

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0975

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 24, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140339). Claimant filed a timely request for hearing. On September 11, 2018, ALJ Wyatt conducted a hearing, and on September 19, 2018 issued Order No. 18-UI-116858, affirming the Department's decision. On October 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing. Claimant submitted written argument to EAB, but failed to certify that he provided a copy of it to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) All Surface Cleaning Company, employed claimant as a mobile service technician and crew leader from June 7, 2010 until June 27, 2018.

(2) As part of his responsibilities, claimant carried a company issued Chevron credit card to purchase gas for company vehicles. Claimant was not authorized to use the credit card for any other use. The employer expected that the credit card remain in claimant's possession at all times during his employment.

(3) The employer had a written policy that prohibited employees from theft and dishonesty. The employer also had a policy that prohibited the use of company property or services for personal gain.

(4) On June 26, 2018, the employer reviewed a fleet management report that documented use of the company's Chevron credit card. The employer discovered that claimant had made gas purchases on the company credit card on June 7 June 23, 2018. Both purchases were made in Hood River, which is not in the employer's service area.

(5) On June 7 and 8, 2018, claimant was out sick and did not work. Claimant did not have access to a company vehicle on June 7, 2018. On June 23, 2018, claimant was not in Hood River on company business.

(6) Claimant admitted that he used the employer's gas credit card on June 7 and 23 in Hood River for personal reasons because he was out of town and his personal credit card was not working. Claimant asserted that he turned in his receipt for the June 7 charges and requested that the amount be deducted from his paycheck. Claimant received a paycheck on June 15, 2018. However, he did not verify whether or not a deduction had been made for the June 7 charges. Claimant also acknowledged that, as of June 27, he had not turned in the receipt for the June 23, 2018 charges. Claimant was aware that it was against company policy, as written in the employee handbook, to use the gas card for personal use.

(7) It was acceptable practice for an employee to use the company's gas credit card to purchase gas for their personal vehicles in case of an emergency, provided that the employee notified the employer immediately, including during the weekend, and turned in the receipt to the office first thing the following morning.

(8) The employer asserted that as of June 27, 2018, claimant had not notified it verbally or in writing of the June 7 or 23 credit card charges, nor had it received claimant's receipts for said charges.

(9) After discovering the June 7 and 23 charges, the employer reviewed the fleet management reports from November 2016 through 2017 to verify charges to claimant's Chevron credit card. The employer identified approximately 18 occasions from November 2016 through 2017 when charges were made to claimant's gas card during times when he did not have access to a company vehicle because he was not working or because it was after hours and claimant had already turned in the company vehicle. The employer had not authorized the use of the company's gas card for any of those occasions.

(10) Claimant denied that the unauthorized charges made between 2016 and 2017 were made by him. Claimant asserted that he would on occasion give his credit card to other crew leaders for business use. The employer's policy did not permit its employees to give their credit cards to other employees. As of June 27, 2018 claimant had not reimbursed the employer for any those gas charges.

(11) On June 27, 2018, the employer discharged claimant for the unauthorized use of the company's gas credit card.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for using the company's Chevron credit card for personal gain by purchasing gas for his personal vehicle and not reimbursing it, which amounted to theft. The employer had policies prohibiting employees from engaging in theft and using company property for personal gain. Claimant was aware of the employer's policies and understood its expectations. Recording at 37:00.

There is no dispute that claimant used the employer's Chevron credit card on June 7 and June 23 to purchase gas for his personal vehicle. It is also undisputed that claimant failed to call the employer immediately to report using the credit card on either occasion, as required by the employer, or that he failed to turn in a receipt or asked to reimburse the employer for the June 23 purchase. Recording at 45:00. While claimant asserted at hearing that he had turned in a note for the June 7 gas purchase, he was unable to establish whether or not said amount had been deducted from his June 15 paycheck. Recording at 36:00. The employer denied having received any information from claimant for the June 7 gas purchase. Given the seriousness of the allegations against claimant it seems to us that he would have taken the necessary steps to verify whether or not such a deduction had been made from his June 15 paycheck. Claimant also asserted that he intended to turn in the June 23 receipt to reimburse the employer but had not had an opportunity to do so as of June 27. However, the employer's practice required claimant to turn in his receipt by the next morning. Claimant therefore had four days to turn in said receipt and he had failed to do so. While claimant denies that he made any of the charges to the employer's credit card from November 2016 through 2017 and asserted that he had given his credit card to other employees who must have made the charges, it is not plausible that someone else was using claimant's credit card outside work hours with as much frequency as it occurred.

Claimant's repeated use of the employer's Chevron credit card were willful violations of the employer's reasonable policies prohibiting employees from engaging in theft, and using company property for personal gain. Claimant's conduct cannot be excused as an isolated instance of poor judgment because he repeatedly made willful charges to the employer's credit card for personal gain, and did not reimburse the employer, thus resulting in theft. *See* OAR 471-030-0038(1)(d)(A). Nor can claimant's conduct be excused as a good faith error, as the record fails to show that claimant sincerely believed, or had a rational basis for believing, the employer would condone him using the employer's credit card to fuel his personal vehicle and not reimburse it.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits.

DECISION: Order No. 18-UI-116858 is affirmed.

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

DATE of Service: November 13, 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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