

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0911

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114954). Claimant filed a timely request for hearing. On September 7, 2018, ALJ Scott conducted a hearing, and on September 11, 2018 issued Order No. 18-UI-116348, affirming the Department's decision. On September 18, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a bakery clerk from April 12, 2017 to July 13, 2018.

(2) The employer prohibited insubordination. The employer's policy was a zero-tolerance policy, and the employer regularly enforced the policy by discharging any employee who engaged in insubordination. The employer notified claimant of the prohibition, and that insubordination would result in discharge.

(3) Upon hire the employer required claimant to sign an associate responsibilities form. Claimant signed the form. The employer's policies provided that the employer could require employees to re-sign the form twice a year and after receiving disciplinary action.

(4) On July 12, 2018, April, the employer's representative, scheduled a meeting with claimant to issue him a written warning. Claimant's union representative was present during the meeting. During the meeting, April placed copies of the written warning and an associate responsibilities form side-by-side on the table in front of claimant, and asked him to sign both documents.

(5) Claimant was not required by the employer's policy to sign the written warning, did not want to sign it, and refused to sign it. Claimant was required by the employer's policy to sign the associate

responsibilities form, did not want to sign it, and refused to sign it. April told claimant he was required to sign the associate responsibilities form, and that his failure to sign it would be considered insubordinate and result in his discharge.

(6) Claimant's union representative encouraged claimant to sign the associate responsibilities form. Claimant had already signed the form upon hire, and felt he should not have to sign it again. Claimant asked April to go get his employee file so he could prove he had once signed the form. Once she had done so, they located the associate responsibilities form claimant had signed upon hire, thus proving that claimant had signed the form upon hire. April continued to request that claimant re-sign a new copy of the associate responsibilities form, but claimant continued to refuse.

(7) On July 12, 2018, the employer suspended claimant pending a discussion with the employee relations department about claimant's refusal to sign the associate responsibilities form. On July 13, 2018, the employer discharged claimant.

CONCLUSIONS AND REASONS: 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) (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.

The employer discharged claimant for insubordination based upon his refusal to sign the associate responsibilities form on July 12, 2018. Claimant argued at the hearing and in his argument that he never refused to sign the associate responsibilities form, that he had no problem signing that form, and would have signed it had he been asked to do so, and was only refusing to sign the written warning. *See* Audio recording at ~ 30:30, 31:15, 41:46, 42:30.

Claimant's argument is not plausible for many reasons. April placed the associate responsibilities form on the table in front of claimant side-by-side with the written warning, and "could not have been any clearer" that while he had the option to sign or not sign the written warning, signing the associate responsibilities form was required. *Id.* at 46:10. Claimant demonstrated that he subjectively understood on July 12th and at the hearing that the employer was requiring him to sign the associate responsibilities form – separate from the warning – stating "that's when" he "had April bring out" his employee file to prove that there was a signed associate responsibilities form in his file. *Id.* at 43:40. There would have been no logical reason for claimant to have April produce his file to prove the existence of a signed employee responsibility form if he had, in fact, been unaware that the employer was asking him to sign that form again. It appears more likely than not, on this record, that claimant subjectively understood the employer was requiring him to sign a new associate responsibilities form on July 12th, but apparently thought he should not have to do so because he had already signed that form upon hire.

Claimant knew or should have known that his refusal to re-sign the associate responsibilities form, regardless of any previous signings, amounted to a clear violation of April's reasonable instructions to sign the form. He also knew, because April told him, that his failure to sign the form on July 12th amounted to insubordination and would result in his discharge. He should also have known that the

employer's policies permitted the employer to require periodic re-signings. Notwithstanding claimant's subjective knowledge of the employer's expectations and consequences, he chose not to sign the associate responsibilities form. In so doing, he willfully engaged in insubordination.

Claimant's conduct cannot be excused under OAR 471-030-0038(3)(b) as a good faith error. Claimant knew he had signed the associate responsibilities form once in the past, and apparently believed he should not have to sign it again. His belief was not in good faith, however, given that the employer's policies permitted the employer to require him to re-sign the document for many reasons, and given that April specifically told him that to re-sign it. On this record, claimant knew and was told that his refusal was considered insubordinate and would result in his discharge. He therefore did not refuse to sign the form on July 12th based upon a sincere belief that he was not required to sign the form that day.

Claimant's conduct cannot be excused under OAR 471-030-0038(3)(b) as an isolated instance, either. Although claimant engaged in one act of insubordination on July 12th, and his conduct was therefore isolated, some isolated conduct, including conduct that causes a breach of trust in the employment relationship, exceeds mere poor judgment and may not be excused. OAR 471-030-0038(1)(d)(D). In this case, claimant's insubordination exceeded poor judgment. The record fails to disclose any logical reason why an individual in claimant's situation would repeatedly refuse to re-sign the form at issue. It appears that his refusal was based upon his belief that he should not have to re-sign the form, even though the employer's policies allowed the employer to require he do so, April's requests were clear, the consequences were explained, and the expectation that he re-sign the form was reasonable. No reasonable employer whose employee had engaged in insubordination in the manner described in this record would be able to trust the employee in the future to abide by policies with which he disagreed or thought he should be exempt, particularly an employer that regularly enforced its zero-tolerance insubordination policy in the same manner. On this record, claimant's insubordinate act exceeded mere poor judgment by causing a breach of trust in the employment relationship, and it cannot be excused from constituting misconduct.

The employer discharged claimant for misconduct. Claimant is therefore disqualified from receiving unemployment insurance benefits because of this work separation, until he requalifies for benefits by earning four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-116348 is affirmed.

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

DATE of Service: October 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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