EO: 200
BYE: 201814

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0752

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 80505). The employer filed a timely request for hearing. On June 12, 2017, ALJ McGorrin conducted a hearing, and issued Hearing Decision 17-UI-85463, concluding that the employer discharged claimant for misconduct. On June 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: With his application for review, claimant included new information that he did not present at the hearing. Under OAR 471-041-0090(2), EAB may consider new information if the party presenting the information shows that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. In support of his request to have EAB consider his new information, claimant explained that he did not receive copies of all the materials which the employer submitted to the ALJ prior to the hearing, and which the ALJ admitted into evidence as Exhibit 1. Claimant asserted that "I believe if I had the evidence to reference to I could have prepared statements and testimony as to the reasoning and my decision…" Claimant's Argument, p. 1.

At the hearing, the ALJ described the contents of Exhibit 1, confirmed that claimant had not received a copy of the exhibit, and gave claimant an opportunity to object to admission of Exhibit 1; claimant indicated he had no objection. Audio recording at 5:31. Because he raised no objection to the admission of Exhibit 1, we conclude that claimant waived his right to assert that his failure to receive the exhibit prior to the hearing impaired his ability to prepare for the hearing or present relevant information about his discharge.[1] Claimant therefore failed to demonstrate that circumstances beyond his reasonable

[1] Exhibit 1 consisted of several pages of employer's policies, a list of employer training sessions in which claimant participated, a October 9, 2015 memorandum confirming a counseling claimant received from his supervisor, and a March 24, 2017 "Corrective Action Report" regarding claimant's discharge. Both the October 9 and March 24 documents were signed by claimant, and at the hearing, claimant testified that he was familiar with the relevant portions of the employer's policies. We therefore conclude that claimant's failure to receive Exhibit 1 prior to the hearing did not adversely affect his ability to prepare for the hearing.

control – the ALJ's admission of an exhibit he did not receive prior to the hearing – prevented him from presenting the information at the hearing that he now wants EAB to consider. EAB therefore considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Shopko Stores employed claimant, last as a loss prevention leader, from December 7, 2012 until March 24, 2017. Claimant's job duties included preventing theft from the employer's store.

(2) The employer's policy prohibited employees from leaving store property to follow an individual. Transcript at 9. Claimant knew about and understood the employer's policy.

(3) On September 15, 2015, claimant left store property to pursue a suspected shoplifter. He did so because he believed that the store manager, who was outside the store in her vehicle, had motioned for him to do so. Transcript at 38. On October 9, 2015, the store manager gave claimant a "documented coaching" in which she reminded claimant of the employer's policy prohibiting an employee from leaving store property to pursue an individual. The "documented coaching" warned claimant that any future failure to comply with the employer's policies "will likely result in disciplinary action up to and including termination." Transcript at 15; Exhibit 1.

(4) On March 7, 2017, claimant observed an individual who appeared to be stealing items from the employer's store. After the individual left the store, claimant contacted the police; the police asked him to keep the suspect under observation and claimant left store property to pursue the individual. Claimant knew he had made a "bad decision to go against company policy," by following the individual, but chose to do so because the individual appeared to be "high" and had a knife concealed in his waist band. Transcript at 22-23. When the individual ran into a bank located about a block from the store where claimant was working, claimant followed him and entered the bank. The police eventually apprehended the individual.

(5) Sometime during the evening of March 7, claimant prepared a report regarding his pursuit of the suspected shoplifter. Claimant did not mention his entry into the bank in this initial report, but told the assistant store manager that his report was not complete. Claimant subsequently spoke to the store manager, who told him he needed to provide a detailed account of what had occurred on March 7. Claimant then amended his initial report to state that he had followed the suspect into the bank.

(6) On March 16, 2017, claimant met with the employer's employee relations specialist to discuss his March 7 pursuit of the suspected shoplifter. On March 24, 2017 the employer discharged claimant because he violated its policies by leaving store property to chase a suspected thief, and because it believed that claimant had lied during the investigation of this incident by failing to disclose or denied that he entered a bank while pursuing the suspect in his initial report and in his March 16 meeting with the employee relations specialist.

CONCLUSION AND REASONS: We disagree with the ALJ, and conclude that the employer discharged claimant, but not for misconduct.

ORS 657.176(2) 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. 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

As a loss prevention leader who was responsible for preventing theft from the employer's stores, claimant knew about and understood that the employer's policy prohibited him from leaving store property to pursue a suspected thief. Claimant also understood, as a matter of common sense, that the employer expected him to provide truthful information during any investigation into his conduct. The employer discharged claimant for violating its policy and expectations by leaving store property to pursue a suspected shoplifter on March 7, 2017, and for allegedly lying during the investigation by failing to disclose or denying that he entered a bank during his pursuit of the suspect in his initial report about the incident and in a March 16 meeting with the employee relations specialist.

In regard to his pursuit of the suspected shoplifter, claimant made a conscious decision to leave store property to follow the suspect, even though he knew he was violating the employer's policy by doing so. Claimant's conduct was therefore at least wantonly negligent. In regard to statements made about the March 7 incident during the investigation, claimant testified that his failure to mention his entry into the bank in his initial report about the incident occurred because his initial report was incomplete, and not because he deliberately chose to omit a relevant fact. Transcript at 31. The employer therefore failed to demonstrate that claimant's statements in his March 7 report resulted from his conscious violation of the employer's expectation that he provide truthful information about his conduct. In regard to statements made during the March 16 meeting with the employee relations specialist, claimant testified that he told the employee relations specialist that he entered the bank during his pursuit of the suspect.[2] The employee relations specialist, however, testified that claimant denied entering the bank during their March 16 meeting.[3] The evidence regarding statements claimant made on March 16 is therefore equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its evidentiary burden. The employer therefore did not show that claimant lied to the employee relations specialist on March 16.

The final issue is whether claimant's pursuit of the suspect may be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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). Isolated acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship or otherwise make a continued 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). Although the

[2] Transcript at 33.
[3] Transcript at 10.

record shows that on September 15, 2015, claimant left store property to chase a suspected thief in violation of the employer's policy, his conduct on that date resulted from his reasonable but mistaken belief that the store manager wanted him to pursue the suspect. Because claimant's actions on September 15, 2015, were not willful or wantonly negligent, the employer failed to establish that his March 7, 2017 conduct was a repeated act or part of a pattern of other willful or wantonly negligent behavior, and not a single or infrequent occurrence. Claimant's March 7 conduct did not violate the law and was not tantamount to unlawful conduct. Nor do we find that his actions on that date created an irreparable breach of trust in the employment relationship or otherwise make a continued relationship impossible. Claimant's conduct therefore did not exceed mere poor judgment.

The employer did not establish that it discharged claimant for misconduct, and not for an isolated instance of poor judgment. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-85463 is set aside, as outlined above.

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

DATE of Service: July 14, 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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