

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0412

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133841). Claimant filed a timely request for hearing. On April 17, 2018, ALJ Janzen conducted a hearing, and on April 18, 2018 issued Order No. 18-UI-107588, affirming the Department's decision. On April 24, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bridgeport Distribution, Inc. employed claimant as a warehouseman from June 9, 2014 to December 19, 2017.

(2) The employer expected claimant to report to work when scheduled, every week from Monday through Friday. Claimant understood the employer's expectation.

(3) Claimant last worked for the employer on December 8, 2017. Later that day, claimant was arrested and incarcerated in Clackamas County Jail because of events that had occurred in 2016. He notified the employer that he was incarcerated and could not report to work until he was released; he was not able to provide the employer with his expected release date.

(4) The employer gave claimant two weeks to return to work, but when he did not return by mid-December 2017, the employer discharged claimant and hired a new warehouseman. The employer's business needs would not allow the employer to hold claimant's position open for him longer than that. Claimant subsequently pled guilty to attempted sex abuse.

(5) On February 19, 2018, after being released from jail, claimant contacted the employer.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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.

The employer discharged claimant for missing work for more than two weeks. Claimant missed work because he was incarcerated. When a claimant is discharged because of absences due to incarceration, the proper inquiry is whether claimant willfully or with wanton negligence created the situation that made it impossible for him to attend work. *Weyerhaeuser Co. v. Employment Div.*, 107 Or App 505, 812 P2s 44 (1991).

Claimant missed work because he was arrested for criminal charges dating back to 2016. Although he did not know he would be arrested in December 2017 because of those charges, he pled guilty to a charge of attempted sex abuse, suggesting that he did willfully engage in criminal conduct that foreseeably resulted in his arrest, incarceration, and his related inability to report to work as scheduled. Claimant therefore willfully created the situation that made it impossible for him to report to work as scheduled from December 8, 2017 through December 19, 2017, and thereafter.

Claimant's conduct is not excusable as an isolated instance of poor judgment or good faith error under OAR 471-030-0038(3)(b). Claimant's incarceration created a situation that made it impossible for the employer to continue employ him, particularly since claimant did not know how long he would be incarcerated and unavailable to work. No reasonable employer would hold an individual's job open indefinitely while waiting for him to be released from jail. Claimant's conduct therefore exceeded mere poor judgment and cannot be excused. *See* OAR 471-030-0038(1)(d)(D). For the same reasons, claimant did not sincerely believe or have a factual basis for believing that the employer would excuse or condone claimant's protracted absences from work or that the employer would have held his job open for him for the duration of his incarceration.

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

DECISION: Order No. 18-UI-107588 is affirmed.

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

DATE of Service: May 23, 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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