

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0446

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 120927). The employer filed a timely request for hearing. On April 10, 2018, ALJ Schmidt conducted a hearing, and on April 13, 2018 issued Order No. 18-UI-107349, concluding claimant's discharge was for misconduct. On May 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Precision Lumber Company employed claimant as a general laborer and maintenance worker from October 7, 2016 to January 31, 2018.

(2) The employer expected claimant to report to work as scheduled or notify the employer if he was going to be absent from work. Claimant knew, or should have known, that expectation as a matter of common sense.

(3) At all relevant times, claimant was on parole. While on parole he drove his vehicle without a driver's license, and was caught, on four different occasions. On December 7, 2017, after the fourth incident, claimant was warned that if he was caught a fifth time he would be considered to have violated his parole and could be incarcerated. On December 22, 2017, claimant drove without a driver's license and was caught doing so.

(4) Claimant notified the employer that he was facing incarceration. On January 26, 2018, claimant last worked for the employer. On January 29, 2018, claimant was arrested for his parole violation and incarcerated. Claimant did not report to work for regularly scheduled shifts on January 29, 2018, January 30, 2018 or January 31, 2018.

(5) The employer did not know when or if claimant would be released from jail or return to work, and on January 31, 2018, discharged claimant because of his attendance. Claimant was not released from jail until early March 2018, at which time he contacted the employer about returning to work.

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

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

It appears more likely than not that at all relevant times claimant was willing to continue working for the employer but was prevented from doing so by reason of his incarceration. He therefore did not voluntarily leave work or abandon his job. Although the employer had loose expectations of claimant's employment and appeared willing to a certain extent to employ claimant again upon his release from jail, it appears more likely than not that the employer stopped tracking claimant's attendance or expecting him to report to work for scheduled shifts after January 31st. Claimant's work separation therefore appears to have been a discharge, effective January 31st.

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) 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.

The employer discharged claimant for missing work while 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 the fifth time he drove a vehicle without a driver's license. He had been warned after his fourth stop for the same offense that he would be in violation of his parole and face incarceration if he did it again, but nevertheless chose to take the risk of operating a vehicle without a license. Claimant therefore willfully engaged in criminal conduct that foreseeably resulted in his arrest, incarceration, and related inability to report to work as scheduled. He therefore willfully created the situation that made it impossible for him to attend work.

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 to 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-107349 is affirmed.

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

DATE of Service: June 1, 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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