

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1026

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 92833). The employer filed a timely request for hearing. On August 3, 2015, ALJ Triana conducted a hearing, and on August 7, 2015, issued Hearing Decision 15-UI-42724, reversing the administrative decision and concluding that the employer discharged claimant for misconduct. On August 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

In his written argument, claimant contested the ALJ's admission of Exhibit 1. Because claimant had not received a copy of Exhibit 1 before the August 7, 2015 hearing was held, the ALJ conditionally admitted the documents into evidence. Audio Recording at 5:27. In Hearing Decision 15-UI-42724, the ALJ explained that claimant could submit a written objection to the admission of Exhibit 1 within five days and that "[a]ny objection not so filed is waived." Hearing Decision 15-UI-42724 at 1. In his argument, claimant asserted that because he was unable to refer to the documents in Exhibit 1 during the hearing, that it was "confusing" to him, that he had "a hard time keeping dates/situations straight," and that he mentioned these difficulties "two or more times" in his testimony. (Exhibit 1 included records of performance counseling given and discipline administered to claimant, as well as an excerpt from the collective bargaining agreement and a list of employer expectations.) Claimant failed to identify any specific errors in Hearing Decision 15-UI-42724 that may have resulted from his inability to remember the details of prior disciplinary incidents, however, and we can find none.

Claimant also protested the admission of Exhibit 1 on the grounds that he was unaware of what he "he could do about it [the conditional admission of Exhibit 1]." Claimant asserted that he only learned about the five day deadline for objecting to the admission of Exhibit 1 when he received Hearing Decision 15-UI-42724. Claimant explained that because he was out of town from August 7 through 15, 2015, "by the time I got the decision the 5 day deadline had passed. If I had known about this deadline I would have had our house sitter open our mail and been ready to reply in a timely manner." Claimant does not

state what legal objection he has to the admission of Exhibit 1. For this reason, we do not find his inability to comply with the five day deadline to be a valid basis for refusing to admit the exhibit.

We considered other portions of claimant's written argument to the extent they are relevant and based on evidence in the record.

FINDINGS OF FACT: (1) Jackson County employed claimant as a property appraiser II from May 22, 2005 to May 12 2015.

(2) The employer expected that employees would accurately record time worked and leave taken on time cards, and submit these time cards to their supervisors by 4 p.m. on Friday; any corrections to time cards were to be made by 8:30 a.m. on Monday. Exhibit 1 at 19. The employer also expected that employees would notify and obtain approval from their supervisors if they needed to change their scheduled work hours or take leave. Transcript at 11. On April 30, 2014, claimant and his coworkers received copies of these and other employer expectations, which were reviewed and discussed at a staff meeting. Claimant signed a form acknowledging that he understood these expectations. Transcript at 12; Exhibit 1 at 23.

(3) On September 8, 2014, claimant claimant's shift was scheduled to end at 3:30 p.m. He remained on the job working until 5:12 p.m. and did not ask his supervisor for authorization to do so. Claimant's supervisor met with him and reviewed the employer's expectations regarding work schedules, including the expectation that he obtain permission from his supervisor to make any changes in his scheduled work hours. Exhibit 1 at 15; Transcript at 15.

(4) On April 24, 2015, claimant and another property appraiser attended a home show during their scheduled work hours. After attending the show, claimant and his coworker went home early, before the time their shifts were scheduled to end. Claimant's supervisors learned about this incident, inquired by email if other employees had also left work early on the day of the home show, corrected the schedules of employees who had, and disciplined one of these employees. Transcript at 48-49.

(5) On Friday, May 1, 2015, claimant was scheduled to work at the employer's sustainability surplus sale from 8 a.m. to 1 p.m. The sale was held at a location approximately seven miles from claimant's office. Because claimant was going to be away from the office on the day his time card was due, claimant submitted his weekly time card to his supervisor on Thursday, April 30. On this time card, claimant indicated that he worked 8 hours on May 1.

(6) On May 1, 2015, claimant arrived at the sustainability surplus sale at approximately 8 a.m., and worked until approximately 1:15 p.m. Claimant took a morning rest break, but no lunch break. After finishing his work at the sale, claimant determined that after subtracting time for a one hour lunch and a 15 minute afternoon rest break, he had only 30 to 45 minutes left of his assigned 8 hour shift. Claimant decided to go home rather than return to the office. He did not contact a supervisor to obtain approval to leave work early and did not change his time card to indicate that he had had not worked 8 hours on May 1.

(7) On May 4, 2015, claimant's supervisor met with him and a union representative to investigate his conduct on May1. After this meeting, claimant's supervisor adjusted claimant's time card entries to

indicate that he had taken 1.75 hours of unauthorized leave on May 1. In his email response to the email notifying him of this change in his time card, claimant stated: "I made some bad decisions on Friday that could have been avoided through better communication." Exhibit 1 at 13.

(8) On May 12, 2015, the employer discharged claimant for failing to obtain authorization to leave work early on May 1, and for failing to accurately report his work hours on that date.

CONCLUSION AND REASON: We agree with the ALJ. We conclude that 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.

The employer expected that claimant would submit weekly timecards that accurately recorded hours worked and leave taken. The employer also expected that claimant would obtain authorization from a supervisor if he needed to change his scheduled work hours or wanted to take leave. Claimant knew and understood these expectations because he and his coworkers had reviewed them at an April 30, 2014 staff meeting and because he had been reminded of them when he changed his work schedule without the permission of his supervisor on September 14, 2014. Claimant's conduct regarding his work hours on May 1, 2015, violated these expectations. On that date, claimant left work early, without his supervisor's permission, and submitted a timecard that inaccurately indicated he worked his full 8 hour shift. Claimant admitted that these actions resulted from a "bad decision" he had made. Finding of Fact 7; Exhibit 1 at 13. Claimant's conduct therefore constituted a conscious violation of the standards of behavior his employer reasonably expected of him and was, at a minimum, wantonly negligent.

In regard to his timecard, claimant contended that on May 4, he fully intended to speak with his supervisor, explain what he had done on May 1, and correct the entries on his timecard for that date. Claimant testified that he was unable to talk to his supervisor because "her door was closed the whole time she was there," and that he was summoned to the employer's human resources department before he had an opportunity to speak to his supervisor. Transcript at 25. Claimant's assertion that the employer's initiation of disciplinary proceedings prevented him from correcting his timecard was not credible. Claimant was unable to provide any plausible reason why did not send his supervisor an email on May 4; when the ALJ asked him why he did not contact his supervisor by email, he testified that "I wasn't sure how long her door would be closed" and that he "just figured I can get up and walk right over there as soon as – as soon as that door opened up and go talk to her about it." Transcript at 26. In addition, claimant did not explain why he could not have knocked on his supervisor's office door and

asked to speak to her.¹ We therefore find it more likely than not that claimant had no plans to speak with his supervisor on Monday, May 4.

In regard to leaving work early without notifying his supervisor on May 1, claimant asserted that his conduct should be excused as a good faith error under the exculpatory provisions of OAR 471-030-0038(3)(b) (August 3, 2011). According to claimant, the employer's managers permitted an employee to go home early, if the employee attended a class during work hours and the class ended before the scheduled work shift did. Claimant asserted that based on his understanding of this practice, he believed in good faith it was permissible for him to go home after he completed his work at the sustainable surplus sale. We disagree. The employer's witness provided un rebutted testimony that when claimant and his coworkers left work early after attending a home show on April 24, the employer investigated, discovered who had left work early, corrected timecards as necessary, and disciplined an employee. Transcript at 48. Based on this record, we conclude it more likely than not that claimant did not sincerely believe that the employer would excuse his failure to contact his supervisor and obtain permission to leave work early on May 1, 2015.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d). Under OAR 471-030-0038(1)(d)(D), "acts that create irreparable breaches of trust in the employment relationship" exceed poor judgment and fall outside of the exculpatory provisions of OAR 471-030-0038(3). The record demonstrated that claimant's work as a property appraiser required him to work independently, away from the office and without direct oversight by a supervisor. As a result of claimant's conduct on May 1 – leaving work before completing his scheduled work shift and without obtaining a supervisor's approval – a reasonable employer would no longer trust that claimant could perform his job duties, work unsupervised and be trusted to accurately report his time. For this reason, claimant's actions irreparably breached the employment relationship.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-41965 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 29, 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.

¹ Among the expectations that claimant and his coworkers reviewed at the April 30, 2015 staff meeting was the employer's were the "Expectations of Management," which included the following section entitled "Open Door": "It is our goal to keep the Manager's doors open as much as practical. This is a signal from management that any staff member is welcome whenever an issue requires a manager's attention. If our door is closed, the conversation is private but please, always knock if you need immediate assistance." Exhibit 1 at 16.

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