

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0601

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115654). Claimant filed a timely request for hearing. On April 7, 2015, ALJ Logan conducted a hearing and issued Hearing Decision 15-UI-38140, affirming the Department's decision. On May 22, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Decibels of Oregon, Inc. employed claimant as a cable installation technician from August 3, 2014 until February 19, 2015. The employer also employed claimant previously, from August 5, 2013 until May 5, 2014.

(2) Claimant was permitted to drive one of the employer's trucks when he was working in the field. Claimant was also permitted to use a credit card that was given to him to charge fuel he used when operating the employer's truck. The employer expected claimant to refrain from using the employer's truck for personal trips or its credit card to purchase fuel for personal trips unless either or both were explicitly allowed by the employer. When claimant was hired in both 2013 and again in 2014 he signed a Truck Issue Form, which stated that "I understand that [the employer's] Company Vehicle is issued to me for **COMPANY RELATED WORK ONLY**" and also stated "**MISAPPROPRIATION OF ANY VEHICLE OR CREDIT CARD ISSUED TO YOU BY [EMPLOYER] WILL RESULT IN IMMEDIATE TERMINATION.**" Exhibit 1 at 3, 4 (capitalization, bold-face and underlining in original). Claimant understood the employer's expectations.

(3) When the employer hired claimant in 2014, claimant was living in Medford, Oregon and the workplace was located in Portland, Oregon. Claimant initially stayed in a motel in Portland during the work week and returned to Medford on the weekends. On approximately December 14, 2014, claimant rented an apartment in the Portland area and moved into it. Claimant generally worked Tuesdays through Saturdays in a given week and arrived at the workplace around 7:00 to 7:30 a.m. to receive his

job assignments. The time claimant ended work varied according to the requirements of the particular jobs to which he was assigned.

(4) On Sunday, February 1, 2015 at 11:11 a.m., claimant purchased \$19.08 in fuel to fill up the fuel tank in employer's truck in Eugene, Oregon. Eugene was approximately 100 miles south of the employer's workplace in Portland, outside of the employer's business area and claimant had no work reason to travel to Eugene that day. On Saturday, February 7, 2014, claimant purchased \$24.08 in fuel to fill up the tank in the employer's truck in Eugene. Claimant had no work reason to travel to Eugene that day. Claimant did not have permission to take the employer's truck to Eugene or to use the employer's credit card to purchase fuel for the truck on February 1 or February 7, 2015.

(5) Sometime before February 13, 2015, claimant submitted his fuel purchase receipts to the employer covering the period including February 1 and February 7, 2015. On February 13, 2015, claimant's supervisor noticed that claimant had purchased fuel for the truck on two occasions in Eugene and asked him if he had taken the truck to Eugene. Claimant told the supervisor he had travelled to Eugene using the company truck on February 1 and February 7, 2015 to attend events related to his cousin's wedding in Eugene. On February 13, 2015, the employer issued suspension notice to claimant for using the employer's truck for personal purposes without permission on February 1 and February 7, 2015 and for using the employer's credit card to purchase fuel for those personal trips. In the section of the warning for claimant's comments, claimant wrote that he had "relocated" for the employer and he currently did not have a personal vehicle. Exhibit 1 at 9. On February 13, 2015, the employer suspended claimant for four working days, until February 19, 2015, while it decided an appropriate disciplinary sanction.

(6) On February 19, 2015, the employer discharged claimant for using the employer's truck without permission for personal purposes on February 1 and February 7, 2015, and for using the employer's credit card, without permission, to purchase fuel for those personal trips on February 1 and February 7, 2015.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

Claimant did not dispute his awareness that he was prohibited from using the employer's truck or its fuel card for personal purposes without the employer's permission. While claimant was unclear on the exact date, he testified that he took the employer's truck to Eugene for personal reasons on one occasion, most likely on February 7, 2015, to attend his cousin's wedding. Transcript at 16, 17, 20. Claimant stated that he did not have the specific permission from any employer representative to take the employer's truck to Eugene for the wedding. Transcript at 19. However, claimant contended that he had mentioned to his supervisor on some unspecified day that he was going to attend a wedding later that

same day, and from that he inferred he had the supervisor's permission to use the employer's truck to travel to Eugene to the wedding. Transcript at 19, 24. Claimant's mere mention to his supervisor that he was planning to attend a wedding in Eugene, without some statement that he intended to use the employer's truck, is not, when combined the supervisor's failure to object, tantamount to claimant having the employer's explicit or implicit permission to use the truck or the employer's fuel card for this personal trip. On the facts as claimant recounted them, the evidence is too scant to support the conclusion that the supervisor gave him permission to use the truck to attend the wedding.

In addition, claimant did not appear to seriously dispute that he might have purchased fuel for the employer's truck in Eugene on February 1 and February 7, 2015 and that he had no business purpose for travelling to Eugene with the employer's truck on these dates or on any other dates. Claimant's explanation why he might have filled the fuel tank in the truck in Eugene for other than the wedding was speculative: that he could have been travelling through Eugene on his way down or back from Medford to pick up some of his belongings that he had left behind when he moved to Portland. Transcript at 17, 18, 20, 21. Although claimant contended that the employer's regional manager who worked out of the employer's Medford office had given him permission sometime in early December 2014 to use the employer's truck to move his belongings from Medford to Portland, it is not clear why claimant would ask an out-of-town manager for that permission rather than his own supervisors in Portland. Transcript at 17, 18. It also is not clear why, when claimant had moved into his own apartment in Portland by December 14, 2015, he would need to make a trip to haul personal belongings that filled the employer's truck two months later. Transcript at 18, 21, 27. It further makes no sense that if claimant thought he had permission to use the truck to travel through Eugene to Medford, he would have stated this in his explanatory comments to the employer's February 13, 2015 suspension notice, particularly when claimant knew that the employer had suspended him pending a decision about his discharge. Exhibit 1 at 9. The evidence that claimant presented is insufficient to rebut the employer's evidence that he did not have the permission of any employer representative to take the employer's truck to Eugene.

Claimant's testimony also cannot be given credence because it is suspect for other reasons. It belies common sense that claimant would not remember the date of his cousin's wedding, which occurred no earlier than one or two weeks before the employer interviewed him on February 13, 2015 and would not remember if and precisely why he had or had not travelled to Eugene or Medford on February 1, 2015 and February 7, 2015. Transcript at 16, 18, 19, 20. Viewing the record as a whole, the employer demonstrated that claimant purchased fuel for the employer's truck in Eugene on February 1 and February 7, 2015, and it can be reliably inferred that he drove the truck to Eugene. Claimant did not have a work purpose for travelling to Eugene using the truck and did not have permission from any employer representative to do so. Claimant knew what he was doing when he took the truck to Eugene, and he willfully violated the employer's standards by this behavior.

Claimant's behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, 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). Here, claimant willfully violated the employer's standards by using its truck for personal purposes without permission on February 1, 2015 and February 7, 2015. Because claimant's willful behavior was repeated, it is not excused as an isolated instance of poor judgment. Nor was claimant's behavior in using the truck for personal purposes excused as a good faith error under OAR 471-030-0038(3)(b). For the reasons addressed above, it is not

plausible that claimant sincerely believed he had permission to use the employer's truck for personal purposes or that the employer would condone this personal use. Claimant's behavior was not the result of an error in understanding the employer's standards.

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

DECISION: Hearing Decision 15-UI-38140 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating

DATE of Service: July 14, 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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