

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1389

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115841). Claimant filed a timely request for hearing. On November 17, 2015, ALJ Monroe conducted a hearing, and on November 19, 2015 issued Hearing Decision 15-UI-48043, affirming the Department's decision. On November 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Electrical Construction Co. employed claimant for a total of approximately 20 years. Most recently, claimant worked from March 11, 2013 to September 24, 2015 as a project manager.

(2) The employer expected employees to behave with integrity and honesty, and had a policy that prohibited employees from placing themselves in a position that created a conflict or the appearance of conflict with the employer. Claimant understood the employer's expectations and policy.

(3) At one point, claimant offered to supplement the employer's staff with his wife's estimating services, and asked his supervisor whether that would be acceptable. The supervisor said "that would be very not okay" and could not happen. Transcript at 14. The employer employed individuals as estimators, and expected claimant to use their services, despite claimant's recurring difficulty getting the employer's estimators to work with him. In June 2015, with claimant's involvement, the employer entered into a contract with Estimating Services, LLC. Claimant's wife owned Estimating Services, LLC.

(4) On September 14, 2015, claimant's wife named claimant as a member of Estimating Services, LLC on documents filed with the Oregon Secretary of State's Corporation Division business registry. Claimant's wife acted as the employer's owner and operator. Claimant was a member of the LLC but did not take an active role in the company's operations.

(5) In mid-September 2015, the employer's accountants and project managers were trying to process payment of invoices from Estimating Services, LLC. During the process, claimant was involved in emails about the invoices, and, at one point, provided the employer with a W-9 form signed by an individual using the name of claimant's wife's four-year old daughter. Those involved discovered that claimant and his wife were the members of Estimating Services, LLC.

(6) On September 22, 2015, claimant met with the division manager. The division manager told claimant that outside estimating services were not needed. Claimant did not mention Estimating Services, LLC or his relationship to that business. The employer's president also spoke with claimant, said he was aware that claimant was using outside estimating services and would be looking into that, and asked claimant if he had anything to say. Claimant said he did not.

(7) On September 23, 2015, claimant sent an email to the president asking for a conversation. In the email, claimant said he was the sole person who had approved the Estimating Services, LLC invoices. The president asked claimant whether there was anything else he needed to know about the invoices, and claimant said there was not. Prior to September 23, 2015, the president was not aware that claimant was involved in another company.

(8) On September 24, 2015, the employer's president met with claimant to discuss the Estimating Services, LLC contracts. During the meeting, claimant said he did not know who owned Estimating Services, LLC. He said he and his wife were not involved with the business. The employer showed claimant a W-9 form that had been signed by someone using the name of claimant's wife's four-year old daughter. Claimant knew that the name of the individual on the W-9 form was his wife's four-year old daughter, recognized her name when the president showed the W-9 form to him, and knew she had not signed it herself. Instead of identifying her, claimant told the president that the person named on the W-9 form owned Estimating Services, LLC, that he did not know who she was.

(9) On September 25, 2015, the employer discharged claimant because his involvement with Estimating Services, LLC was in conflict with the employer's business, or appeared to be, and his dishonesty about his involvement with that business demonstrated a lack of integrity.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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.

As a preliminary matter, we concluded that the employer's evidence had more probative value than claimant's. The employer's witnesses testified with a high degree of specificity, and their versions of

the events at issue were largely consistent. By way of comparison, claimant's testimony was initially specific and detailed about the individuals and dates upon which he claims he had informed the employer about his wife's company. When the ALJ asked claimant follow-up questions, however, his answers became less detailed, less coherent, and he was unable to recall many specific details concerning events about which he had previously claimed to have specific recollections. Claimant alternately asserted he had specifically informed the employer and its employees of his wife's ownership of Estimating Services, LLC but, when asked how he had done so, then stated, "[w]ell it was not hidden." Transcript at 24. Because it appears on the whole that the employer's evidence was more reliable, wherever facts were in dispute, we found facts and drew inferences from facts provided by the employer's witnesses.

The employer had the right to expect claimant to refrain from engaging in activities that impugned his integrity at work, caused a conflict of interest, or gave the appearance of such a conflict. Claimant knew the employer's expectations. Transcript at 17. The preponderance of the evidence shows that claimant knowingly violated the employer's expectations when he failed to reveal that the employer had contracted with his wife's company, an LLC, for outside estimating services, failed to reveal that he became a member of this LLC, and presented the employer with a W-9 form with a signature claimant knew was false. In addition, when the division manager and company president asked what claimant knew about the company, on at least three separate occasions, claimant denied his affiliation with the company and denied that he knew that his wife owned it. He also told the president that the individual who allegedly signed the W-9 form, his wife's four-year-old daughter, owned the company. Claimant's violations of the employer's expectations were, therefore, willful and repeated.

Claimant's conduct is not excusable as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). Conduct may be excused as an isolated instance only if it is a single or infrequent occurrence of willful or wantonly negligent behavior rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). Here, as discussed above, claimant's conduct involved many repeated instances of willful misconduct, so his conduct was not isolated. Conduct may only be excused as a good faith error if the individual committing the behavior does so with a sincere, if mistaken, belief that they are in the right. Here, however, claimant repeatedly lied to the employer by denying knowledge of Estimating Services, LLC, failing to disclose his and his wife's involvement with the business, and trying to obscure his connection to the business by presenting the employer with a W-9 with a false signature and claiming someone by the name of his wife's four-year-old daughter was the owner. Individuals who sincerely believe they are in the right do not engage in dishonesty to conceal their actions in such a manner. Thus, the record therefore fails to show that claimant engaged in the conduct at issue under a sincere belief that he was in the right, and his conduct is not excusable as a good faith error.

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

DECISION: Hearing Decision 15-UI-48043 is 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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