

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0513

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 102956). The employer filed a timely request for hearing. On April 7, 2017, ALJ Wyatt conducted a hearing, and on April 14, 2017, issued Hearing Decision 17-UI-80998, concluding the employer discharged claimant for misconduct. On May 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not offered into evidence during the hearing, did not explain why he was unable to present the information at that time or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. He also failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Accordingly, under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090, EAB only considered the hearing record when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a parts specialist from April 29, 2015, to November 16, 2016.

(2) The employer expected employees to refrain from committing acts of dishonesty, including intentionally providing false information to the employer during a company investigation. Claimant was aware of the employer's expectation as a matter of common sense.

(3) On October 26, 2016, claimant found a coworker's personal cell phone in the console of a truck he was assigned to use to make a part delivery. Rather than immediately return the phone to its owner, whose identity was apparent from the cellphone case, he maintained possession of it for an unknown period of time, accessed it, took down the owner's cell phone number and sent a social media "friend request" to himself from the coworker's cell phone in addition to posting a message about the job, using the owner's identity, to the social media site. Claimant eventually and anonymously returned the phone

to an employer lost and found box. He later admitted to a coworker that he possessed and accessed the phone, who alerted the coworker who owned the cellphone, who then complained to management.

(4) On November 15, 2016, the employer's district manager conducted an investigation during which he obtained statements from the cell phone's owner and other coworkers to whom claimant had spoken about the cellphone. Exhibit 1. Claimant initially denied having any knowledge of the cellphone or its whereabouts, but after being confronted with the substance of coworker statements, admitted he had initially lied to the manager about finding and possessing the phone to protect the cell phone's owner from discipline for leaving a personal cell phone in the truck. However, claimant denied ever accessing the cell phone or using it to post a message or friend request using the owner's identity.

(5) On November 16, 2016, after considering claimant's statements and the surrounding evidence, the employer discharged claimant, in part, for dishonesty during the employer investigation.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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.

In Hearing Decision 17-UI-80998, after finding that claimant admittedly lied to the employer about finding and possessing a coworker's cellphone during an investigation into the incident, the ALJ concluded that claimant's discharge was for misconduct, reasoning that claimant violated the employer's reasonable expectation that employees be truthful regarding work related matters and that "even a single instance of dishonesty, in the context of an employment relationship, exceeds mere poor judgment and cannot be excused. Hearing Decision 17-UI-80998 at 1-3. We agree.

As a preliminary matter, we conclude claimant was not a credible witness. First, claimant admitted that he initially lied to the employer's district manager during his investigation. Next, claimant's assertion that he initially lied to the employer about finding and possessing the phone to protect his co-worker from discipline for leaving her cell phone in the truck was implausible, given that he never attempted to personally or privately return the phone to her knowing it was hers. Exhibit 1 at 030/032. Third, his assertion to the employer and at hearing that he never accessed the phone was equally implausible given that the owner found a "friend request" to claimant from her social media account that she never sent and that although it was undisputed she never gave him her phone number, shortly after misplacing her phone, she received a text message from him to her number, an act which claimant admitted to another coworker. Exhibit 1 at 026/032 and 028/032. Because claimant was not a credible witness, we based our findings on facts in dispute on the employer's evidence, which included testimony from the district manager claimant lied to during the investigation and written statements from coworkers contradicting claimant's which were submitted during the course of the employer's investigation. Exhibit 1.

The employer had the right to expect claimant to be honest regarding work related matters which claimant understood as a matter of common sense. During the employer's November 15 investigation,

claimant violated that expectation by submitting untruthful written statements regarding whether he found and possessed the coworker's cellphone and then accessed it without the owner's permission. By making those statements, knowing they were false, claimant willfully disregarded the employer's common sense expectation that he be truthful regarding work related matters.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not sincerely believe, or have a factual basis for believing, the employer would tolerate his dishonesty about essentially appropriating a coworker's property and then lying to the employer about it. Moreover, to be excused as an isolated instance of poor judgment, claimant's conduct must have been a single or infrequent act, and must not have exceeded poor judgment by causing an irreparable breach of trust in the employment relationship. OAR 471-030-0038(1)(d). As described above, claimant's dishonesty was not isolated, and viewed objectively, his dishonesty during an employer investigation demonstrated the employer could no longer trust him to be honest about work-related matters. His conduct also exceeded mere poor judgment, and may not be excused.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-80998 is affirmed.

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

DATE of Service: May 30, 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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