

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1382

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant for misconduct (decision # 124418). On August 26, 2015, the Department served notice of an amended decision concluding that employer discharged claimant for misconduct (decision # 143730). Claimant filed timely requests for hearing. On November 10, 2015, ALJ Murdock conducted a consolidated hearing, and on November 17, 2015 issued Hearing Decisions 15-UI-47779 and 15-UI-47780, affirming the Department's decision. On November 23, 2015, claimant filed applications for review of both decisions with the Employment Appeals Board (EAB).

On December 1, 2015, ALJ Murdock issued Hearing Decision 15-UI-48522, and on December 2, 2015, issued Hearing Decision 15-UI-48655, both of which amended Hearing Decision 15-UI-47780 insofar as some dates in the order were concerned. Because neither amended decision changed the outcome of Hearing Decision 15-UI-47780 insofar as claimant's disqualification from benefits based on his discharge by ESCO Corporation, we construed claimant's application for review as applying to both.¹

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-47779 and 15-UI-48655. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1381 and 2015-EAB-1382).

FINDINGS OF FACT: (1) ESCO Corporation employed claimant as a janitor beginning November 10, 2010. From May 14, 2015 through May 17, 2015, the employer suspended claimant. On July 1, 2015, the employer discharged claimant.

¹ We also note that, at the time both amended decisions were issued, OAH lacked jurisdiction over the matter. Claimant's timely filed application for review of Hearing Decision 15-UI-47780 transferred jurisdiction to EAB as of November 23, 2015.

(2) The employer expected claimant to work throughout his scheduled shift, except during his break times. Claimant was typically scheduled to work from 3:00 a.m. to 11:30 a.m., with 10-minute rest breaks after a brief staff meeting at 6:00 a.m. and at 10:00 a.m., and a 30-minute lunch break at 8:00 a.m. Upon claimant's request, his lead worker could authorize him to take his first rest break as early as 5:00 a.m., and authorize an additional 5-minute grace period when returning from his breaks. Claimant understood the employer's expectations with regard to working and his break periods.

(3) In January 2015, the employer counseled claimant for taking extended breaks.

(4) Shortly before 4:35 a.m. on April 30, 2015, claimant sat on a toilet in the CEO's restroom, rested his head on the toilet paper dispenser, and fell asleep. Claimant's lead worker could not see claimant working in the area he was assigned, and discovered claimant asleep at 4:35 a.m. The lead worker observed claimant sleeping for a few minutes before making a noise to awaken claimant. Claimant accused the lead worker of spying on him. The lead worker told claimant he was not supposed to be sleeping.

(5) Shortly before 4:15 a.m. on May 14, 2015, claimant sat in a stall in a women's restroom at work and fell asleep. At 4:15 a.m. on May 14, 2015, the lead worker observed that claimant's supplies were outside the women's restroom, but he could not hear any cleaning noises inside the restroom. The lead worker entered the restroom and observed claimant sleeping. He video-recorded claimant sleeping for five minutes before awakening him.

(6) On May 14, 2015, the lead worker reported claimant's conduct to the employer's management and showed the recording. Effective May 14, 2015, the employer suspended claimant for three days, through May 17, 2015.

(7) After May 17, 2015, claimant returned to work.

(8) From 4:08 a.m. to 4:36 a.m. on June 30, 2015, claimant read a magazine while on duty instead of performing his assigned work. A security guard observed claimant during that time. From 3:59 a.m. to 4:20 a.m. on July 1, 2015, claimant read instead of working. A coworker observed him doing so.

(9) The employer learned that claimant was reading while on duty on those occasions, and, on July 1, 2015, discharged claimant for misusing his time by failing to work throughout his scheduled shifts.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer suspended and 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.

As a preliminary matter, claimant disputed that he slept while on duty as the employer alleged, and disputed that he read for as long as the employer alleged. However, we concluded that probative value of the specific, consistent and detailed accounts the employer submitted into evidence outweighed claimant's denials. Therefore, where facts were in dispute, we found them in favor of the employer's evidence.

The employer had the right to expect claimant to work throughout his scheduled shifts except while on his scheduled rest and lunch breaks. Claimant knew or should have known that expectation based upon the employer's policies, his January 2015 warning, and as a matter of common sense. The preponderance of the evidence shows that claimant repeatedly and willfully violated the employer's expectations.

The employer suspended claimant because, on May 14, 2015, claimant sat down in a stall in a women's restroom he was assigned to clean and slept for over five minutes. He was not on a scheduled rest break. It is implausible that claimant accidentally fell asleep while working. Claimant worked as a janitor, a job commonly known to require physical movement and activity, but he was discovered sitting in a toilet stall while on the job. Claimant would necessarily have had to make a conscious decision to sit down in the stall to rest while he knew he was not on a scheduled break, making his conduct willful. We therefore conclude he was suspended for a willful violation of the employer's expectations.

Claimant's suspension was not for an isolated instance of poor judgment. For conduct to be considered an isolated instance, it must have been a single or infrequent instance of willful poor judgment. OAR 471-030-0038(1)(d). Claimant had, just two weeks earlier, engaged in the same type of willful violation of the employer's expectations when he again made a conscious decision to sit down on a toilet and rest his head on a toilet paper dispenser when he was supposed to be working, and was not on a scheduled break. Due to the nature of janitorial work, claimant would have necessarily had to make a choice to sit down on the toilet and rest his head in order to have been discovered in that position by his lead worker. Claimant's suspension was, therefore, for misconduct, and not an isolated instance of poor judgment.

Likewise, claimant's subsequent discharge was for misconduct. Once claimant returned from his suspension, claimant again repeatedly and willfully violated the employer's expectations that he work throughout his scheduled shifts except while on his scheduled breaks by reading for 21 to 28 minutes at a time during his scheduled work hours on June 30 and July 1 instead of performing his assigned duties. Claimant was not on a scheduled break on either occasion, and, given his recent suspension and history of discipline, it is implausible that he did not know such conduct would violate the employer's expectations. Claimant's decision to read instead of working during scheduled work hours constituted further repeated instances of willful misconduct.

None of the conduct that preceded claimant's suspension or discharge can be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not sincerely believe, or have any factual basis for believing that the employer would condone or excuse his repeated failures to work throughout his scheduled shifts, or his decisions to either rest or read at times he knew he was expected to be working.

For those reasons, we conclude that the employer suspended and discharged claimant for misconduct. Claimant is disqualified from benefits on the basis of his suspension and discharge.

DECISION: Hearing Decisions 15-UI-47779 and 15-UI-48655 are affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 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.

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