

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1486

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 7, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83539). The employer filed a timely request for hearing. On November 18, 2015, ALJ Murdock conducted a hearing, and on December 4, 2015 issued Hearing Decision 15-UI-48821, concluding claimant's discharge was for misconduct. On December 10, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer requested and received an extension of time to file a written argument to January 19, 2016. Because the outcome of this decision is in the employer's favor, and to avoid undue delay, we did not wait for the written argument deadline to expire before issuing this decision.

FINDINGS OF FACT: (1) City of Portland Bureau of Police employed claimant as a police officer from October 23, 2014 to August 31, 2015.

(2) The employer prohibited employees from cheating on exams, and prohibited dishonesty. The employer defined cheating to include referring to unauthorized information during an exam. Claimant understood the employer's prohibitions, and was aware that he could be discharged for violating them.

(3) On August 27, 2015, claimant was attending advanced academy classes. Advanced academy classes used closed-book testing methods. Claimant was never told he was allowed to refer to notes during tests, and, when tests were about to commence, students uniformly put away their study aids before

beginning them, demonstrating their common understanding that they were not to refer to their notes during tests.

(4) On August 27, 2015, the employer administered two tests to the class in which claimant was participating. Claimant's desk area was clear when the employer handed out the tests. During the second test, on the use of deadly force, claimant pulled out his notebook and referred to his notes on the use of deadly force during the beginning of the test. Claimant's answer to the first question corresponded to the material in his notes.

(5) One of the test proctors looked into the test room, saw claimant holding his notebook open on his desk at a 30 to 45 degree angle, and saw claimant's eyes moving between the test page and his notebook. Claimant noticed that the proctor was looking at him, and immediately put the notebook away. Claimant's answer to the second test question was incomplete and inaccurate.

(6) The employer confronted claimant about looking inside his notebook during the deadly force test. Claimant said initially that his notebook was open but he did not look inside it. He then said his notebook sat slightly open, but claimant could not make the notebook open slightly without pinching it in at the sides, and when the employer later tested the notebook its employees observed that it did not sit slightly open, but actually lay flat unless someone opened it. Claimant then said that his notebook was on his desk, closed, during both tests, and he had been resting his left hand on it until the proctor saw him, after which he put his notebook away so the proctor would not think he was cheating.

(7) The employer investigated the situation. Employees viewed claimant's notebook sitting on a flat surface and concluded that the notebook did not appear to be open. Employees reenacted the situation the proctor had observed, with one employee sitting where the proctor had observed claimant and the other sitting in the seat claimant occupied during the exam. The employees verified that the employee in the proctor's seat would have been close enough to clearly see claimant's actions during the test, and that the proctor had been close enough to claimant to see his eyes moving between the notebook and his test sheet.

(8) On August 28, 2015, the employer decided to discharge claimant for cheating on the test and being dishonest when confronted about it. The employer discharged claimant, effective August 31, 2015, for those reasons.

CONCLUSIONS AND REASONS: We agree with 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.

The employer had the right to expect claimant to refrain from cheating and dishonesty. Claimant understood the employer's expectations.

Claimant testified at the hearing that he did not cheat on the test, and, therefore, was not dishonest with the employer when he claimed he had not cheated. However, we disbelieve claimant's testimony because he was not a credible witness. When the employer passed out and collected the test from claimant, claimant's desktop was cleared of all items, including the notebook, which suggests that claimant opened his notebook after the individuals conducting the test left the room and put it away before they returned. Claimant claimed that his notebook was closed on his desk except to the extent that it naturally sat partially ajar. He then said he had his hand on it. However, claimant had to pinch the sides of his notebook to make it sit ajar. He said he had not looked inside the notebook during the testing period, but was witnessed holding the notebook open and looking inside it during the testing period. The notes in the notebook corresponded to the test topics. Claimant's answer to the first question was consistent with the phrasing of his notes in his book, whereas his subsequent answers were not. When claimant saw he was being observed, he immediately closed the notebook and put it away, demonstrating that he knew having the notebook out during the test was not acceptable. Claimant said he closed the notebook when he was observed with it because he did not want people to think he had cheated, but implied at the hearing that he might have thought the test was an "open book" test, which, if true, is inconsistent with the cheating concern he mentioned. *Compare* Transcript at 9, 46. Claimant also provided inconsistent testimony at the hearing about where his notebook was located during the test, first stating it was on the right side, then on the left. *Compare* Transcript at 44, 45.

By comparison, the employer's witnesses provided straightforward testimony that was consistent with the oral and written statements they each had made close in time to the incident, and each of the witness's oral and written statements were consistent with the others'. The employer investigated the allegation that claimant had cheated, by observing his notebook and verifying that the proctor would have been able to see claimant during the test and was close enough to observe his eye movement. We conclude that the employer's evidence, based on consistent, plausible and verified observations, is more reliable than claimant's inconsistent and implausible version of events, and found facts accordingly.

The preponderance of the evidence is that claimant cheated on his deadly force examination by referring to his notebook, and, when confronted about it, was dishonest with the employer about his activities. Cheating and dishonesty constitute willful violations of the employer's expectations. Claimant's conduct cannot be excused as an isolated instance of poor judgment because, although isolated, claimant's conduct caused an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). The breach of trust occurred because claimant was in an advance training class for police officers. As a matter of common knowledge, police officers hold positions of public trust and must be trustworthy enough to enforce laws, take oaths to tell the truth, and reliably testify in court. Claimant's decision to cheat on an exam and then be dishonest about it demonstrated that the employer could not rely on claimant to be honest with respect to his training, let alone conduct himself with integrity while working as a police officer. No reasonable employer, particularly a police agency, would continue to employ claimant after such an incident. Claimant's conduct therefore caused an irreparable breach of trust and exceeded mere poor judgment.

Claimant's conduct cannot 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 he was acting in accordance with the employer's expectations when he cheated on the test and was dishonest about it, nor did he sincerely believe that the employer would overlook or excuse his conduct.

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

DECISION: Hearing Decision 15-UI-48821 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 8, 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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