

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0645

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 11, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 100147). The employer filed a timely request for hearing. On June 14, 2018, ALJ Frank conducted a hearing, at which claimant did not appear, and on June 19, 2018, issued Order No. 18-UI-111595, concluding the employer discharged claimant for misconduct. On June 28, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Affinity Home and Design, LLC, employed claimant from May 29, 2015 to April 19, 2018. Claimant performed installation and renovation duties for the employer.

(2) The employer expected and required its installation and renovation staff to use a stud finder, a device used to locate vertical wooden framing studs behind walls, to first locate and then mark on the walls with a pencil the location of studs before nailing baseboards to a wall using a nail gun. The use of a stud finder required very little skill or expertise. In approximately June of 2017, the employer discovered claimant had not used a stud finder as required before nailing baseboard to a wall, resulting in the puncture of a water pipe and causing significant property damage. The employer then bought a stud finder specifically for claimant and directed him to use it every time he was tasked with nailing baseboards to walls. Thereafter, if not before, claimant was aware of and understood the employer's expectation regarding the use of a stud finder.

(3) Shortly after the June 2017 incident, claimant again failed to use a stud finder before nailing some baseboard to a wall and again punctured a water pipe, causing significant property damage. Following that second incident, the employer removed claimant from baseboard installation until sometime later, when claimant agreed to use a stud finder every time he nailed baseboards to a wall.

(4) Thereafter, despite his agreement with the vice president, claimant only used a stud finder to locate studs when the employer's vice president was in his presence. When other installation staff reported that

fact to the vice president, he reminded claimant that he was required to use a stud finder whenever nailing baseboards to walls.

(5) On April 19, 2018, while working alone, claimant again punctured a water pipe with a nail while nailing baseboard to a wall, which resulted in the flooding of three living units. That day, the vice president investigated at the work site and observed that there were no markings on the wall at the point where claimant had caused the pipe puncture with the nail gun that identified the presence of a stud. He also determined that claimant had applied other nails through walls in that room that day that had not been nailed into studs, which also indicated claimant had not used a stud finder that day. While monitoring the damage repair to the pipe, the vice president was told by claimant's coworker that claimant routinely failed to use the stud finder, contrary to claimant's previous agreement that he would. When questioned by the vice president, claimant responded that he had used the stud finder that day, but added, "I must not be using it correctly," which the vice president found implausible because claimant had used it correctly in the past and doing so required very little expertise. Audio Record ~ 17:00 to 18:00.

(6) On April 19, 2018, based on its investigation of claimant's work that day and claimant's history of failing to use a stud finder when nailing baseboards to walls, the employer discharged claimant for insubordination in failing to use a stud finder.

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 connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) 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. 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).

The employer had the right to expect claimant to use a stud finder to locate studs behind a wall before undertaking to nail baseboard to the wall. The employer's vice president discussed that expectation with claimant both in June 2017, when claimant punctured a water pipe with a nail after not using the finder, and shortly thereafter, when he did the same thing again, before the employer removed him from installing baseboard for a period of time. On April 19, 2018, claimant again violated that expectation when he failed to use a stud finder before nailing some baseboard to a wall causing the puncture of a water pipe that damaged three living units. Although claimant told the vice president at that time that he had used the stud finder before nailing the baseboard to the wall, before adding, "I must not be using it correctly," viewing the record as a whole, both his statement and explanation were not credible. He had used a stud finder in the past, without reporting any difficulty, and if he had actually used it as required on April 19, 2018, he would not have penetrated the water pipe with a nail and there would not have

been evidence of other nails being applied to locations in that room where there were no studs. Finally, claimant's coworker reported on April 19 that claimant routinely failed to use a stud finder unless the vice president was present. Based on these facts, we infer that claimant consciously chose to avoid using a stud finder on April 19, 2018, when he worked alone installing baseboards to walls in the unit in question, and which resulted in claimant penetrating a water pipe behind a wall with a nail. More likely than not, on that date, claimant willfully violated the employer's expectation that he use a stud finder before nailing baseboards to walls.

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 of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's willful disregard of the employer's expectation on April 19 was not an isolated instance, because at least one other time between June 2017 and April 19, 2018 claimant again penetrated a water pipe with a nail after failing to use a stud finder, under circumstances where he had been warned about that conduct, provided with a stud finder, and instructed to use the stud finder, yet consciously failed to do so.

Nor can claimant's conduct be excused as the result of a good faith error in his understanding of the employer's expectation. That claimant used a stud finder when nailing baseboard to walls only when the vice president was present demonstrated that claimant did not sincerely believe, or have a factual basis for believing, that the employer would condone his installation of baseboards without using that tool.

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

DECISION: Order No. 18-UI-111595 is affirmed.

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

DATE of Service: August 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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