

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0183

*Modified
Disqualification*

PROCEDURAL HISTORY: On October 11, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #94546). Claimant filed a timely request for hearing. On December 19, 2013, ALJ R. Davis conducted a hearing, and on January 9, 2014 issued Hearing Decision 14-UI-08253, concluding claimant voluntarily left work without good cause. On January 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Portland Public Schools employed claimant from September 15, 2006 to September 24, 2013 as a para-educator.

(2) If claimant was unable to work due to illness, the employer expected her to use the school district's substitute requesting system to request a substitute teacher, and also notify the school she would be absent before the start of the school day. Claimant knew her position required a substitute if she was absent, and that sometimes a substitute would not report to the school even if she had requested one. The principal gave claimant these expectations during the 2012-2013 school year, and claimant followed the employer's expectations that year when she had multiple absences due to her child's medical condition.

(3) On September 4, 2013, the employer began its 2013-2014 academic year. Claimant was absent from work from September 9, 2013 to September 20, 2013 because she was sick.

(4) Although claimant requested a substitute each day she was absent, on three or four of the days claimant was absent from work, she failed to notify the school of her absence. A substitute did not report to the school some of the days claimant was absent. Claimant's illness did not prevent her from calling to notify the school she would be absent.

(5) On September 24, 2013, the employer had an investigation meeting with claimant to discuss claimant's failure to report her absences. At the meeting, the employer told claimant the employer could terminate her or she could resign. Based in part on her union representative's recommendation, claimant resigned at the meeting so she would not have a discharge on her personnel record.

CONCLUSIONS AND REASONS: We conclude the employer discharged claimant 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).

The ALJ concluded that claimant quit work, assuming claimant could have continued to work for the employer for an additional period of time because "it is common knowledge that Oregon public schools follow a procedure which includes a Due Process meeting prior to discharging a school employee [and] there was no evidence such a hearing had actually occurred."¹ We disagree with the ALJ's conclusion that claimant quit work. Claimant provided the only first-hand evidence of what occurred at the September 24, 2013 meeting. She testified that the employer told her it would discharge her or she could resign. Transcript at 12. The record does not show claimant was scheduled to work or attend an additional due process meeting after September 24, or that the employer otherwise had any continuing work available to claimant at the time she signed her resignation. Nor does the fact that claimant signed a resignation mean she was unwilling to continue working for the employer. Claimant testified that she signed the resignation because the employer had already decided to discharge her, and to avoid having a termination on her record. Transcript at 12. Because claimant was willing to continue working, and the employer would not allow her 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) 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*

¹ Hearing Decision 14-UI-08253 at 2.

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).

We agree with the ALJ's conclusion that claimant's failure to notify the employer that she would be absent on at least three separate occasions during the first two weeks of school was misconduct. The employer expected claimant to request a substitute, and to also notify the school when she would be absent from work. The employer's expectation was reasonable so that it could ensure a substitute would replace claimant in her absence. Although claimant requested a substitute each day, she did not subsequently contact the employer to notify it that she would be absent. The prior principal explained the employer's expectations to her during the 2012-2013 school year. Claimant asserted at hearing that she was uncertain if the new principal had the same expectations as the prior principal. Transcript at 20 to 21. However, we are not persuaded that claimant did not understand she was supposed to call the school in addition to requesting a substitute. She had followed the employer's expectations in the past, and did so for some, but not all, of the days she missed work in September 2013. Nor did claimant show she had a reasonable basis to believe the employer's expectations had changed merely because the employer had a new principal. Moreover, claimant knew her position required a substitute if she was absent, and that sometimes no substitute would go to the school even if claimant had requested one.

Claimant also asserted at hearing that she did not call the employer to report she would be absent because she was sick with influenza. Transcript at 16. Claimant testified that she would call to request a substitute, and then fall back asleep without calling the school. *Id.* Claimant did not show she could not have called the school when she awoke to call the substitute, or when she awoke later in the day. Claimant testified that she did not call the school when she awoke later in the day because she assumed a substitute would be at the school by that time. Transcript at 19. Claimant understood the employer's expectations and failed to ensure she complied with those expectations. Thus, her conduct 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). For conduct to be excused as an isolated instance of poor judgment, 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). From September 4 to September 20, 2013, claimant failed to contact the employer a minimum of three times. Claimant's conduct was not isolated because her repeated failure to notify the employer of her absences was a repeated act and pattern of willful or wantonly negligent behavior. It was thus not excusable as an isolated instance of poor judgment.

Claimant's failure to contact the employer cannot be excused as a good faith error. The record does not show that claimant sincerely believed, and had a rational basis for believing, that the employer would condone her failure to notify it that she would be absent.

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

DECISION: Hearing Decision 14-UI-08253 is modified, as outlined above.

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

DATE of Service: February 27, 2014

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.