

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1257

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75048). On November 2, 2016, decision # 75048 became final without claimant having filed a request for hearing. On September 5, 2017, claimant filed a late request for hearing. On September 8, 2017, ALJ Kangas issued Hearing Decision 17-UI-92172, dismissing claimant's late request for hearing on decision # 75048 subject to claimant's right to renew the hearing request by responding to an appellant questionnaire by September 22, 2017. On September 19, 2017, the Office of Administrative Hearings (OAH) received claimant's response to the questionnaire. On October 4, 2017, OAH issued a letter order stating that Hearing Decision 17-UI-92172 was vacated and that OAH would schedule a hearing to address the timeliness of claimant's original hearing request and, if appropriate, the merits of decision # 75048. On October 12, 2017, OAH served notice of a hearing set for October 25, 2017. On October 25, 2017, ALJ M. Davis conducted a hearing at which the employer failed to appear, and on October 25, 2017 issued Hearing Decision 17-UI-95451, allowing claimant's request for hearing and concluding claimant was discharged for misconduct. On October 31, 2017, claimant filed an application for review of Hearing Decision 17-UI-95451 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that claimant's request for hearing should be allowed are **adopted**.

FINDINGS OF FACT: (1) Grants Pass Sanitation Republic Service employed claimant from March 16, 2015 until July 28, 2016 as a gatehouse attendant and heavy equipment operator.

(2) The employer expected claimant to report for work as scheduled or contact the employer if he had to miss work. Claimant understood the employer's expectation as a matter of common sense.

(3) On July 21, 2016, claimant drove a motor vehicle when his driving privileges had been suspended and was arrested and incarcerated for that offense. *See* ORS 811.175. Claimant remained incarcerated until July 28, 2016 and was therefore unable to report for three work shifts from July 22, 2016 through July 27, 2016. Claimant repeatedly asked the jail deputies for assistance in notifying the employer that he would miss work due to incarceration, but the jail deputies did not assist claimant with contacting the employer or contact the employer for claimant. On July 28, 2016, the employer discharged claimant for missing three consecutive shifts without notifying the employer he would be absent.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to report for work as scheduled or contact the employer. Claimant understood that expectation. The employer discharged claimant for violating that expectation by failing to report for work as scheduled or notifying the employer of his absences from July 22 through July 27, 2016. To determine whether the employer discharged claimant for misconduct, the issue is whether claimant willfully or with wanton negligence created the situation that made it impossible for him to attend work or notify the employer that he would be absent. *See Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991). Claimant consciously operated a motor vehicle knowing he was prohibited to do so under Oregon law because his license was suspended. Thus, with indifference to the consequences of his actions, claimant created the situation that resulted in his incarceration, which he knew or should have known would probably result in his violation of the employer's attendance expectations. Claimant's inability to report for work or contact the employer from July 22 through July 27, 2016 was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Acts that violate the law 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). Claimant's act of driving with a suspended driver's license violated the law, and therefore exceeded mere poor judgment. Nor can claimant's conduct be excused as a good faith error because he drove his vehicle knowing that he was prohibited from doing so under Oregon law.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-95451 is affirmed.

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

DATE of Service: November 29, 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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