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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0399

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 10, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163635). Claimant filed a timely request for hearing. On February 28, 2014, ALJ Triana conducted a hearing, and on February 25, 2014 issued Hearing Decision 14-UI-11039, affirming the Department's decision. On March 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which presented facts not introduced into evidence at the hearing. Claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT*:* (1) Fred Meyer, Inc. employed claimant from April 19, 1983 until October 31, 2013. Claimant initially worked on the production floor, but since approximately 1998 had worked in various management capacities. Claimant was last employed as a production superintendent. Claimant's supervisor was the employer's production manager.

(2) Throughout the time he was employed in management, claimant was supervised by multiple plant managers and production managers. These managers had various different views about how claimant was expected to report any absences from work. In general, claimant's supervisors had not required claimant to call in before a shift to report that he was going to be absent, although claimant generally did so to let the production workers know that they could reach him by phone if any problems arose during his absence.

(3) Near in time to October 25, 2013, claimant's most recent production manager told claimant to call in to let someone at the workplace know when he was going to be absent or to text the production manager about the absence. The production manager advised claimant at this time that, because claimant had already missed several days of work due to health issues, the production manager wanted to "have your back covered" if claimant missed any additional days of work. Transcript at 27.

(4) On October 25, 27 and 28, 2013, claimant missed his usual days at work because his wife had an aggravation of a spinal condition. Claimant needed stay at home to care for his two-year old son. On October 25 and 26, 2013, claimant reported his absences by calling the workplace and speaking to one of the production employees. Claimant told these employees that he was available by phone if they needed any assistance from him. Claimant did not speak with or text the production manager about his absences. On October 28, 2013, claimant did not contact anyone to report his absence from work. On October 29, 2013, the production manager called claimant at home. Claimant explained to the production manager the reason that he had been absent and that he would return to work on November 2, 2013.

(5) Before October 31, 2013, the employer had not issued any disciplinary warnings to claimant.

(6) On October 31, 2013, the employer discharged claimant for violating its attendance policy.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

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. Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-11039, the ALJ found as fact that claimant's production manager had told him to let "someone" know if he was going to be absent or to text that manager to inform that manager of the absence, but concluded that claimant's calling only production employees to inform them of his absences on October 25 and 27, 2013 was a wantonly negligent violation of the employer's attendance standards. Hearing Decision 14-UI-11039 at 1, 4. The ALJ reasoned that claimant should reasonably have interpreted the production manager's statement of his expectations to "mean that [claimant] needed to contact a person in a supervisory position [to report an absence] or someone with authority to arrange for coverage of [claimant's] duties and not an employee working under claimant who would have no authority to do anything with the information that claimant was going to be out." Hearing Decision 14-UI-11039 at 4. We disagree.[1]

[1] We agree, however, with the ALJ's conclusion that the written attendance policy which the employer submitted as Exhibit 1 was not applicable to claimant's discharge because it applied only to hourly employees and claimant was a salaried employee. See Exhibit 1 at 1. We also agree with the ALJ's conclusion that the record established that October 29, 2013 was claimant's

The employer did not present the testimony of any witnesses at the hearing. The only evidence that is available about the employer's expectations as they applied to claimant was claimant's testimony. Claimant stated repeatedly at hearing that he was not required in the past to call in to work to report his absences, and that, at some point, the most recent production manager had told him to call "someone" or to text that manager about absences. Transcript at 13, 16, 20, 21. Although the ALJ concluded that claimant should reasonably have known he needed to report his absences to a supervisor to allow the supervisor to arrange coverage for him, there was no evidence in the record that any other employees customarily covered claimant's position during claimant's absences. We infer from claimant's testimony that claimant was in a sufficiently high supervisory position that he made production decisions that other employees implemented, and it was not customary for the employer to assign specific employees to cover his day-to-day duties when he was absent. Transcript at 7-8, 12, 13, 16, 18, 19. It was further inferable from claimant's testimony that the employer expected claimant, when absent, to remain available by phone to answer any questions from the production employees on the floor, which suggests that no coverage was arranged for claimant. Transcript at 12, 13, 19. On these facts, the available evidence does not support the conclusion that, more likely than not, the employer would have arranged coverage for claimant's position during an absence. Thus, the available evidence also does not support the ALJ's conclusion that claimant was reasonably aware, based on the employer's need to cover his position, that he needed to report his absences to a supervisor. The most that the evidence establishes is that the production manager communicated to claimant that the employer expected him to at least inform a production employee when he expected to be absent. Because it was not disputed that claimant called one of the production employees to state he was going to be absent, but would still be available by phone, on October 25 and 27, 2013, he did not violate the employer's expectations. However, claimant's failure to call either a production employee or the production manager on October 28, 2013 to report that he was going to be absent violated the employer's expectations. The production manager had clearly told claimant to call "someone" when he was going to be absent, and his failure to do so on October 28, 2013 was a wantonly negligent violation of the employer's expectations.

Despite being wantonly negligent behavior, claimant's failure to call in to report his absence from work on October 28, 2013 was excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior, and must not have been the sort of act that caused an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). There was no evidence in the record that before October 28, 2013 claimant ever willfully or with wanton negligence violated any of the employer's standards. Claimant's behavior on October 28, 2013 was isolated. Given the varying standards for notice of an absence communicated by prior production managers, and that the employer did not apparently arrange for coverage of claimant's position when claimant was absent, claimant's lapse in not calling a production worker on the third day he was absent was understandable. That claimant did not call in on one day to report an absence did not fundamentally undercut the employment relationship. A single disciplinary violation in a career spanning over thirty years with the employer is not the type of act that would cause an employer to reasonably conclude that claimant had irreparably breached the employment

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regularly scheduled day off and, therefore, claimant's failure to report an absence on that day could not have been a violation of the employer's attendance standards. Hearing Decision 14-UI-11039 at 4.

relationship. Because claimant's behavior on October 28, 2013 was isolated and did not cause an irreparable rupture in the employment relationship, it is excused as an isolated instance of poor judgment.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-11039 is set aside, as outlined above.

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

DATE of Service: April 9, 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.