

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0101

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143813). Claimant filed a timely request for hearing. On January 17, 2018, ALJ Murdock conducted a hearing, and on January 19, 2018 issued Hearing Decision 18-UI-101300, affirming the Department's decision. On January 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: Claimant offered Exhibit 1 into evidence at the outset of the hearing, but the ALJ did not admit it at that time stating that she would reserve judgment on that issue until later in the hearing. Audio Record ~4:15 to 6:00. The employer acknowledged that the employer had received a copy of the exhibit prior to the hearing, and claimant testified about portions of the exhibit at hearing. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if necessary to complete the record. The documents submitted by claimant are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, claimant's documents, marked as Exhibit 1, are admitted into the record. Any party that objects to the admission of Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

WRITTEN ARGUMENT: With his application for review, claimant submitted a written argument. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing, as required by OAR 471-041-0090 (October 29, 2006). Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument to the extent it was based on the record, in reaching this decision.

FINDINGS OF FACT: (1) Lucky Limousine Service LLC employed claimant as chauffeur driver from April 14, 2014 to November 20, 2017.

(2) The employer expected its drivers to arrive on time to pick up clients for transport to their planned destinations. The employer also expected its drivers to accurately and truthfully record transportation event times within the employer's record keeping system. Claimant was aware of and understood the employer's expectations.

(3) In September 2014, claimant was late picking up a client due to traffic conditions. In September 2015, claimant was late picking up a client due to a local power outage which cancelled his alarm clock settings. In October 2016, claimant was late picking up a client because he had not been informed about the transport in a timely fashion. In October 2017, claimant was late picking up a client because he mistakenly noted the time on his watch.

(4) On August 19, 2017, claimant was transporting a client group to Crown Point along U.S. Highway 30 in Oregon, when he swerved to avoid an oncoming SUV travelling outside of its lane. In doing so, he caused his employer vehicle to scrape a stone guard rail, causing vehicular damage. The employer later suspended claimant for 10 days for failing to keep a proper lookout and take extra precautions when traveling around a curve. Claimant believed he had been unfairly suspended for taking action to prevent a collision with due regard for the clients' safety. He further believed that the employer would use "any little thing I was gonna do wrong from that point on" to terminate his employment. Transcript at 22.

(5) On September 29, 2017, claimant was scheduled to pick up a client at 4:30 a.m. for transport to Portland International Airport (PDX). He arrived at the employer's garage at 3:00 a.m. so he would not be late but lost track of time. At 4:30 a.m., the client contacted the employer's night dispatcher inquiring about when their driver would arrive. The dispatcher located claimant and reported the client's call. In a panic, claimant asked the dispatcher not to document the issue because "he would get fired if [the employer] found out." Transcript at 7. Claimant left the employer's garage at 4:42 a.m. and arrived at the pickup location at 5:00 a.m. He transported the client and arrived at PDX at 5:30 a.m. However, claimant "was scared [about] losing [his] job" so he reported on the employer's paperwork that "he left the garage at 3:50, that he was on location at 4:14, that the passengers were picked up at 4:25, and that he dropped the passengers at 5:00 a.m." Transcript at 7-8, 22.

(6) On October 27, 2017, the employer received an email from the client's agent reporting that on September 29 the client's driver (claimant) was late and did not help with luggage. The employer conducted an investigation, which included reviewing camera footage showing that claimant left the garage at 4:42 a.m. and phone logs documenting his statements to the dispatcher, which it concluded about November 12, 2017. Claimant was out due to illness until November 20, 2017, at which time the employer discussed its findings with claimant, who told the employer "he felt he needed to lie so he wouldn't get fired." Exhibit 1 at 15; Transcript at 18-22.

(7) On November 20, 2017, the employer told claimant it was concerned about claimant's lack of integrity after he entered fictitious times on his paperwork and discharged claimant for being dishonest about his conduct on September 29, 2017. Exhibit 1 at 15.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

As a preliminary matter, we agree with the ALJ that the employer failed to establish that claimant had either willfully or with wanton negligence failed to arrive on time to pick up clients for transport to their scheduled destinations in September 2014, September 2015, October 2016 or October 2017. Hearing Decision 18-UI-101300 at 3. We also agree that the employer discharged claimant on November 20, 2017 for falsifying his trip records on September 29, 2017.

The employer had the right to expect claimant to accurately and truthfully record transportation event times within the employer's record keeping system. At hearing, claimant acknowledged that he was aware of and understood that expectation and admitted to the employer on November 20 that he willfully violated that expectation on September 29, 2017 by entering fictitious times on his paperwork because "he felt he needed to lie so he wouldn't get fired." Transcript at 16. He further clarified at hearing that his motivation for falsifying the trip documents on September 29 was that he "was scared [about] losing [his] job." Claimant's conduct was a willful violation of the employer's expectation that its drivers to accurately and truthfully record transportation event times within the employer's record keeping system.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Moreover, some conduct, even if it is isolated, such as acts that 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 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). Here, claimant admitted that he falsified the employer's records with the intent of concealing the fact that he was late in picking up one of its clients. Claimant's conduct not only placed the employer's business at risk for losing a good client, but, viewed objectively, made it difficult if not impossible for the employer to trust claimant to honestly perform his essential work tasks in the future, creating an irreparable breach of trust in the employment relationship. Accordingly, claimant's conduct exceeded mere poor judgment and may not be excused under OAR 471-030-0038(3)(b).

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectation regarding honesty. Claimant did not assert or show that he believed, or had a factual basis for believing, the employer would condone falsifying records reporting work activities or client contacts.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits based on his work separation until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 18-UI-101300 is affirmed.

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

DATE of Service: February 27, 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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