

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1384

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 10039). Claimant filed a timely request for hearing. On November 22, 2016, ALJ Triana conducted a hearing, and on November 30, 2016 issued Hearing Decision 16-UI-71927, affirming the Department's decision. On December 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: (1) The Home Depot employed claimant as a freight associate from March 30, 2015 until September 15, 2016.

(2) The employer expected associates not to operate equipment in the freight area unless the employer had certified them to operate that piece of equipment. Certification required the associate to take and pass online courses and to take and pass a driving test administered by a supervisor. Claimant understood the employer's expectations. The employer had certified claimant to operate a forklift, a small forklift, a reacher and an order puller.

(3) In June 2016, claimant operated the pacer "a few times" "to move stuff around in the freight area" when he was not certified to operate it. Transcript at 17. The pacer was a piece of equipment used in the receiving department to assist in unloading freight from trucks.

(4) On September 9, 2016, claimant again operated the pacer in the freight area when he was not certified to operate it. An associate reported to the employer that claimant had been driving the pacer. Later that day, the employer's assistant manager met with claimant and asked him if he had operated the pacer. Claimant told the assistant manager he had driven the pacer "a little bit." Transcript at 7.

(5) On September 15, 2016, the employer discharged claimant for operating the pacer when he was not certified to operate it.

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 connected with work. 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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute that he was not certified to operate the pacer or that he knew the employer prohibited him from operating the pacer if he was not certified in its operation. Transcript at 17, 18. Rather, claimant first contended at hearing that he did not actually drive the pacer on September 9, 2016, but "jumped on – on the pacer and jumped off it" when he was unable to start it due to receiving an "error code" and that another associate actually ended up actually operating the pacer that night. Transcript at 15. Later in his testimony, claimant reversed this initial statement, denied earlier testifying that he did not drive the pacer because of the error code, and testified that another associate had actually tried to start the pacer, had received the error code and that claimant then got on the pacer to try to start it with the intention only to confirm if an error code would be received or not. Transcript at 26. Aside from these contradictions in his hearing testimony itself, claimant also contradicted his testimony at hearing in the statements he submitted as hearing exhibits, in which he stated that no associate, including him, had gotten on the pacer or tried to drive it on September 9, 2016. Exhibit 1 at 2, 9. At hearing, claimant further denied that he had admitted to the assistant manager who interviewed him on September 9, 2016 that he had operated the pacer earlier that night, but in the statements he submitted as hearing exhibits claimant flatly contradicted his hearing testimony when he stated he told the assistant manager on September 9, 2016 that he had driven the pacer earlier that night because he allegedly had been falsely accused of doing so and "I only said that I drove the pacer because I was sure I would be able to get [the employer] to provide a copy of the [surveillance] video they claimed to have proving my innocence." Exhibit 1 at 8; Transcript at 20, 21, 22. It makes little sense that claimant would think that by lying and making this admission as opposed to denying he had driven the pacer, he would increase the likelihood the employer would produce a video to exonerate him. In sum, claimant's testimony was replete with inconsistencies and contradictions.

Claimant also contended that a prior supervisor had observed him driving the pacer on occasions prior to September 9, 2016 and did not discipline him, but only told him "better not crash it" and another associate supposedly told claimant "don't let them see you drive it [the pacer]" without a license; it is noteworthy that claimant did not try to justify driving the pacer without a certification on September 9, 2016 due some mistaken belief that his current supervisor or the employer would condone it. Transcript at 17; Exhibit 1 at 9. Furthermore, it implausible that the former supervisor's warning to claimant and the alleged comment of the associate, if actually made, were sincerely interpreted by claimant as signs that the employer condoned his operating the pacer without a certification to do so or that the employer was not going to enforce its certification requirement against him, especially since he was cautioned not to get caught driving it. Based on the number of internal contradictions in claimant's testimony at hearing, the contradictions revealed when his testimony is compared against what he stated in his exhibits, and his illogical explanations, claimant's testimony, taken as whole, was not credible. On this record, the preponderance of the reliable evidence show that claimant knew he was prohibited from

operating the pacer without being certified in its operation, that he operated it on September 9, 2016 without having the required certification and later admitted to the employer that he had done so. By this behavior, claimant willfully violated the employer's standards.

Claimant's willful non-compliance with the employer's standards on September 9, 2016 may not be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, that the behavior sought to be excused was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's expectations. OAR 471-030-0038(1)(d)(A). Here, to the extent his testimony can be believed, claimant admitted he drove the pacer without having a certification to do so a "few times" in approximately June 2016. Transcript at 17. Claimant did not contend at hearing that he was not aware of the employer's certification requirement in June 2016 and, for the reasons addressed above, it was not plausible that claimant thought in June 2016 that the employer had made an exception to its requirements and would allow him to drive the pacer without the needed certification. Since claimant previously drove the pacer in willful violation of the employer's standards on at least a few occasions in June 2016, his doing so on September 9, 2016 was not isolated. As such, his behavior on September 9, 2016 is not excused as an isolated instance of poor judgment.

Nor is claimant's willful violation of the employer's standards on September 9, 2016 excused from constituting misconduct as a good faith error under OAR 471-030-008(3)(b). Claimant did not contend at hearing that he mistakenly believed he was certified to drive the pacer, nor that the employer's policies or his current supervisor would allow him to drive the pacer without being certified and, as discussed above, it was implausible that he could have held any such belief in good faith. For this reason, his willful violation of the employer's standards on September 9, 2016, was not excused as a good faith error.

On this record, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-71927 is affirmed.

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

DATE of Service: January 19, 2017

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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