

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0380

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75619). Claimant filed a timely request for hearing. On March 29, 2016, ALJ Triana conducted a hearing, and on March 31, 2016 issued Hearing Decision 16-UI-56232, affirming the Department's decision. On April 4, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, which EAB considered when reaching this decision.

The employer submitted a written argument that presented information not offered into evidence during the hearing. The employer did not explain why it was unable to present this new information at the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstance beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) River City Environmental, Inc. employed claimant as a commercial truck driver from January 12, 2015 until January 21, 2016.

(2) The employer expected that when the employer assigned claimant to shred documents, he would shred those documents and refrain from taking possession of them for personal purposes. The employer also expected claimant would refrain from making non-business related use of his cell phone when he was on-duty and not on break. The employer further expected claimant to refrain from using company

vehicles without the permission of a supervisor and the employer's dispatch personnel. Claimant understood the employer's expectations.

(3) Sometime before January 11, 2016, claimant injured himself at work. As a result of the injury, he was restricted from driving for the employer and was given non-driving duties to perform.

(4) Sometime during the week beginning January 11, 2016, claimant complained to the employer's safety risk manager that the employer's owner had been harassing him due to his injury. The risk manager informed the employer's human resources manager of claimant's complaint.

(5) On January 18, 2016, claimant left the cab of a truck in which he was performing modified work duties by wiping down and cleaning the interior. Claimant went to the wash bay and began speaking on his cell phone about a personal matter. Claimant was not on break. When claimant saw the employer's owner walking by while he was on the cell phone, he quickly entered the cleaning room, which was a small room located off the wash bay. The owner saw claimant speaking on the cell phone and asked him if he knew what his assigned light duty work was that day. When claimant stated he was assigned to clean the interiors of some of the trucks, the owner told claimant to get back to his assigned work. Later on January 18, 2016, sometime soon after his interaction with the owner, claimant complained to the employer's human resources manager that the owner had been harassing him for using his cell phone and had instructed him to perform work duties that were outside his medical restrictions. The human resources manager consulted with the employer's vice-president and it was determined the employer would retain the services of an independent investigator to investigate claimant's allegations against the owner. The employer contacted a private investigator recommended by its attorney and arranged for the investigator to come to the workplace at 2:00 p.m. later that same day.

(6) Sometime before lunch on January 18, 2016, the human resources manager told claimant that he should begin shredding some documents as part of his modified work duties. There were several boxes of documents that claimant was expected to shred and three shredders for him to use. Some of the documents to be shredded contained confidential information such as credit card numbers, social security numbers of employee and applicants for employment and other private information about employee and applicants. An employee happened to look at a screen showing live-feeds from the employer's video surveillance of the workplace. The employee noticed that while performing the shredding, claimant removed some of the documents to be shredded and set them aside. The employee later observed claimant folding up some of the documents and, apparently to conceal that he was taking them, placing them down the front of his pants.

(7) Sometime later on January 18, 2016, after the employee viewed claimant on the surveillance videos, the safety risk manager told claimant it was time for him to take his lunch. Claimant left the area in which he had been shredding documents and got into one of the employer's pick-up trucks. Claimant then drove the pick-up away from the work premises to get some lunch. Claimant did not have a supervisor's permission to use the pick-up and he did not tell dispatch he was taking the pick-up. As claimant was driving away, the employer's owner observed him. Sometime later, when the owner was speaking with the safety risk manager on an unrelated matter, he asked that manager where she had sent claimant in the pick-up. She said she had not sent claimant anywhere and had not given him permission to use the pick-up. Soon after, the owner received a call from the dispatcher informing him that she had telephoned claimant and claimant told her he was using the pick-up get some lunch. The dispatcher told

the owner she informed claimant that he had not cleared his use of the pick-up with dispatch and she had instructed claimant to bring the truck back immediately. Claimant did not immediately return with the pick-up, but waited to do so until he obtained his lunch. Claimant later returned to the workplace and resumed shredding documents.

(8) After the owner returned from his lunch on January 18, 2016, an employee who worked in dispatch told the owner she had viewed claimant earlier that day on surveillance screens removing some documents from those he was shredding and placing them down the front of his pants. The owner contacted the human resources manager and, with the assistance of staff from the employer's IT department, viewed the video surveillance of claimant performing the shredding earlier that day. The owner and the human resources manager confirmed the accuracy of the employee's observations of claimant. They saw claimant on the video setting aside some of the documents to be shredded, folding them, lifting a safety vest he was wearing and stuffing them down inside the front of the pants he was wearing, as the employee had stated.

(9) At approximately 2:00 p.m. on January 18, 2016, the private investigator arrived at the workplace and met with the human resources manager. In addition to investigating claimant's allegations of harassment against the owner, the human resources manager asked him to investigate claimant's behavior in placing some of the documents to be shredded in the front of his pants, and to try to learn what documents claimant had taken.

(10) Sometime after 2:00 p.m. on January 18, 2016, the private investigator interviewed claimant in a conference room at the workplace. During the interview, claimant said he had taken some of the documents to be shredded earlier that day. When the investigator asked claimant to give to him the documents he had taken, claimant reached down the front of his pants and produced a cover letter from an applicant for employment, a resume submitted by that same applicant and two copies of a letter from the employer to the driver of a vehicle that had been damaged when it had collided with one of the employer's vehicles.

(11) On January 18, 2016, after the interview of claimant had concluded, the employer suspended claimant. On January 21, 2016, the employer discharged claimant for his behavior on January 18, 2016, including taking some of the documents he was assigned to shred, for talking on his cell phone about a non-business related matter while on duty and for using the employer's pick-up without permission.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Overall, claimant's testimony was replete with assertions that were not plausible. These assertions included a claim that the employer "planted" surveillance cameras on the day claimant shredded the

documents to observe him performing that task; a claim that, within the sight of at least three managers, the owner, the human resources manager, the safety risk manager, and the private investigator threatened claimant with a pistol during their January 18 interview; and a claim that those managers blocked the door to the conference room to allow the investigator to keep claimant captive. Transcript at 42, 51, 52, 53, 56. Claimant further contended that the private investigator threatened to take him to jail for “grand theft auto,” and that, to the extent he took any the documents he was supposed to shred, he was apparently compelled to take them due to a “tick disorder.” Transcript at 47, 51, 52, 53. With respect to his behavior in taking some of the documents to be shredded, claimant also contended that he did not hide them in the front of his pants, that none of those he took contained confidential information and that he had been told he could take them. Transcript at 44, 45, 46, 48, 49, 53, 64, 65, 66. Claimant likened his belief he was allowed to take the documents similar to that of his previous behavior of taking and keeping a rubber chicken, a toy rat or spider and other miscellaneous items he found at the dump when performing work for the employer. Transcript at 48.

In contrast to claimant’s testimony, two employer witnesses testified consistently at hearing that they observed claimant on video secreting some of the documents to be shredded in the front of his pants, and referred to a statement from the private investigator that claimant produced at least some of the documents he had taken from the front of his pants. It seems improbable that the employer’s witnesses would fabricate identical stories about claimant hiding documents down his pants or removing them from his pants. On this record, the weight and reliability of the employer’s evidence outweighs that of claimant. The preponderance of the evidence shows that claimant placed at least some of the documents he was expected to shred down the front of his pants with the purpose of taking them for personal use. The only likely explanation for claimant stuffing those documents down his pants was to conceal that he was intending to remove them, and that he was aware the employer prohibited him from keeping any of the documents to be shredded. The evidence shows, more likely than not, that claimant willfully violated an employer expectation of which he was aware by taking some of the documents he was expected to shred.

Claimant’s willful violation of the employer’s standards on January 18, 2016 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as an “isolated instance of poor judgment,” the behavior to be excused must have been, among other things, a single or infrequent occurrence rather than a repeated act or patent of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). On January 18, 2016, claimant also engaged in two other acts that violated the employer’s standards with willful or wanton negligence. First, he made a non-business related cell phone call when he was on duty and not on break. While claimant contended he did not have any “appropriate” work to perform when he was on his cell phone that day, he did not contend he was on break or that he was unaware the employer prohibited personal cell phone calls while on duty. Transcript at 28-29, 69. Claimant’s personal use of his cell phone on January 18, 2016 was at least a wantonly negligent violation of the employer’s standards. Second, also on January 18, 2015, claimant took the employer’s pick-up truck to get his lunch without having the permission of a supervisor or the dispatcher to do so. While claimant attempted to justify his failure to obtain permission to use the pick-up on January 18, 2016 based on other times he had driven the employer’s vehicles for personal purposes, on all of those prior occasions he described, he had the employer’s permission or that of a person he contended was a supervisor. Transcript at 58, 59. The evidence claimant provided was insufficient to rebut the evidence of the employer about claimant’s awareness that he needed to permission of a supervisor to use the employer’s pick-up for a personal

purpose such obtaining lunch. On this record, claimant's failure to have the employer's permission to use the employer's pick-up before taking it on January 18, 2016 was at least a wantonly negligent violation of the employer's standards. Because claimant willfully or with wanton negligence violated the employer's standards on three separate occasions on January 18, 2016, claimant's behavior was not a single or infrequent occurrence. As such, his behavior that day may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant's behavior in placing the documents to be shredded down the front of his pants on January 18, 2016 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). As previously discussed, based on his concealing the documents to allow him to remove them from the workplace without the employer's knowledge, it is implausible that claimant thought the employer would allow him to take the documents. Since claimant's behavior was not undertaken in a sincere, but erroneous belief, that he was allowed to take the documents, claimant's behavior may not be excused as a good faith error.

The employer discharged claimant for unexcused misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-56232 is affirmed.

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

DATE of Service: May 20, 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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