

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0665

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115845). Claimant filed a timely request for hearing. On May 11, 2017, ALJ Frank conducted a hearing, and on May 12, 2017 issued Hearing Decision 17-UI-83308, affirming the Department's decision. On June 1, 2017, 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). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Housing Authority of Jackson County employed claimant from April 1, 2003 until March 20, 2017 as the lead technician responsible for inspecting vacant units and supervising the crews that cleared the units.

(2) The employer expected claimant to follow its code of conduct regarding honesty at work. The employer also expected the crews that cleared the units to discard items left in the vacant units or donate them to charity. Claimant understood the employer's expectations, and occasionally donated items himself when the crews he supervised were busy. The employer had no policy or procedures to track the disposition of the items taken from the units.

(3) In October 2015, the employer gave claimant a verbal warning for taking a vacuum cleaner, toaster and microwave out of a vacant unit. Claimant asserted at that time that he was going to donate the items.

(4) On March 7, 2017, the vacate crew removed five laptop computers from a unit that was being emptied. After the crew returned to the employer's shop, claimant saw a box of the computers on the hood of the company vehicle used by the crewmembers to clear the unit. Claimant asked two crew members what they planned to do with the computers, and they told claimant the computers were to be donated. Claimant told them he would take care of it, and put them in his vehicle.

(5) Claimant did not donate the computers by March 20, 2017. The employer knew claimant had taken the computers and met with claimant regarding the matter on March 20, 2017. When the employer's maintenance director asked claimant about the computers, claimant denied having removed them from the crew's vehicle. The director showed claimant a photograph of the computers inside claimant's vehicle, and claimant stated he had taken the computers and was going to donate them to a local charity. The computers were still in claimant's vehicle.

(6) On March 20, 2017, the employer discharged claimant for failing to donate or dispose of property recovered from a vacated unit.

CONCLUSIONS AND REASONS: We agree with the ALJ, and conclude that claimant's discharge was 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. However, isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for dishonesty in failing to donate computers recovered from one of the employer's vacant units. Claimant asserted at hearing that he planned to donate the computers to a local charity, but had not done so before March 20, 2017 due to his inability to go outside after a medical treatment, his work schedule, and the recipient's availability. Audio Record at 23:06 to 24:43. However, on March 20, 2017, when the employer's maintenance director asked claimant about the computers, claimant denied having taken the computers. Only after the maintenance director showed claimant a photograph of the computers in claimant's truck did claimant admit having taken the computers. Claimant testified at hearing that he never denied taking the computers. Audio Record at 24:54 to 25:03. However, both the maintenance director and the development director were present at the March 20 meeting and testified that claimant denied that he took the computers until he saw the photograph of them in his truck. Audio Record at 16:25 to 16:30, 32:34 to 33:09. Thus, the employer's evidence outweighs claimant's testimony on that issue. By denying that he had taken the computers after he took them, claimant demonstrated that, more likely than not, he willfully took the computers without intending to donate them.

Claimant's willful failure to follow the employer's policy of donating items recovered from its units cannot be excused as an isolated instance of poor judgment or good faith error. For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). However, EAB has consistently concluded that even a single dishonest act, such as claimant's, may cause an irreparable breach of trust in the employment relationship, exceed mere poor judgment and fall outside the exculpatory provisions of OAR 471-030-0038(3).¹ Nor can claimant's conduct be excused as a good faith error. Claimant did not assert, and the record does not show, that he sincerely believed, or had a rational basis for believing, that the employer would condone his taking the computers for any purpose other than donating or discarding them.

The employer discharged claimant for misconduct and claimant is disqualified from the receipt of benefits based on his work separation.

DECISION: Hearing Decision 17-UI-83308 is affirmed.

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

DATE of Service: June 28, 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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¹ Examples of single acts of dishonesty that we concluded exceeded mere poor judgment and caused an irreparable breach in the employment relationship include the following: Appeals Board Decision 2014-EAB-0968, July 22, 2014 (claimant made a single false time card entry); Appeals Board Decision 2014-EAB-0377, March 26, 2013 (claimant falsely reported a meeting with a customer that never occurred); and Appeals Board Decision 13-AB-0296, March 13, 2013 (claimant falsified a time record by not logging out of the time system during an hour she was away from the workplace).