

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0380

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83316). Claimant filed a timely request for hearing. On March 15, 2017, ALJ Frank conducted a hearing, and on March 23, 2017 issued Hearing Decision 17-UI-79530, affirming the Department's decision. On March 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oregon Department of Transportation employed claimant from August 4, 2003 until December 27, 2016, last as a track compliance specialist.

(2) The employer expected claimant to make ethical decisions. In 2003, 2011 and 2013, claimant completed training regarding the principles of public service ethics. The employer also expected claimant to comply with personal conduct expectations including putting personal conflicts aside to communicate and work as a team for the good of the business and to treat others professionally and in a courteous manner. Most recently in 2012, claimant received the employer's written personal conduct expectations for rail division employees. Exhibit 1. The employer also expected claimant to refrain from intentionally misleading and reporting inaccurate information to his managers. Claimant understood this expectation from prior training and as a matter of common sense.

(3) At 10:00 a.m. on August 18, 2016, claimant met with his rail manager to discuss the results of an employer investigation into claimant's work performance. The manager gave claimant notice that claimant would receive a three-month pay reduction for allegedly completing a track inspection report that was intentionally inaccurate and working at a mall without permission with a new employee trainee. The salary sanction was also imposed because claimant lied to his rail manager on February 10, 2016 when claimant denied that he had parked in a coworker's paid reserved parking space without the coworker's permission.

(4) At 1:50 p.m. on August 18, 2016, claimant's rail manager went to claimant's desk to inform claimant that the employer had changed the effective date of the salary sanction. Claimant was not at his desk. At 2:00 p.m., the manager went to the employer's motorpool complex and saw claimant's assigned truck parked there, not in use. At 2:05 p.m., the manager called claimant and asked claimant where he was. Claimant responded, untruthfully, that he was using his assigned truck, was at a work safety meeting in Halsey (Portland) and could return to the Salem office by 4:15 p.m. Claimant knew he did not go to the Halsey location or attend a safety meeting on August 18, 2016. Claimant's manager called claimant again at 2:41 p.m. and asked claimant his whereabouts. Claimant responded untruthfully that he was driving his assigned truck, on his way back from Halsey to his office in Salem. Claimant knew he was in Salem in his personal vehicle both times his manager spoke with him on August 18. Exhibit 1.

(5) Claimant's untruthful statements to the employer caused the employer a "profound loss of trust" in claimant's credibility and professional judgment. Exhibit 1 at 25. The employer considered a continued employment relationship to be impossible because claimant's position required him to engage in enforcement functions, work independently, and to be trustworthy and use professional judgment for the benefit of public safety. Exhibit 1 at 25.

(6) On December 27, 2016, the employer discharged claimant for violating its ethics and personal conduct expectations by intentionally misleading and reporting inaccurate information to the employer.

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.

The employer discharged claimant for violating its ethics and personal conduct expectations when he intentionally gave false information about his whereabouts and activities during work time to his manager on August 18, 2016. Claimant did not dispute that he intentionally gave false information to his manager on August 18 when he stated he was attending a safety meeting and returning from a safety meeting in Portland, while he was actually out of the office, in his personal vehicle, in Salem. As a matter of common sense, the employer had the right to expect employees to be honest when providing information about their activities and whereabouts during work time. Claimant knew or should have known that expectation through training and common sense, and willfully violated it.

OAR 471-030-0038(1)(d) and (3)(b) provide that an individual's conduct may be excused from constituting misconduct if it occurred as the result of a good faith error or was an isolated instances of poor judgment that did not exceed mere poor judgment. Claimant did not act in good faith because he did not sincerely believe or have any factual basis for believing the employer would consider it

acceptable to lie to his manager about where he was or what he was doing during work time. Claimant's conduct was not an isolated exercise of poor judgment because it was a repeated act. Claimant also lied to his manager on February 10, 2016 when claimant denied that he had parked in a coworker's paid reserved parking space without the coworker's permission. Moreover, claimant's conduct on August 18 cannot be excused as an isolated instance of poor judgment because his conduct exceeded mere poor judgment by causing an irreparable breach in the employment relationship, thereby making a continued relationship impossible. *See* OAR 471-030-0038(1)(d)(D). Claimant argued that he lied to his manager on August 18 to "avoid the situation" and "any confrontation" with his manager "on any issue at all." Audio Record at 28:22 to 29:40. Claimant may have accomplished the same result without lying to his manager, and his stated intent to avoid confrontation does not justify his conduct. Viewed objectively, no reasonable employer would trust an individual who lies about their activities and whereabouts during work time, nor would any reasonable employer continue to employ a dishonest individual whose responsibilities included rail safety enforcement and working independently. We therefore conclude that claimant's conduct exceeded mere poor judgment, and cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-79530 is affirmed.

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

DATE of Service: April 11, 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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