

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0968

Affirmed
Disqualification Effective Week 22-17

PROCEDURAL HISTORY: On June 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work for the employer without good cause (decision # 75646). Claimant filed a timely request for hearing. On July 25, 2017, ALJ Wymer conducted a hearing at which the employer did not appear, and on July 26, 2017 issued Hearing Decision 17-UI-88928, affirming the Department's decision. On August 11, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Eugene employed claimant as a street sweeper operator from August 2008 until the week of May 22, 2017.

(2) In April 2017, a supervisor instructed claimant and a seasonal employee to act as flaggers, directing traffic at an intersection, while a street sweeper swept debris from the intersection after a traffic accident. Claimant and the seasonal employee initially followed the supervisor's instruction. After a few minutes, however, claimant determined, based on 8 years' experience as a flagger, that he and the seasonal employee, who was not certified as a flagger, could not direct traffic at the intersection without jeopardizing their own safety. Claimant therefore instructed the seasonal employee to leave the intersection, and claimant did the same. The employer gave claimant a written warning for doing so.

(3) Approximately one week later, the employer began requiring street sweeper operators to measure their assigned street sweeper's brooms each morning and enter the measurements into a notebook kept in the street sweeper. Claimant understood the employer's expectations. Approximately one week later, however, claimant entered the previous morning's broom measurements into the notebook without checking to see if the measurements had changed. Nor did claimant correct his notebook entries after later determining that the broom measurements had changed, although he entered the correct measurements in a separate checklist. The employer gave claimant a written warning for falsifying the broom measurements in the notebook, and on May 5, 2017, placed claimant on two weeks' administrative leave pending a determination regarding his continued employment.

(4) While on leave, claimant determined that the employer was going to terminate his employment, and decided to quit work to avoid being fired. On May 12, 2017, claimant therefore notified the employer that he was quitting work, effective June 2, 2017. On May 19, 2017, however, claimant's union representative informed him that the employer was probably going to terminate claimant's employment. During the week of May 22, 2017, the employer informed claimant that his employment had been terminated.

CONCLUSIONS AND REASONS: We disagree with the ALJ that claimant voluntarily left work for the employer on June 2, 2017 (during week 22-17). We conclude that the employer discharged claimant during the week of May 22, 2017 (week 21-17). However, the employer discharged, not for misconduct, within 15 days of claimant's planned voluntary leaving on June 2, 2017 without good cause. We therefore agree with the ALJ that claimant is disqualified from receiving benefits, effective week 22-17.

In Hearing Decision 17-UI-88928, the ALJ found that on May 12, 2017, claimant notified the employer that he was quitting work, effective June 2, 2017, and that during the week of May 22, 2017, the employer notified claimant that his employment had been terminated.¹ However, the ALJ then concluded that claimant voluntarily left work for the employer on June 2, 2017.² We agree with the ALJ's findings, but disagree with his conclusion that claimant voluntarily left work on June 2, 2017. Under OAR 471-030-0038(2) (August 3, 2011), a work separation is a voluntary leaving only if the employee could have continued to work for the same employer for an additional period of time. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.* Here, the record, and ALJ's own findings, show that claimant was willing to continue to work for the employer until June 2, 2017, but the employer did not allow him to continue working after some time during the week of May 22, 2017. The work separation therefore is a discharge, and not a voluntary leaving.

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) 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. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. 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

¹ Hearing Decision 17-UI-88928 at 2.

² *Id.* at 3.

behavior. OAR 471-030-0038(1)(d)(A). Isolated acts exceed mere poor judgment only if they violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship, or otherwise make a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

We infer that the employer discharged claimant because of his falsification of his assigned street sweeper's broom measurements. In Hearing Decision 17-UI-88928, the ALJ concluded that claimant's conduct was a willful violation of the employer's reasonable expectations, and although an isolated instance of willful or wantonly negligent behavior, created an irreparable breach of trust in the employment relationship that made a continued relationship impossible, and therefore constituted misconduct.³ We agree with the ALJ that in falsifying the broom measurements, claimant consciously engaged in conduct he knew violated the employer's expectations, and therefore willfully violated those expectations. We also agree with the ALJ that it was an isolated instance of willful or wantonly negligent behavior. The record fails to show claimant falsified broom measurements on prior occasions. With respect to the prior flagging incident, the record fails to show it was reasonable for the employer to expect claimant to continue directing traffic after determining that he could not do so without jeopardizing his own safety and that of his coworker, that claimant knew or should have known the employer expected him to do so, or that he acted with indifference to the consequences of his actions. The record therefore fails to establish that claimant's falsification of the street sweeper's broom measurements was a repeated act or pattern of willful or wantonly negligent behavior. However, we disagree with the ALJ's conclusion that claimant's conduct created an irreparable breach of trust in the employment relationship. The record fails to show that, viewed objectively, claimant's conduct was so egregious that the employer could not have imposed a lesser form of discipline, such as suspension, and trusted him to refrain from such conduct in the future. We therefore conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct.

However, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that the voluntary leaving would be without good cause, and the employer discharged the individual, not for misconduct, no more than 15 days prior to the date of the planned voluntary leaving, then the work separation shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. ORS 657.176(8). However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. *Id.* Here, the employer discharged claimant, not for misconduct, during the week of May 22, 2017, which was within 15 days of claimant's planned voluntary leaving on June 2, 2017. We therefore must address whether claimant's planned quit would have been without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Leaving work without good cause includes, but is not limited to, resignation to avoid what would otherwise be a discharge for misconduct or potential discharge for misconduct. OAR 471-030-0038(5)(b)(F). Otherwise, "good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable

³ *Id.* at 4.

alternative but to leave work. OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time. In addition, where the gravity of the situation experienced by the individual results from his or her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of section OAR 471-030-0038(4). OAR 471-030-0038(5)(f).

Here, claimant arguably faced a grave situation, a probable discharge at the end of his two week administrative leave. However, although claimant did not plan to leave work to avoid a discharge, or potential discharge, for “misconduct,” the gravity of his situation resulted from his own deliberate actions, the willful falsification of his assigned street sweeper’s broom measurements in violation of the employer’s reasonable expectations. Claimant did not assert, and the record does not show, that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have had no reasonable alternative but to falsify those measurements, or that claimant had no reasonable alternative but to do so. Claimant’s planned voluntary leaving therefore would have been without good cause under OAR 471-030-0038(5)(f). Thus, under ORS 657.176(8), claimant is disqualified from receiving benefits, effective the week of June 2, 2017 (22-17).

DECISION: Hearing Decision 17-UI-88928 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 6, 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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