

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1412

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71541). Claimant filed a timely request for hearing. On September 16, 2015, ALJ Messecar conducted a hearing, and on September 23, 2015 issued Hearing Decision 15-UI-44762, affirming the Department's decision. On October 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB). On October 21, 2015, EAB issued Employment Appeals Board Decision 2015-EAB-1187, reversing Hearing Decision 15-UI-44762 and remanding this matter to the Office of Administrative Hearings (OAH) for further proceedings. On November 5, 2015, ALJ Messecar conducted a hearing, and on November 13, 2015 issued Hearing Decision 15-UI-47638, again affirming decision # 71541. On November 25, 2015, claimant filed an application for review of Hearing Decision 15-UI-47638 with EAB.

EAB considered the entire hearing record and claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Thomas Kay Textiles Inc. employed claimant as a flooring installer and foreman from January 5, 2005 to August 8, 2015.

(2) In July 2015, claimant was the foreman at a jobsite. As such, he was expected to ensure that the correct adhesive had been provided for the work being done. Claimant understood that expectation. However, claimant assumed that the adhesive provided was correct, and did not check to ensure that it was. The employer therefore used the wrong adhesive. Claimant also damaged a flooring plank, and did repair the plank or notify another employee that it needed to be repaired, although he understood he was expected to do so.

(3) In early August 2015, claimant was assigned to remove floor tiles from a grocery store in anticipation of installing new flooring. On two nights in a row, August 4-5, 2015, claimant damaged

fixtures in the client's grocery store when using the employer's tile scraper. Claimant reported the incidents to his supervisor and agreed to be more careful.

(4) On the next night, August 6, 2015, claimant met with the employer's client before starting work and promised that nothing else would be damaged. After beginning work, claimant noticed the tile scraper machine was not working smoothly. Claimant decided to continue using the machine anyway. The hydraulic joystick controlling the machine then broke and claimant was unable to stop the machine before it cracked a glass freezer door. Claimant decided to use a bolt to temporarily repair the handle. Claimant continued to use the machine even though he knew that, in the past, when the machine was not working properly, the employer had stopped all work until the machine could be repaired. Later that night, claimant damaged cashier booths two separate times because the machine was difficult to control with the temporary fix.

(5) The employer discharged claimant for damaging the client's property on August 6, 2015.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of 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).

Here, the employer had a right to expect claimant to refrain from damaging its client's property on August 6, 2015. Claimant knew or should have known that continuing to use the malfunctioning and damaged tile scraper machine probably violated the employer's reasonable expectations. His conscious decision to continue using the machine after damaging client's property multiple times on August 4, 5 and 6, 2015 demonstrated indifference to the consequences of his actions. Claimant's conduct on August 6 therefore was, at best, wantonly negligent. Nor does the record show claimant sincerely believed, or had a rational basis for believing, that the employer would condone his continued use of a malfunctioning and damaged tile scraper machine. Claimant's conduct therefore cannot be excused as a good faith error.

Nor can claimant's conduct on August 6, 2015 be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In July 2015, claimant knew or should have known that failing to confirm that the correct adhesive had been provided for the work being done probably violated the employer's reasonable expectations. He

also knew or should have known that failing to repair a plank he damaged, or notify another employee that it needed to be repaired, probably violated the employer's reasonable expectations. In each instance, claimant's conduct demonstrated indifference to the consequences of his actions, and therefore was, at best wantonly negligent. Claimant's exercise of poor judgment on August 6, 2015 therefore was part of a pattern or willful or wantonly negligent behavior, and not a single or infrequent occurrence.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 15-UI-47638 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 6, 2016

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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