

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0169

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 100458). Claimant filed a timely request for hearing. On January 21, 2016, ALJ Vincent conducted a hearing, and on January 28, 2016, issued Hearing Decision 16-UI-51907, affirming the administrative decision. On February 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Columbia County (County) employed claimant as a corrections deputy in its Sheriff's office from August 30, 2010 until November 17, 2015. Claimant worked in the County jail.

(2) The County Sheriff's Office Conduct Policy prohibited employees from making knowingly false or misleading statements, from falsifying records or making entries in records with an intent to deceive, and from engaging in dishonest conduct that adversely affected the employer- employee relationship. Exhibit 1. Claimant knew and understood the employer's policy.

(3) The employer provided corrections deputies with bar code scanning devices. Deputies used these devices to record each task they performed during their assigned shifts, and the time they performed these tasks. Information from the scanning devices was then downloaded into the jail information management system.

(4) On March 15, 2015, claimant was working the graveyard shift; his duties including serving breakfast to the jail inmates. Claimant scanned barcodes to indicate that he served breakfast to the three or four inmates in the K-POD unit of the jail, performed security rounds in this unit, and conducted a formal head count of the K-POD inmates. The barcode scans claimant made were false, however, because claimant did not serve breakfast to the K-POD inmates, did not perform security rounds, and did not conduct a head count of the K-POD inmates. Exhibit 1, 11/17/15 letter at 5. A K-POD inmate complained to claimant that he had not received breakfast, and told claimant that he was not refusing the

meal. Claimant told the inmate that he was too late and that no more breakfast was available. Audio Recording at 12:00.

(5) In the report claimant entered about his March 15, 2015 shift in the County's information system, he falsely stated that he attempted to enter the K-POD, but was unable to do so. Claimant also stated that after he was unable to enter the K-POD, he served breakfast to the inmates in the J-POD unit. Claimant asserted that when he finished doing so, he looked into the K-POD and determined that no inmates were up, ready for and wanting breakfast. Exhibit 1, 11/17/15 letter at 5.

(6) On June 11, 2015, the employer suspended claimant for two days without pay for failing to serve breakfast to the K-POD inmates on March 15, 2015. Claimant filed a grievance over the suspension. The employer denied the grievance at the first step of the grievance procedure, and claimant appealed the grievance to the County Sheriff at the second step of the grievance procedure.

(7) On August 10, 2015, the Sheriff interviewed claimant as part of the Step 2 grievance procedure. During this interview, claimant asserted that on March 15, 2015, he attempted to enter K-POD to serve breakfast to the inmates but was unable to do so. Based on this and other statements claimant made during the interview, the Sheriff concluded that claimant may have been untruthful in the account he provided of his conduct on March 15.

(8) The Sheriff conducted an investigation into claimant's actions during his March 15, 2015 shift. Based on the results of this investigation, the Sheriff concluded that claimant had falsely reported his actions on that date in his bar code scanner, in the reports he entered into the County's information system, and in the statements he made to the Sheriff and those assigned to investigate his conduct.

(9) By letter dated November 17, 2015, the County discharged claimant for violating the Sheriff's policy that prohibited making false statements, falsifying records, and engaging in dishonest conduct that adversely affected the relationship between employer and employees. Exhibit 1, 11/17/15 letter at 1.

DECISION AND REASONS: We agree with the ALJ and conclude 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer's policy prohibited employees from falsifying records or otherwise entering false information in the employer's records, and from engaging in dishonest behavior that adversely affected the employer-employee relationship. Claimant knew and understood the employer's policy. On March 15, 2015, claimant used a bar code scanner to enter false information about his actions during his assigned shift; he also included false information about his conduct in the report he entered in the County's information system. Claimant knew or should have known that his actions violated the employer's policy concerning truthfulness. His conduct was, at best, at least wantonly negligent.

Claimant's behavior may be excused if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior that would otherwise constitute misconduct may be excused as an isolated instance of poor judgement if it was 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). Under OAR 471-030-0038(1)(d)(D), an act which exceeds "mere poor judgment" by causing an irreparable breach in the employment relationship does not fall within the exculpatory provisions of OAR 471-030-0038(3), however. Whether an individual's conduct caused an irreparable breach of trust, and cannot be excused as an isolated instance of poor judgment, is an objective determination based on whether a reasonable employer under similar circumstances would also conclude that an irreparable breach of trust had occurred. *See accord Isayeva v. Employment Department*, 266 Or App 806, 340 P3d 82 (2014) (an irreparable breach is an objective determination); *see also Callaway v. Employment Department*, 225 Or App 650, 654, 202 P3d 196 ("an employer cannot unilaterally announce a breach of trust if a reasonable employer in the same situation would not do so"). Here, claimant's refusal to provide a truthful account of his actions on during his March 15, 2015 shift would cause a reasonable employer in the same type of business as the County Sheriff's office, *i.e.*, overseeing the welfare and security of inmates in a jail, to conclude it could no longer trust claimant to comply with the employer's policies.

Nor can claimant's actions be excused as a good faith error under OAR 471-030-0038(3)(b). At hearing, claimant provided no testimony concerning his behavior on March 15, 2015. Instead, claimant asked that the ALJ consider Exhibit 2 -- a December 22, 2015 letter in which claimant's attorney filed a grievance concerning claimant's discharge at Step 2 of the grievance procedure -- as an accurate account of the relevant facts. Audio Recording at 32:26. This letter, which was prepared by claimant's attorney based on information provided by the claimant, addressed some of the issues raised in the investigation the employer conducted into claimant's March 15 conduct. At no point in this letter, however, does claimant specifically deny that he provided false information about his actions on March 15. Instead, the letter asserted that many of the comments claimant provided during the investigations were taken out of context, that claimant's explanations of his actions were often "rambling," and that claimant's remarks were often "part of a lengthy stream of consciousness explanation of the events on March 15, 2015." Exhibit 2. Based on the evidence claimant offered, we have no reason to conclude that claimant sincerely but mistakenly believed the employer would excuse his deliberate refusal to provide truthful information about his conduct on March 15. Claimant's behavior therefore did not result from a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-51907 is affirmed.

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

DATE of Service: March 2, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.