

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0731

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 114730). The employer filed a timely request for hearing. On May 24, 2016, ALJ Vincent conducted a hearing, and on June 1, 2016 issued Hearing Decision 16-UI-60806, concluding claimant's discharge was for misconduct. On June 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Normally, this would prevent EAB from considering the argument under OAR 471-040-0080 and ORS 657.275. In this case, however, the argument contains new information necessary to complete the record. For those reasons, claimant's argument is hereby admitted into evidence as EAB Exhibit 1. A copy of the exhibit is attached to the copies of this decision mailed to the parties. Any party that objects to our admitting EAB Exhibit 1 into evidence must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Winco Foods employed claimant as a store clerk at its Corvallis store from September 21, 2013 to February 28, 2016.

(2) The employer trained clerks during orientation to perform parking lot sweeps during their shifts to ensure that the parking lots were clean and safe, and, immediately upon completion of the lot sweeps, to make log entries accurately reflecting what time each lot sweep was performed. Claimant understood the employer's expectations.

(3) On February 25, 2016, the employer assigned claimant to do the lot sweeps during the first part of his shift. Claimant might have performed one or two lot sweeps during a three-hour period, if any, and did not record the times he performed those lot sweeps in the log.

(4) At approximately noon the same day, a safety committee member inspected the lot sweep logs, noticed that no entries had been made for the day, and informed claimant of the omission. For the remainder of his shift, claimant performed lot sweeps and logged them accurately and appropriately.

(5) Claimant later made an "end of day decision" to falsify log entries for the earlier part of his shift so he would not get in trouble for not having done the sweeps or made corresponding log entries. Audio recording at ~25:10, ~25:35. Although claimant did not recall performing any lot sweeps before his interaction with the safety committee member, and thought he might have done only one or two lot sweeps, claimant made log entries showing he did seven lot sweeps, at 9:15 a.m., 9:50 a.m., 10:23 a.m., 10:48 a.m., 11:17 a.m., 11:46 a.m. and 12:10 p.m. He fabricated times for five of the lot sweeps he entered into the log, because he had not performed those lot sweeps. Claimant did not know whether any of the times he entered into the log actually corresponded to the one or two lot sweeps he believed he might have actually performed that day, and fabricated those, as well.

(6) The employer considered claimant's falsification of the lot sweep logs to constitute gross misconduct under its policies, in part because the employer used the lot sweep logs as evidence in legal matters when needed. Claimant understood the logs were important documents the employer could use as evidence. On February 28, 2016, the employer discharged claimant for failing to perform lot sweeps and falsifying the lot sweep logs to reflect that he had.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

As a preliminary matter, claimant's evidence about the events in question was less credible than the employer's. Specifically, in claimant's written argument, he wrote, "In this particular instance, I failed to record/initial the schedule, even though I did perform the work. This is not dishonest or falsification." That contradicts claimant's testimony at the hearing that he did not believe he had performed the work. Specifically, he provided consistent testimony at the hearing that he was not sure if he did any lot sweeps that morning, might just have done one or two of them, and admitted that he falsified all the time entries because he could not be certain any of the seven times he documented actually corresponded to the times he might have done the one or two lot sweeps that day. Audio recording at ~26:35, ~27:20. Because claimant has provided contradictory statements about his conduct on the occasion in question, we conclude that his evidence was, generally, unreliable. Where claimant's argument contradicted his testimony, we found his testimony more credible because it was, during the hearing, internally consistent and plausible. Where claimant's testimony or argument contradicted the employer's

consistent and plausible evidence, however, we found facts in accordance with the employer's version of events.

The employer had the right to expect claimant to perform lot sweeps and accurately document his activities. Claimant's decision to falsify lot sweep logs to reflect frequent sweeps to avoid getting in trouble indicates that he knew the employer's expectations with respect to lot sweeps and log entries, and understood the consequences of failing to meet those expectations. In this case, claimant intentionally falsified the employer's lot sweep logs to reflect that he had made seven lot sweeps even though he estimated he might have made only one or two. It is notable that the falsified times claimant entered in the log were specific to the minute, for example, falsely showing that he did lot sweeps at 10:23 a.m. and 11:17 a.m. Claimant's decision to enter specific false times rather than approximating the times of any lot sweeps he might actually have made suggests that he was trying to create false but credible-looking entries that would make it appear to the employer that he had made the frequent sweeps required when, in fact, he had not. Claimant's falsification of the log entries was a willful violation of the standards of behavior the employer had the right to expect of him.

It appears on this record that claimant's willful violation was isolated because, although claimant made seven false entries into the employer's lot sweep log, each entry arose out of one "end of shift decision" on claimant's part to falsify the employer's lot sweep log, making it a single exercise of poor judgment. Although some conduct, if isolated, can be excused under OAR 471-030-0038(3)(b), it cannot be excused if, for example, the conduct exceeds mere poor judgment because it caused a breach of trust in the employment relationship. OAR 471-030-0038(1)(d)(D). In this case, claimant's conduct exceeded mere poor judgment and cannot be excused because the conduct caused an irreparable breach of trust. Claimant created a record of activities he knew he never performed, and assigned specific times to these activities to try to create a false sense of accuracy in the log that might allow his failure to perform assigned duties go unnoticed. Claimant created these false records to attempt to avoid getting in trouble for having failed to do the lot sweeps or completed the logs. Honesty is a fundamental component of the employment relationship. Any reasonable employer needs to be able to rely upon its employees to perform assigned duties, and, when they do not or cannot, refrain from engaging in acts of dishonesty to try to keep their errors from being discovered. Given claimant's decision-making process with respect to falsifying the logs in this case, as described above, coupled with claimant's knowledge that the employer used the logs to document the employer's lot cleanliness and safety and could even use them as evidence in a court case, no reasonable employer would continue to trust or employ claimant. For those reasons, we conclude that claimant's conduct caused an irreparable breach of trust in the employment relationship and, therefore, it cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant must be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-60806 is affirmed.

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

DATE of Service: July 26, 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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