EO: 990
BYE: 201435

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

876
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0024

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 10, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #135533). Claimant filed a timely request for hearing. On December 4, 2013, ALJ Hoyer conducted a hearing, and on December 16, 2013 issued Hearing Decision 13-UI-06629, concluding the employer discharged claimant for misconduct. On January 6, 2013, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Mikes Drive-In Inc. employed claimant as a cook from March 28, 2013 to July 4, 2013.

(2) The employer expected employees to report to work for their scheduled shifts or to contact the manager or supervisor on duty before their scheduled shifts if they needed to miss work due to illness, emergency or personal reasons. Claimant received a copy of the employer's attendance policy at hire. Claimant understood the employer's policy.

(3) On July 3, 2013, the employer had scheduled claimant to begin work at 3:00 p.m. Claimant called the employer at approximately 5:30 p.m. and said he could not report to because he had missed a meeting with his probation officer and did not want to be arrested at his place of work.

(4) The employer had scheduled claimant to work on July 4, 2013. Claimant did not call the employer or report to work on July 4, 2013. The employer was no longer willing to allow claimant continue working because he violated the employer's attendance policy.

(5) On July 5, 2013, two women went to the restaurant and asked if they could have claimant's paycheck so they could deliver it to him. The employer did not give claimant's paycheck to the women. Claimant

contacted the employer on July 16, 2013 to pick up his final paycheck. He did not talk with a manager or supervisor at that time.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant for misconduct.

We first review the nature of the work separation. 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). The employer considered claimant to have abandoned his job because he did not report to work or contact the employer after July 3, 2013. However, the provisions of OAR 471-030-0038(2), not the parties' characterization, determines the nature of the work separation. The employer was not willing to allow claimant to work after he failed to report to work or call the employer on July 4, 2013. Claimant asserted that he was willing to continue working for the employer until July 16, 2013, when he decided he would move to Wisconsin. Transcript at 13. Because claimant was willing to work for the employer for an additional period of time after July 4,, but the employer was unwilling to allow him to do so, the work separation was a discharge.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 discharged claimant because he violated its attendance policy. The final incident occurred on July 4, 2013, when claimant failed to contact the employer or report for work. Barring illness or other exigent circumstances, the employer reasonably expected claimant to report to work for his scheduled shifts or to notify the employer before his shift if he was unable to work. Claimant understood the employer's attendance policy because he received a copy of it at hire, and as a matter of common sense.

Both parties testified that claimant failed to notify the employer before his shift that he would miss work on July 3, 2013, but provided conflicting testimony about what occurred after that day. The employer testified that claimant did not contact the employer after July 3, 2013. Transcript at 19. Claimant did not contest the employer's testimony that he was a "no call, no show" on July 4, 2013. However, claimant testified that he was scheduled to work on July 5, 2013, and that he told the manager personally before his shift that day that he had to miss ten days of work to serve jail time for a probation violation. He alleged the manager told him he was "laid off" until he decided to come back to work. Transcript at

16. We found the employer's witness more credible than claimant, and have found the facts in accordance with the employer's witness' testimony on matters in dispute. Claimant's testimony was confusing and vague. He did not recall dates. His testimony was implausible that the employer would cover his shifts for ten days just two days after the manager reprimanded him for failing to call in before his shift. Transcript at 9. It was also implausible that claimant would have spoken with the manager in person on July 5, 2013, but also would have sent two people to his place of employment to pick up his paycheck for him. The facts show claimant failed to notify the employer or report to work on July 4, 2013, and that he did not contact the employer again after that time. Because claimant showed indifference to the consequences of his conduct when he knew his actions would probably violate the employer's expectations, claimant's failure to contact the employer or report to work on July 4, 2013 was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be "isolated" the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant's conduct was not isolated under OAR 471-030-0038(1)(d)(A) because he had violated the employer's attendance policy on July 3, 2013. Claimant provided no plausible reason for his failure to contact his employer before his shift on July 3, 2013. His failure to notify his employer before his shift on July 3 was wantonly negligent, thus his failure to notify his employer or report to work on July 4, 2013 was not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error under OAR 471-0030-0038(3)(b). Claimant did not sincerely believe, or have a factual basis for believing, that the employer would excuse his failure to contact the employer or report to work. Claimant's manager told him the day before the final incident that his job was in jeopardy if he failed to follow the attendance policy. Transcript at 10.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 13-UI-06629 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: <u>January 28, 2014</u>

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.