

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0390

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90531). Claimant filed a timely request for hearing. On March 29, 2018, ALJ Buckley conducted a hearing, and on March 30, 2018 issued Order No. 18-UI-106329, affirming the Department's decision. On April 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a copy of Order No. 18-UI-106329 which contained handwritten comments, which EAB has construed to be a written argument. Claimant failed to certify that she provided a copy of this argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, EAB did not consider claimant's written argument when reaching this decision.

The employer submitted a written argument that contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090(2). For this reason, EAB did not consider the employer's new information when reaching this decision.

FINDINGS OF FACT: (1) Superior Home Maintenance, LLC employed claimant from June 2015 until February 2, 2018, last as a field technician.

(2) The employer expected claimant to refrain from insubordination, to follow the employer's reasonable instructions and to perform the tasks the employer reasonably assigned to her. Claimant understood the employer's expectations as a matter of common sense.

(3) The employer compensated claimant based on assigned jobs she performed for the employer's customers and generally only after she had actually performed the work. The employer expected to pay claimant only once for the work she performed. Claimant understood the employer's expectations as a matter for common sense.

(4) Sometime before November 2017, claimant was assigned to clean out, repair and deep clean a customer's gutters. In approximately November 2017, claimant performed the assigned work except for the deep cleaning, which she intended to accomplish later. The compensation claimant would receive for the deep cleaning was \$204. Shortly after performing the work, claimant submitted a work order to the employer showing that she had not accomplished the deep cleaning portion of the assignment. Sometime after November 2017, before claimant completed the deep cleaning, claimant was paid for the entire assignment, including \$204 for the deep cleaning she had yet to perform. That claimant was paid for the deep cleaning before it was performed was due to the then-project manager's mistake. The employer had never before compensated an employee in advance for work that was to be performed later. At that time, claimant was not aware she had received compensation for the as yet to be performed deep cleaning.

(5) Around approximately January 19, 2018, claimant received a work order assigning her to complete the deep cleaning part of the November 2017 assignment and indicating she would not receive additional compensation for performing that work. Claimant asked the employer's new project manager for an explanation and he told claimant that since she had already received compensation for the deep cleaning, she was not owed any additional compensation. Claimant then gave the project manager the work order she had submitted to the employer after completing the first part of the November 2017 assignment, which showed she had not performed the deep cleaning, as evidence that she had not received compensation for the deep cleaning. The project manager told claimant he would clarify with the employer's office manager whether or not she had already been paid for the deep cleaning. Shortly after, the office manager confirmed to claimant that due to the then-project manager's mistake she had been paid for the deep cleaning when she was paid for the other parts of the November 2017 assignment, even though the deep cleaning was yet to be performed. At that time, claimant did not ask the office manager or the current project manager for additional evidence that she had already been paid for the deep cleaning part of the November 2017 work assignment. Claimant did not agree to perform the deep cleaning.

(6) On February 2, 2018, the project manager and the employer's owner met with claimant to discuss the scheduling and performance of the deep cleaning part of the November 2017 assignment. The owner told claimant the employer was not going to pay her again for the deep cleaning work since it had already paid her for that work when it paid her for the first part of the assignment. Claimant refused to perform the deep cleaning unless she received some additional compensation for it. Claimant did not ask the owner or the project manager for evidence that she had ready been paid for the deep cleaning. The owner told claimant that she needed to complete the deep cleaning without receiving additional compensation or she would be discharged. Claimant then left to perform other work for the employer.

(7) Later on February 2, 2018, claimant refused to perform the deep cleaning unless she received additional compensation for it. The employer then discharged claimant for refusing to perform the deep cleaning for which she had already received compensation. Had claimant asked, the employer would have provided documentary evidence to claimant showing that she had already been paid for performing the deep cleaning.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although claimant suggested at hearing that she did definitively know at the time of her discharge that she had already received compensation for the deep cleaning work that she was refusing to perform, she not only did not dispute, but agreed, that the employer had indeed already compensated her for it. Audio at ~20:05, ~20:47, ~24:47, ~25:00. Claimant was reasonably aware as a matter of common sense that the employer reasonably expected her to perform work for which she had already been paid, even if that payment was in error, or to return that payment. Claimant was further aware as a matter of common sense that the employer reasonably expected to pay her only once for performing the same work, and not twice, and that the employer did not expect to make a double payment to her based on the employer's payroll mistake. Assuming claimant was unsure whether she had already been paid for the deep cleaning work when she was discharged, she reasonably should not have flatly refused to perform the work before seeking additional evidence from the employer as to whether or not she had had already received payment for that work, particularly when she did not contend that the employer had ever before undercompensated or failed to pay her for any work she had performed. Claimant did not dispute the sincerity of the testimony of the employer's owner that had she asked to be shown documentary evidence that she had already received payment for the deep cleaning before refusing to perform the work without additional pay the employer would have provided it and would not have discharged her pending her receipt and review of that evidence. Audio at ~41:34. Claimant's insistence at hearing that she needed additional pay to perform work for which she had already been paid and that, somehow, it was unreasonable for the employer not to agree to a "compromise" with her on the matter of additional pay strongly suggests that she believed, or at the very least strongly suspected that the employer had mistakenly paid her in advance for the deep cleaning at the very time she was refusing to perform that work. Audio at ~19:35, ~21:35, ~26:50, ~27:18, ~44:24. On this record, claimant's refusal on February 2, 2018 to perform the deep cleaning work absent receiving additional compensation was a willful violation of the employer's expectations.

Although claimant's behavior on February 2, 2018 was a willful violation of the employer's expectations, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be an isolated instance of poor judgment, however, claimant's behavior must not, among other things, have exceeded "mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, it appears most likely that at the time claimant was refusing to perform the deep cleaning work absent receiving additional pay, claimant knew or very strongly suspected that she had already been paid for that work. Claimant's intent could only have been to take advantage of the employer's mistake in paying her for that work in advance by eliciting the payment of additional compensation for the same work or, in other words, obtaining a windfall payment from the employer. Given these facts, a reasonable employer would conclude that claimant's willful attempt to exploit the employer's mistake in this manner for her financial benefit

signified that it could not trust her in the future to act in its interest, and that claimant's behavior caused an irreparable breach of trust in the employment relationship. As such, claimant's behavior falls outside that which may be excused as an isolated instance of poor judgment.

Nor was the willful behavior for which the employer discharged claimant excused as an good faith error on claimant's part under OAR 471-030-0038(3)(d). Because it is implausible that claimant did not know or at least strongly suspect that the employer had previously paid her for the work she was refusing to perform absent receiving additional compensation, the behavior for which she was discharged on February 2, 2018 did not arise from a misunderstanding of the employer's standards. As well, given the clarity of the employer's instruction to claimant that it would not pay her additional compensation for the deep cleaning work, it is implausible that she thought the employer would condone her behavior in insisting that she receive additional compensation. The record is insufficient to support that claimant's behavior at issue was arose from a good faith error.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-106329 is affirmed.

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

DATE of Service: May 24, 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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