

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0128

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151436). Claimant filed a timely request for hearing. On February 1, 2016, ALJ Seideman conducted a hearing and issued Hearing Decision 16-UI-52100, affirming the Department's decision. On February 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) T-Mobile USA Inc. employed claimant as a customer services representative from April 16, 2013 to November 13, 2015.

(2) The employer expected claimant to report for work as scheduled. Claimant understood that expectation.

(3) On November 6, 2015, claimant failed to report for work as scheduled because he was arrested and incarcerated for neglecting to pay a fine for operating a motor vehicle while using a mobile communication device. *See* ORS 811.507. A hearing was scheduled for November 20, 2015. Claimant remained incarcerated, and therefore was unable to report for work from November 6 through 20, 2015. On November 13, 2015, the employer discharged claimant for that reason.

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. 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).

The employer had a right to expect claimant to report for work as scheduled. Claimant understood that expectation. The employer discharged claimant for violating that expectation by being unable to report for work as scheduled from November 6 through 20, 2015. Claimant was unable to report for work due to his incarceration. To determine whether the employer discharged claimant for misconduct, the issue is whether, with indifference to the consequences of his actions, claimant consciously engaged in conduct he knew or should have known would probably result in his incarceration. See *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991). Claimant knew or should have known that neglecting to pay a fine for operating a motor vehicle while using a mobile communication device would probably result in his incarceration, and his failure to pay the fine demonstrated indifference to the consequences of his actions. Claimant's inability to report for work as scheduled from November 6 through 20, 2015 therefore were wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that violate the law exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's failure to pay the fine for operating a motor vehicle while using a mobile communication device violated the law, and therefore exceeded mere poor judgment. Nor can claimant's conduct be excused as a good faith error. Claimant understood the employer expected him to report for work as scheduled. His conduct therefore was not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits based on his work separation from the employer.¹

DECISION: Hearing Decision 16-UI-52100 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 26, 2016

¹ In written argument, as at hearing, claimant asserted he should not be disqualified from receiving benefits because his mother notified the employer he was incarcerated, and was told the employer would place claimant on unpaid administrative leave pending the outcome of his hearing on November 20, 2015. However, the employer discharged claimant for being unable to report for work as scheduled through November 20, and not for failing to notify the employer that he was unable to do so. The employer was under no obligation to place claimant on administrative leave, and any initial decision to do so is not material to whether the employer ultimately discharged claimant for misconduct.

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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