

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0823

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93639). The employer filed a timely request for hearing. On June 1, 2017, the Office of Administrative Hearings (OAH) sent the parties a notice of hearing for a hearing on June 20, 2017 at 8:15 a.m. On June 20, 2017, ALJ Shoemake conducted a hearing at which claimant failed to appear, and on June 23, 2017 issued Hearing Decision 17-UI-86423, concluding the employer discharged claimant for misconduct. On July 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a written argument in which he asked for the opportunity to respond to the employer's evidence at the hearing, which we construe to be a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090 allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant argued that he failed to attend the hearing because he did not receive the notice of hearing or otherwise know the hearing was scheduled. Written Argument. However, documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012). Claimant's only other assertion regarding his mail was that he filed a complaint with the postal service regarding the "lost" mail. Written Argument. Without more, claimant's assertions that he did not receive the notice in the mail and filed a complaint with the postal service are not sufficient to rebut the presumption that he received the notice of hearing. Absent another explanation for failing to appear at the hearing, claimant failed to show that circumstances beyond his reasonable control prevented him from presenting information at the hearing. Thus, claimant's request to present new information is denied.

FINDINGS OF FACT: (1) Allied Skyhop, Inc. employed claimant from July 2016 to February 3, 2017 as an operations manager.

(2) Claimant was responsible for overseeing the maintenance of a fleet of the employer's vehicles. The employer expected claimant to ensure the completion of basic maintenance on the vehicles, and accurately and honestly complete a weekly report regarding the maintenance of the vehicles in the fleet. The employer also expected claimant to refrain from intentionally reporting inaccurate information to the employer. Claimant understood these expectations from prior warnings and as a matter of common sense.

(3) During the last six weeks of claimant's employment, the CEO gave claimant verbal warnings when claimant failed to maintain the correct number of staff to complete the employer's operations and lied to the CEO about having hired new staff when he had not done so. The CEO warned claimant that the employer would discharge him if he did not improve his performance.

(4) In January 2017, before claimant left work for a vacation, claimant wrote on the weekly vehicle maintenance reports and stated to employer's chief executive officer (CEO) during a telephone conversation that the oil changes on the vehicles were current and had been completed on time.

(5) During January 2017, due to mechanical problems that occurred in a vehicle, the employer learned that the basic maintenance of the vehicles had not been completed as claimant had reported. Claimant was on vacation when the vehicle problems occurred.

(6) On January 26, 2017, when claimant returned from vacation, claimant told the employer that he did not complete the maintenance as scheduled because "he didn't get to it." Audio Record at 12:02 to 12:11. Claimant did not explain why he had previously told the CEO that the vehicle maintenance had been completed.

(7) On February 3, 2017, the employer discharged claimant for poor performance and lying to the employer about having completed the vehicle maintenance.

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 failing to perform his duties in a timely manner and lying to the employer about having completed his duties. Although the record does not establish that claimant's poor performance was necessarily due to a willful or wantonly negligent disregard of the employer's expectations, the record does show that claimant gave false information to the employer's CEO when he stated that the vehicle maintenance was complete and current in January 2017. As a matter of common

sense, the employer had the right to expect employees to be honest when providing information about the status of their job duties. Claimant knew or should have known that expectation through 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. The record does not establish that claimant acted in good faith. As a matter of common sense, claimant did not sincerely believe or have any factual basis for believing the employer would consider it acceptable to lie to the employer and his CEO about having completed his duties. Claimant's conduct was not an isolated exercise of poor judgment because it was a repeated act. Claimant also lied about having hired staff necessary to complete the employer's operations. Moreover, conduct that causes an irreparable breach of trust that makes a continued employment relationship impossible may not be excused. OAR 471-030-0038(1)(d)(D). Viewed objectively, no reasonable employer would trust an individual who lies about completing work. 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-86423 is affirmed.

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

DATE of Service: August 3, 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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