

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1222

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 121350). The employer filed a timely request for hearing. On October 9, 2017, ALJ Monroe conducted a hearing, and on October 13, 2017 issued Hearing Decision 17-UI-94605, concluding that claimant's discharge was for misconduct. On October 20, 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). We therefore considered only the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant as a meat cutter from September 8, 2008 to July 13, 2017.

(2) The employer expected meat department employees to do "sweeps" of the meat department. Sweeps involved "[r]egular and timely floor inspections and the immediate clean-up of any spills/debris." Exhibit 1. The employer also expected employees to maintain "sweep logs" documenting that they completed the sweep on schedule by signing the sweep log "immediately" after the clean-up or inspection. *Id.* The sweep log policy stated, "You cannot go back at a later time and complete the sweep log, or "fill-in" undocumented clean-ups or floor inspections after the fact," and that doing so was considered gross misconduct. *Id.* The employer provided claimant with copies of the policy. On November 29, 2011, the employer sent an email to its managers, including claimant, titled "sweep log reminder." *Id.* The email included several paragraphs explaining the sweep and sweep log policy and the reason for it, and the employer included a copy of the sweep log policy as an attachment to the email. Claimant understood that the employer prohibited him from falsifying the employer's records.

(3) On five occasions between May 31, 2017 and July 7, 2017, claimant initialed the sweep log to indicate he had done a sweep during periods when he was not physically present on the meat department

sales floor. He had not done the sweeps on any of those five occasions, and did not know whether or not a coworker had done the sweeps. For example, on June 1, 2017, claimant signed that he had done a sweep at 1:00 even though he was on a lunch break from 12:43 to 1:14. On June 29, 2017, claimant signed that he had done a sweep at 4:30 even though he was on a lunch break from 4:11 to 4:42.

(4) On July 7, 2017, claimant signed the meat department sweep log at 7:35 a.m. and 8:45 a.m. after walking through the department and checking for debris. During the late morning, an assistant manager noticed that the sweep log had not been signed since that morning and several sweeps had been missed. At approximately 12:25 p.m., claimant looked at the sweep log and saw that no one had signed the log since 8:45 a.m. Claimant back-filled the sweep log by initialing that he had done sweeps between 8:45 a.m. and 12:25 p.m. even though he had not actually done any sweeps and did not know whether any other employees had done the sweeps and just forgotten to initial the sweep log. The assistant manager later noticed that the missing entries had been back-filled by claimant.

(5) Later on July 7, 2017, the employer questioned claimant about having back-filled the sweep log. Claimant admitted that he had back-filled the sweep log, and said he had done it to keep others from getting in trouble for failing to initial it. On July 10, 2017, the employer placed claimant on suspension while it investigated claimant's conduct. During that period of time, the employer reviewed the sweep log and surveillance video footage and discovered that claimant regularly initialed the sweep log without having done the sweeps as required. On July 13, 2017, the employer discharged claimant for repeatedly falsifying the sweep log.

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 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 prohibited employees from back-filling sweep logs. The employer repeatedly notified claimant of that prohibition throughout his employment, and claimant knew or should have known about it. The employer also prohibited employees from falsifying records, and claimant understood that prohibition. Nevertheless, on at least six occasions between May 31, 2017 and July 7, 2017 claimant falsified the employer's sweep logs by back-filling them. Claimant's repeated falsifications of the employer's sweep logs demonstrated his indifference to the consequences of his conduct, where he was conscious of the fact he was back-filling the logs and knew or should have known that doing so would probably violate the employer's expectations. Although, as claimant testified, his intent in falsifying the sweep logs was not malicious, and was intended to keep others from getting into trouble for failing to

initial the sweep logs, the fact remains that knowingly falsifying the sweep logs still amounted to repeated wantonly negligent violations of the employer's expectations. *See* Transcript at 35.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be excused as an isolated instance of poor judgment it must, in pertinent part, be a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d). As explained above, claimant's conduct involved repeated wantonly negligent falsifications of the employer's sweep logs. His conduct was therefore a repeated act of wantonly negligent poor judgment that cannot be excused as isolated.

Claimant alleged, however, that he acted in good faith when he falsified the logs. Claimant testified that he and other coworkers would "help out each other" with the logs, and that when one of them noticed the sweep log was not signed "we would ask to see who was assigned to case and whether they knew they hadn't signed it from that time that it was last signed, and . . . filled it out." Transcript at 23, 24. Claimant claimed "that had just been one of those things that people would do, you know, every once in a while and nobody would be in trouble for it, so therefore, it was kind of engraved in me to where, you know, I mean, no one – no one had gotten terminated for it. And if I would have known that I would get singled out for it then I wouldn't have risked my job on the line for it." Transcript at 24-25. Claimant also testified, however, that employees talked about it "when someone would get talked to about something for it, because then the department as a whole would come together and be like, well, you know, this has happened. We might, you know, want to be careful about, you know – it would almost be kind of like a department, them talking about it in a like a department meeting about going over the sweep logs and stuff like that." Transcript at 26.

Claimant's alleged belief that he would not "be in trouble" or get discharged for falsifying sweep logs is not the same as sincerely believing falsifying sweep logs was consistent with or tacitly approved under the employer's policies or expectations. Nor, at the time that claimant falsified the sweep logs, did he hold a sincere belief that he or another employee had actually performed the sweep that he was then initialing had been completed. On this record, claimant did not hold a good faith belief that he had either performed the sweeps in question or that the employer expected or would condone his completion of the sweep log for sweeps he had not actually performed. Claimant's conduct therefore cannot be excused as a good faith error.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-94605 is affirmed.

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

DATE of Service: November 17, 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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