

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1365

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90059). Claimant filed a timely request for hearing. On November 2, 2015, ALJ Vincent conducted a hearing, and on November 4, 2015 issued Hearing Decision 15-UI-47152, affirming the Department's decision. On November 6, 2015, the ALJ issued Hearing Decision 15-UI-47311, an amended hearing decision to correct the history of the case to show that claimant and the employer appeared for the hearing. On November 18, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Hearing Decision 15-UI-47311 mistakenly states that Exhibit 1 was admitted into evidence at the hearing. The ALJ did not admit Exhibit 1 into the record at hearing because the employer failed to send a copy of the exhibit to claimant before the hearing and the employer's witness was able to provide the information through testimony. Audio Record at 3:48 to 6:10. We considered only the information admitted into the record during the hearing.

FINDINGS OF FACT: (1) Your Town Press Inc. employed claimant from January 27, 2014 to July 14, 2015 as a machine operator in the employer's bindery.

(2) The employer expected employees to punch in using the employer's time clock when they arrived at work and when they finished working at the end of a shift. The employer expected employees to report time card errors to a supervisor immediately. The employer prohibited employees from allowing another person to punch his or her timecard, or from tampering with the time clock. Claimant knew and understood the employer's expectations regarding time records.

(3) On Friday, July 10, 2015, claimant was scheduled to work at 9:00 a.m. He reported to work late at 10:00 a.m. When he arrived at work, he saw that his time card was already punched and showed he had arrived at 9:06 a.m. Claimant did not tell his supervisor about the time card error until his supervisor asked him about his time card later that day.

(4) Later on July 10, 2015, claimant was the last employee in his section to leave work. The exit punch on claimant's time card for July 10, 2015 showed a double punch instead of a normal, single punch. One punch was for 9:30 p.m., and the other for some time after 10:00 p.m. The employer's bindery was closed that weekend.

(5) When the employer's work crew reported for work on Monday, July 13, 2015, the time clock was recording a time different from the time shown on the clock face. The employer believed the time clock was not working properly because claimant had tampered with the time clock before he left work on July 10, 2015.

(6) On July 14, 2015, the employer discharged claimant for failing to report the July 10, 2015 time card error in a timely manner, and for allegedly tampering with the time clock.

CONCLUSIONS AND REASONS: We conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-47311, the ALJ concluded that claimant's failure to immediately report the one-hour error on his time card to his supervisor was a willful violation of the employer's time reporting expectations because claimant "knowingly submitted an erroneous report of his time of arrival . . . because he desired to receive pay for time that he had not worked."¹ The ALJ also concluded claimant's conduct could not be excused as a good faith error or an isolated instance of poor judgment because claimant's conduct was dishonest and "tantamount to theft of time," and therefore caused a breach in the employment relationship and exceeded mere poor judgment.²

The employer discharged claimant for failing to report the false start time on his July 10 time card and allegedly tampering with the employer's time clock at the end of his shift that day. Audio Record at 18:14 to 20:15. The record does not show, by a preponderance of the evidence, that claimant tampered with the time clock. Claimant denied having done so, and the record does not show that it was more probable than not that claimant caused the clock to malfunction. Thus, we focus our analysis on claimant's failure to immediately report the extra hour recorded on his time card to a supervisor. Claimant knew and understood the employer expected him to report time card errors immediately. We

¹ Hearing Decision 15-UI-47311 at 2.

² *Id.*

conclude that claimant's failure to do so was wantonly negligent because he demonstrated an indifference to the employer's interest in ensuring accurate timekeeping records. Nor was claimant's failure to report the error immediately a result of a good faith error in his understanding of the employer's expectations. However, we disagree with the ALJ's conclusion that claimant's conduct was not an isolated instance of poor judgment.

The record shows claimant's failure to report the time card error was an isolated instance. Some acts, even if isolated, such as those that violate law or are tantamount to unlawful conduct are so serious that they exceed mere poor judgment and cannot be excused because they create an irreparable breach of trust or make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The employer's manager asserted that claimant admitted he did not tell his supervisor about the time card error because he needed the money. Audio Record at 18:14 to 18:33. However, at hearing, claimant denied having made that statement, and testified that he delayed telling the supervisor about the time card error because the supervisor was busy when claimant first discovered the error, and then forgot to tell the supervisor about it until asked. Audio Record at 31:11 to 32:00. We find the parties' testimony about claimant's reason for failing to notify his supervisor was, at best, equally balanced. Thus, the record fails to show claimant acted with dishonesty or with the intent to deprive the employer of an hour's worth of wages. Consequently, claimant's conduct was not tantamount to theft or sufficient to cause an irreparable breach of trust in the employment relationship.

In a discharge case, the employer bears the burden to establish misconduct under ORS 657.176(2)(a) by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because claimant engaged in a single wantonly negligent act on July 10, and that act did not exceed mere poor judgment, the employer failed to satisfy its evidentiary burden. The employer discharged claimant for an isolated instance of poor judgment and not misconduct. Claimant is not subject to disqualification from unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-47311 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 29, 2015

NOTE: 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.

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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