

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0002

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103152). Claimant filed a timely request for hearing. On December 14, 2017, ALJ Janzen conducted a hearing and issued Hearing Decision 17-UI-99032, affirming the Department's decision. On December 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marketsource, Inc. employed claimant from January 15, 2013 until September 26, 2017 as a district manager.

(2) Claimant's duties as a district manager included traveling to multiple store locations for one retail client in his assigned geographic area and spending a minimum of 24 hours per week in the client's stores coaching employees and performing other managerial duties. The employer expected claimant to refrain from falsifying company documents by accurately and honestly recording the time he was physically in the client's stores. The employer used the timekeeping records in part to determine if claimant qualified for a bonus based on the time he physically spent in the client's stores. If claimant complied with the 24-hour requirement each week for a month, he received a monthly operations bonus. The employer also used the timekeeping records to ensure it was complying with its contract with the client to spend time in their stores. The employer had to report truthful timekeeping information to the client and errors or misrepresentations jeopardized the employer's contract with the client. Claimant understood the employer's expectations.

(3) In August 2017, a regional manager learned that some of claimant's team captains were completing claimant's in-store managerial duties for him, such as conducting interviews, writing work schedules, and reviewing and approving time cards. As a result, the employer conducted an investigation to verify the time claimant was physically present in the retail client's stores from August 22, 2017 through August 26, 2017 and September 3, 2017 through September 9, 2017.

(4) The employer and the retailer's investigator reviewed video footage from the stores and compared it to the time claimant reported visiting the client store locations. The footage showed claimant misrepresented the time he spent in the stores on August 22, 23 and 25 by a total of more than 16 hours, and on September 5, 6, 7 and 8 by a total of more than 23 hours. Exhibit 2 at 5-7. For the same days, claimant also submitted lunch receipts from restaurants that were not in the retailer's stores that contradicted the hours he reported he was in the stores. *Id.* On August 25, September 5 and September 8, 2017, claimant did not enter the stores where he reported having been working. *Id.*

(5) On September 26, 2017, the employer discharged claimant for providing false information to the employer about the time he was physically in client store locations.

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. 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 discharged claimant for misrepresenting time he was working inside a retailer's stores during two work weeks. At hearing, claimant did not contest the accuracy of the employer's records showing when claimant entered and left the retailer's stores. However, claimant alleged that the timekeeping records he provided the employer did not represent time that he was physically in the stores, but rather, were the times that he would "clock in at the store, go out and recruit, come to store, take care of [his] business and go on to the next [store]." Transcript at 24-25. Claimant alleged that much of the time he reported was time he was performing "external recruiting" of employees in local restaurants, malls and competitors' stores, and that he believed that time counted toward the 24-hour requirement. *Id.* Claimant's explanation regarding the time he worked is implausible because it cannot account for August 25, September 5 and September 8, 2017, the days when the employer's video records showed he did not report to the retailer's stores at all. Nor does claimant's explanation show why, if claimant's assertions were true, the employer's records do not show claimant entering the retailer's stores to "clock in," leaving to recruit locally, and entering the store again when he returned to the store. *See* Exhibit 2 at 5-7. Finally, if claimant's assertion were accurate, and he "clocked in" first each shift, the employer's video records would at least show claimant entering the stores at the same time claimant reported each day, which is not the case for August 22 and 23, and September 6 and 7. *Id.* Based on these observations, and the evidence showing claimant had coworkers perform some of his basic managerial duties for him, we conclude that the preponderance of the evidence shows claimant misreported the time he was working in the stores on multiple occasions during August 22, 2017 through August 26, 2017 and September 3, 2017 through September 9, 2017. In failing to accurately and honestly record his "in store" time, claimant consciously engaged in conduct he knew or should have known violated the employer's expectations regarding timekeeping, and willfully violated its expectations in that regard.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act to be isolated, the exercise of poor judgment must be 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). Moreover, acts that create an irreparable breach of trust in the employment relationship make a continued relationship impossible, exceed mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3). In the present case, claimant violated the employer's timekeeping expectations repeatedly, as is most apparent on the days when he did not even report to the stores where he reported working. His conduct was therefore a repeated act and a pattern of willful violations, and not a single or infrequent occurrence. In addition, claimant's willful failure to honestly represent his work time, viewed objectively, was sufficient to create an irreparable breach of trust in the employment relationship that made a continued relationship impossible. Claimant's acts therefore exceeded mere poor judgment, and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Nor can claimant's conduct be excused as a good faith error. It is not plausible that claimant erroneously believed he was accurately reporting his activities to the employer, nor is it plausible that he mistakenly believed that the employer would condone his failure to accurately log his work time, especially where it caused the employer to pay claimant bonuses he did not earn.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-99032 is affirmed.

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

DATE of Service: February 5, 2018

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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