

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1130

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 154708). The employer filed a timely request for hearing. On August 28, 2015, ALJ Vincent conducted a hearing. On September 3, 2015, ALJ Vincent issued Hearing Decision 15-UI-43894, affirming the Department's decision. On September 10, 2015, the ALJ issued an amended hearing decision to correct a clerical error in his earlier decision, Hearing Decision 15-UI-44130, which also affirmed the Department's decision. On September 23, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written argument the employer submitted on September 28, 2015 when reaching this decision. EAB did not consider the written argument the employer submitted on October 5, 2015 because the employer failed to certify that it provided a copy of that argument to claimant as required under OAR 471-041-0080(2)(a) (October 29, 2006).

FINDINGS OF FACT: (1) Federal Express Corp. employed claimant as a courier from July 3, 2007 to May 29, 2015.

(2) In December 2014, claimant inadvertently put diesel fuel in a gasoline-operated vehicle. He was unfamiliar with that vehicle, forgot what type of fuel to use in it, and made a mistake.

(3) The employer prohibited employees from throwing parcels. The employer provided claimant with training on that policy and posted it in two locations on every vehicle. On May 20, 2015, claimant felt frustrated and overwhelmed, briefly argued with a lead worker, and threw parcels from a truck. Claimant had never previously engaged in that type of behavior.

(3) On May 29, 2015, the employer discharged claimant for throwing parcels on May 20, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for an isolated instance of poor judgment.

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 had the right to expect claimant to refrain from throwing parcels. Claimant understood that expectation. On May 20th, claimant demonstrated conscious indifference to the employer's expectation and the consequences of his behavior by throwing parcels in violation of the employer's policy. His conduct was wantonly negligent.

However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined to include a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct, and must not exceed mere poor judgment. OAR 471-030-0038(1)(d). In this case, the only disciplinary warning claimant had ever received was the result of an inadvertent mistake. Inadvertent mistakes are not considered willful or wantonly negligent. Therefore, claimant's conduct in that incident cannot be considered as part of a repeated act or pattern with his behavior in the final incident, making claimant's exercise of poor judgment in the final incident an isolated instance.

Isolated instances exceed mere poor judgment when the conduct is unlawful or tantamount to an unlawful act, causes an irreparable breach of trust in the employment relationship, or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The record fails to show that throwing parcels constituted an unlawful act or was tantamount to an unlawful act. Nor did the employer establish that claimant's single exercise of poor judgment during his almost eight-year term of employment, occurring while he felt frustrated and overwhelmed, was either likely to reoccur or was so egregious under the circumstances that the employer could no longer trust claimant to perform his duties in accordance with the employer's policies. The record therefore fails to show that claimant's conduct exceeded mere poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-44130 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 15, 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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