

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0197

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 144709). Claimant filed a timely request for hearing. On February 3, 2016, ALJ Francis conducted a hearing, and on February 10, 2016 issued Hearing Decision 16-UI-52745, affirming the administrative decision. On February 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was relevant and based on the hearing record.

FINDINGS OF FACT: (1) Compass Commercial Development, a commercial real estate company, employed claimant as an assistant project manager from August 18, 2014 until June 28, 2015.

(2) The employer expected that claimant would obtain approval for any leave he wished to take from his job. Claimant knew and understood this expectation as a matter of common sense. In addition, claimant secured the employer's agreement that he could have time off to travel to Cambodia from November 12 through 28, 2014. Claimant performed volunteer work for a charity he had founded during this trip.

(3) On or about December 29, 2014, claimant told his supervisor that he would be taking time off in March 2015 to take a vacation trip to New Zealand. Although his supervisor was reluctant to allow claimant to go, he did not clearly voice his objections to claimant's trip. Claimant traveled to New Zealand from March 21 through April 8, 2015. Transcript at 8; Exhibit 1 at p. 7.

(4) On May 18, 2015, claimant met with his supervisor and told him that in June 2015, he was going to travel to Nepal to perform volunteer work for Hands On, a non-governmental organization that assisted victims of natural disasters. (Severe and devastating earthquakes occurred in Nepal in April and May, 2015). The supervisor told claimant that he admired claimant's commitment to service, but also said that if claimant went to Nepal, he would replace claimant if he could find an individual qualified to perform claimant's job. Transcript at 9. At the time claimant planned to travel to Nepal, he was

working on the largest project the employer had ever undertaken. The employer very much needed claimant's skill as a "hands-on project manager" who regularly visited the site of this project. Transcript at 7 and 8.

(5) Claimant traveled to Nepal from June 15 through July 2, 2015. On June 28, 2015, his supervisor sent him the following email¹:

I've decided to make a change [sic] Paul. The need for you to serve in Nepal the last few weeks (after the previous time in Cambodia and then New Zealand), and the necessity for us to honor our commitments, makes this situation incompatible. You are not being released as a result of performance issues relating to the job, but because you make choices that put your job second to these travel and service opportunities and that is unworkable for us. Exhibit 1 at 20.

(6) On June 29, 2015, the employer hired a project manager to replace claimant.

DECISION AND REASONS: We disagree with the ALJ, and conclude that the employer discharged claimant for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). Here, the record shows that claimant was willing to continue to work for the employer after he returned from Nepal, but the employer indicated his refusal to allow him to do so in a June 28, 2015 email. Claimant's work separation was therefore a discharge.

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.

Claimant and his supervisor provided completely different accounts of the May 18, 2015 meeting at which they discussed claimant's trip to Nepal. Claimant testified that his supervisor did not "voice any objections [to his trip] nor did he say I could not go." Transcript at 26. Claimant's supervisor, however, asserted that he told claimant that while he admired claimant's willingness to volunteer, he was going to replace claimant if he could find a qualified applicant for claimant's job. Transcript at 8. In addition, claimant's coworker testified that claimant told him that his supervisor had warned him (claimant) that

¹ Claimant received the email in Nepal on June 29, 2015 because of the time difference.

he would be replaced if he went to Nepal. Transcript at 19. When the ALJ specifically asked claimant if his supervisor told him he would be replaced if he went to Nepal, claimant responded as follows:

There was a reference pertaining to the provisions that were being put in place to make sure that the communications and duties were met during my absence, and that the provisions are so comprehensive that's – or may be obsolete and may not have a position when I return. Transcript at 27.

When the ALJ then asked claimant to explain this response, and inquired about the comprehensive or complex provisions to which claimant had referred, claimant testified:

Well it was - it was office banter. Whether that – that's – I was doing such a good job to make sure that everything was covered that, you know, joking saying well maybe I won't have a job when I get back because everything was covered so well. Transcript at 27 and 28.

Because of claimant's evasive and confusing responses to the ALJ's questions about his supervisor's statements at the May 18, meeting, we find the supervisor's testimony as corroborated by the testimony of claimant's coworker to be more credible. We find it more likely than not that the supervisor indicated his refusal to approve claimant's trip to Nepal by warning claimant that he would be replaced if he went. Claimant knew and understood that the employer required him to obtain approval for any time he took off from his work as a matter of common sense and because claimant had secured the employer's approval for a trip to Cambodia in November 2014. Claimant's actions in taking off from work for almost three weeks to travel to Nepal, when he knew his supervisor had not authorized the trip, demonstrated a conscious indifference to the employer's expectations regarding his behavior and were 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 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 decision to take an extended amount of time off from work without authorization would cause a reasonable employer in the same type of business as the employer, i.e., commercial real estate, to conclude it could no longer trust claimant to perform the type of "hands-on project management" his job required.

Nor can claimant's actions be excused as a good faith error under OAR 471-030-0038(3)(b). As discussed above, we have no reason to believe that claimant sincerely but mistakenly believed his

supervisor gave him permission to travel to Nepal on May 18, 2015. Claimant's behavior therefore did not result from a good faith error.

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

DECISION: Hearing Decision 16-UI-52745 is affirmed.

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

DATE of Service: March 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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