOJ or notify the employer he was behind in his work was wantonly negligent, and that claimant’s actions could not be excused as an isolated instance of poor judgment because his actions occurred “for months.”¹ We disagree with the ALJ’s conclusion that claimant acted with a willful or wantonly negligent disregard of the employer’s expectations or interest by failing to submit the DOJ reports on time. Claimant understood his primary job duty to be establishing contracts for the employer to sell on behalf of schools in Oregon and Texas. In 2013, the employer gave claimant the additional duty of submitting the DOJ reports. By May 2014, claimant began to fall behind with the DOJ reports because he was overwhelmed with work as he continued to add new school contracts. Moreover, neither party knew until January 13, 2015 the consequences for failing to submit the DOJ reports on time. Claimant testified at hearing that, had he known, he would

¹ *Id.*

have allotted his work time differently. Audio Record at 20:33-20:50. The record fails to show that claimant knew or should have known that prioritizing his other duties over filing the reports probably violated the employer's expectations, or that his failure to file the reports in a timely manner was willful or wantonly negligent, and not mere inefficiency resulting from a lack of job skills or experience in performing all of his duties or correctly allocating his work time.

Although the record does not show that claimant knew or should have known from prior experience, training, or warnings that he should tell the employer if he fell behind on the DOJ reports, we infer that claimant knew or should have known to do so through common sense. However, it is notable that the employer did not notify claimant of any specific deadlines for filing the reports, the record fails to show that claimant knew or should have known at what point a report would be considered "late," much less "severely delinquent," and claimant did not know what, if any, consequences the DOJ might impose from his actions until the day before his discharge, when it was too late for him to rectify matters. Moreover, even if claimant's failure to notify the employer about the delinquent reports was wantonly negligent, his conduct was, at worst, an isolated instance of poor judgment, and not misconduct. An act is isolated if the exercise of poor judgment is 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). To be considered a "repeated act," an act must involve "judgment," which is "an evaluation resulting from discernment and comparison." OAR 471-030-0038(1)(d)(B). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Notwithstanding that claimant's failure to notify the employer he was behind in filing report occurred "for months," as the ALJ concluded, the record fails to show that claimant engaged in more than a single evaluation resulting from discernment and comparison when he chose not to notify the employer he was behind in filing his reports. It is as likely as not that claimant fell behind in filing his reports, and made a single decision not to notify the employer about it, and then spent "months" struggling to catch up. Because the record fails to show claimant made a series of judgments, the record does not show that claimant's failure to notify the employer he was behind constituted repeated acts or a pattern of conduct, making claimant's exercise of poor judgment in failing to tell the employer about the late reports a single or infrequent occurrence of poor judgment. Furthermore, the record fails to show that claimant's conduct violated the law, was tantamount to unlawful conduct, or, viewed objectively, that it was so egregious that it created an irreparable breach of trust in the employment relationship. Nor does the record show that claimant's conduct otherwise made a continued relationship impossible.

We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-36306 is set aside, as outlined above.²

J. S. Cromwell and D. H. Hettle, *pro tempore*;

² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

Susan Rossiter, not participating.

DATE of Service: June 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 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.