

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1335

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110408). Claimant filed a timely request for hearing. On October 30, 2015, ALJ Shoemake conducted a hearing, and on November 6, 2015 issued Hearing Decision 15-UI-47335, affirming the Department's decision. On November 10, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wells Fargo Bank NA employed claimant from March 2, 2015 to July 14, 2015 as a home mortgage consultant.

(2) The employer expected claimant to follow directions and complete job duties assigned by his supervisor. Claimant understood these expectations as a matter of common sense. One of claimant's job duties was to contact prospective clients received through the employer's software system. Claimant understood this expectation.

(3) Claimant's schedule was to work Monday through Friday, from 8:00 a.m. to 5:00 p.m. After July 1, 2015, claimant did not report to work in person at the employer's branch. Although the employer permitted employees to work remotely from home, prior to July 1, claimant usually worked at the employer's bank branch. From July 2 through July 14, 2015, claimant did not report to work in person at the branch, but instead logged in remotely to the employer's time tracking system during his regular work hours.

(4) From July 2 until July 7, 2015, claimant had no contact with his manager. On July 7, 2015, claimant's manager left claimant a voicemail message, and sent him an email stating, "Please check in.

Hi, [claimant], I've emailed your work email and called your cell, and [am] concerned I am not hearing from you. Can you please check in and let me know you're okay." Transcript at 5. The manager received no response to the email and telephone message.

(5) From July 2 through July 14, 2015, claimant did not contact the prospective clients that were assigned to him through the employer's software system. Claimant's manager reassigned them to other consultants.

(6) On July 9, 2015, the employer had a staff meeting at claimant's branch. Claimant did not contact his manager or report to the branch for the meeting.

(7) Later on July 9, 2015, claimant's manager sent claimant an email advising him that she had not received any communication from him that week, and that it was "not acceptable" that he was not contacting the leads provided through the employer's software. Transcript at 8. The manager stated in the email that she considered claimant's lack of communication to be insubordination, and directed him to report to the employer's branch in person on July 10, 2015 by 1:00 p.m., or face disciplinary action up to and including termination of employment. The manager also stated that claimant needed to contact her by 5:00 p.m. on July 9. Transcript at 8-9. The manager received no response to the email. Claimant did not report to the branch in person on July 10, 2015.

(8) On July 10, 2015, claimant's manager sent claimant a letter stating that because attempts to reach claimant by phone and email had gone unreturned, and claimant failed to attend the staff meeting or contact the prospective clients assigned to him, claimant must "*return to the branch, in person, by no later than Tuesday, July 14th, at noon*, to resume [his] position as home mortgage consultant" and to discuss his employment. Transcript at 10-11; emphasis added. The letter stated that claimant's employment would be "voluntarily terminated" on July 14, 2015 if he failed to report to work at the branch by the deadline. Transcript at 10-11. The letter also stated claimant should contact the employer if he was unable to report to the branch due to a health condition. Transcript at 11. Claimant received the letter and read it.

(9) At 11:54 a.m. on July 14, 2015, claimant's manager received an email from claimant in response to the July 10, 2015 letter, stating, "[] I won't be able to make this meeting; too busy working on more important activities related to establishing referral relationships with realtors. I will just continue to work remotely and log my hours in the time tracker." Transcript at 11-12. Claimant then stated he might file a claim against the employer for unpaid overtime hours. Claimant had not complained to the manager before regarding unpaid wages.

(10) Later on July 14, 2015, the employer sent claimant a letter stating that the employer considered claimant to have resigned by refusing to report to the branch to speak with his manager by noon on July 14, 2015. The letter also instructed claimant to return the employer's property to the employer. Claimant received the letter on July 15, 2015. He contacted the employer's information technology (IT) department, and was told that the employer no longer permitted claimant access to its computer system. Claimant did not contact any other employer representative.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant for misconduct.

Nature of the work separation. The first issue is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

Claimant stated in his last email to his manager on July 14, 2015 that he was willing to continue working, albeit from home, doing his preferred job duties. He attempted to perform work on July 15, but was unable to do so because the employer locked him out of its computer system. The employer severed the employment relationship in response to claimant’s email refusing to report to work in person on July 14, 2015. Because claimant was willing to continue working, but was not allowed to do so by the employer, the work separation was a discharge.

Misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected work. OAR 471-030-0038(3)(a) 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 the 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 he refused to report to work in person by noon on July 14, 2015, after being directed to do so by his manager. Claimant alleged at hearing that he believed the purpose of the July 10 letter from the manager was to ask him if he was quitting, and was not an instruction to report to work in person. Transcript at 20. Claimant’s testimony is implausible because the manager’s letter stated, unambiguously, that the manager required claimant to “return to the branch, in person, by no later than Tuesday, July 14th, at noon,” or his employment would end at that time. Moreover, had claimant believed the letter was asking if he was quitting, it is more probable than not that, rather than just refusing to report to work in person on July 14, he would have notified the employer by some other means that he was not quitting, particularly after learning that he had been locked out of the employer’s computer system and the employer considered him to have resigned. In disobeying a known, reasonable directive from his manager under circumstances he created, claimant demonstrated insubordination, disregarded the employer’s interests and willfully violated a standard of behavior the employer had the right to expect from him.

Claimant argued at hearing that his July 14 conduct amounted to, at most, an isolated instance of poor judgment. Transcript at 31. However, claimant’s conduct was not isolated. After July 1, claimant failed to contact the client leads assigned to him through the employer’s software, report to the branch office to meet with his manager on July 10 after being directed to do so, and respond to his manager’s attempts to

contact him. Each of those instances represented another occurrence of wantonly negligent poor judgment. Moreover, acts that create irreparable breaches of trust in the employment relationship or make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Objectively considered, claimant's blatant refusal to respond to the employer's reasonable directives to report to the branch, where he had, generally, reported for work prior to July 1, was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. No reasonable employer would be able to trust claimant based on his conduct. Claimant's July 14 conduct cannot be excused as an isolated instance of poor judgment.

Nor were claimant's actions the result of a good faith error in his understanding of the employer's expectations. Claimant's manager repeated the employer's expectation that claimant communicate with the employer and report to work in person in emails, phone messages and a letter. Claimant did not show that he sincerely believed or had a factual basis for believing the employer would condone his failure to report to work in person on July 14.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 15-UI-47335 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: December 21, 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.

The record fails to show that claimant was unable to report to the branch location due to his health, or for any reason other than a personal preference to perform other work at home. Although claimant may have preferred to perform other work that he believed was more productive, claimant knew or should have known his refusal to report to the branch office when instructed to do so was nonetheless a violation of reasonable work behavior that the employer had a right to expect.