

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1495

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82512). Claimant filed a timely request for hearing. On November 18, 2015, ALJ Vincent conducted a hearing, and on November 24, 2015 issued Hearing Decision 15-UI-48236, affirming the Department's decision. On December 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he attempted to introduce new information that he did not present at the hearing. Claimant did not explain why he failed to offer this information during the hearing or otherwise show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Target Corporation employed claimant as a maintenance mechanic from July 1, 2002 until September 11, 2015.

(2) The employer expected claimant to perform all conveyor system maintenance tasks listed on the work orders he was assigned. The employer also expected claimant to refrain from knowingly providing false information in documents he prepared in the course of his job, including preventive maintenance reports. Claimant understood the employer's expectations as a matter of common sense.

(3) On June 2, 2015, the employer issued a corrective action to claimant for unsatisfactory work performance. The corrective action stated that on certain specified dates claimant failed to perform maintenance tasks adequately.

(4) On August 21, 2015, claimant was assigned a work order to perform preventive maintenance tasks on a conveyer system. The work order stated, among other things, that claimant was expected to visually inspect the roller assembly and the rollers, ensure the rollers rolled properly, check for build-up of and remove debris around the rollers and check for roller wear. Exhibit 1 at 15. Claimant inspected the rollers, saw that some were “compromised” but did not change them out. Claimant did nothing because he thought the section of the conveyer containing the roller assembly was shortly going to be completely replaced as a whole unit and he thought that any maintenance work on the rollers would be pointless. On the work order, claimant circled “yes” in response to the question whether the work order had been completed. Exhibit 1 at 15. Claimant circled “no” in response to the question whether a follow-up work order was needed to complete the maintenance. *Id.* In the “comments” section of the work order or elsewhere on it, claimant did not indicate that he had not changed rollers that his inspection revealed to have been worn and which he would have replaced except for his belief that the section of the conveyer containing the roller assembly was going to be entirely replaced.

(5) After August 21, 2015, the employer did not replace the section of the conveyer containing the rollers as it had planned. On September 2, 2015, the systems engineer was in the area of the conveyer on which claimant was assigned to perform preventive maintenance on August 21, 2015. The engineer noticed that the rollers were not operating properly and were damaged. They were bent, hitting each other and holes were worn through one or more of them. The engineer reported his observations to claimant’s supervisor. Claimant’s supervisor inspected the rollers and determined that the extent of damage to the rollers could not have happened since August 21, 2015, and concluded that claimant had not replaced them as he should have when he performed preventive maintenance on August 21, 2015.

(6) On September 11, 2015, the employer discharged claimant for falsifying the preventive maintenance report he completed on August 21, 2015 when he indicated he had completed work order but knew he had not replaced the rollers.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-48236, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant knew he had not replaced the rollers when he filled out the preventive maintenance report on August 21, 2015 and willfully violated the employer’s standards for honesty when he marked “yes” on the work order, indicating that he had completed it. Hearing Decision 15-UI-48236 at 2. The ALJ also reasoned that claimant’s behavior when he filled in the preventive maintenance report was not excused as an isolated instance of poor judgment since his “dishonesty” caused a breach of trust in the employment relationship that exceeded mere poor judgment. Hearing Decision 15-UI-48236 at 2. We disagree.

At the outset, we agree with the ALJ that claimant's marking on the preventive maintenance report that he had completed the work order, when he knew that he had not, violated the employer's standards. Different from the ALJ, we do not conclude that claimant was willfully dishonest since he was not intending to deceive the employer by the statement, but rather was acting under the belief, which the employer did not rebut, that the roller assembly on that section of the conveyer was shortly going to be completely replaced and he thought it was needless to replace the rollers at that time. Audio at ~32:34, ~32:52. However, even if claimant was not intending to be deceitful when he completed the preventive maintenance report, it was at least wantonly negligent of him to represent that he had completed the entire work order when, regardless of the reason, he knew he had not done so. Unless claimant's wantonly negligent behavior on August 21, 2015 is excused by one of the exculpatory provisions of OAR 471-030-0038(3)(b), it was disqualifying misconduct.

Under OAR 471-030-0038(3)(b), behavior that would otherwise constitute misconduct may be excused if the behavior is an isolated instance of poor judgment. Behavior is excused as an "isolated instance of poor judgment" if it was a single or infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior. OAR 471-030-0039(1)(d)(A). To constitute an isolated instance of poor judgment, claimant's behavior also must not have "exceeded mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, the employer raised the incidents for which claimant was issued the warning on June 2, 2015 as prior acts of alleged misconduct. Audio at ~14:44. However, that earlier warning involved claimant's alleged carelessness in performing work, errors and generally unsatisfactory work performance. Audio at ~14:44. The employer presented no evidence about the incidents underlying the June 2, 2015 warning from which claimant's willful or wantonly negligent violation of the employer's standards can be inferred. Absent such evidence, the employer did not demonstrate that the acts for which claimant received that warning constituted acts of a type that formed a pattern of willful or wantonly negligent when combined with his behavior on August 21, 2015. For purposes of OAR 471-030-0038(1)(d)(A), claimant's wantonly negligent behavior on August 21, 2015 was isolated and meets the first prong of the test to be excused as an isolated instance of poor judgment.

It does not appear from the record that claimant filled out the preventive maintenance report as he did on August 21, 2015 to dishonestly deceive or mislead the employer, but because he thought any work he performed on the rollers would be purposeless since that conveyer section was shortly due to be replaced. Audio ~32:34, ~35:52. Although claimant might have violated the employer's standards when he marked the preventive maintenance report to indicate that the work order had been completed, his doing so under the circumstances was understandable. As well, claimant's behavior on August 21, 2015 was substantially mitigated by his generally satisfactory work performance over the thirteen years he was employed. Audio at ~35:06; Exhibit 1 at 10. It was also mitigated by the employer's failure to raise any reason why claimant filled out the preventive maintenance form as he did other than the reason that claimant gave or to show any apparent benefit to claimant from indicating that he had completed the work order. Notably, the employer did not contend that claimant sought to avoid the work of changing the rollers when he stated that the work order had been completed, or that in some other way or for some other reason he was attempting to knowingly mislead the employer. Furthermore, claimant's testimony at hearing about what he had done on August 21, 2015 was forthright in admitting his actions and remorseful. Audio at ~31:50, ~32:34, ~33:40. Viewing the sum of the mitigating factors in this record,

a reasonable employer would not have concluded that it could not trust claimant to perform his work capably and to fill out preventive maintenance reports accurately in the future, or that a continued employment relationship with him was impossible. Because claimant's wantonly negligent behavior on August 21, 2015 meets all the requirements, it is excused from constituting disqualifying misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-48236 is set aside, as outlined above.¹

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: January 14, 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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¹ 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.