

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0435

*Reversed
Disqualification*

PROCEDURAL HISTORY: On February 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94535). Claimant filed a timely request for hearing. On March 13, 2014, ALJ Holmes-Swanson conducted a hearing, and on March 14, 2014 issued Hearing Decision 14-UI-12470, reversing the Department's decision. On March 20, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamins Inc. employed claimant from July 11, 2005 to December 18, 2013.

(2) The employer expected employees to be available for work, and to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer. Claimant understood those expectations.

(3) On February 8, 2012, claimant was 45 minutes late for work. On July 5, 2012, he was 30 minutes late for work.

(4) In July 2012, claimant was convicted of driving under the influence of alcohol. Under the terms of his parole, he was required to attend two Alcoholics Anonymous (AA) meetings per week. The employer did not require claimant to work during times that conflicted with his AA meetings.

(5) On September 7, 2012, claimant was one hour late for work. On September 21, 2012, he did not report for work, and did not notify the employer he would be absent. On January 5, 2013, he was late for work. On April 27, 2013, he was 35 minutes late for work. On November 11, 2013, he did not report for work, and did not notify the employer he would be absent.

(6) In late November 2013, claimant chose to work for the employer instead of attending one of his required AA meetings. He also falsely stated in writing that he had attended the meeting. As a result, on December 18, 2013, claimant was incarcerated for 30 days for violating the terms of his parole.

(7) On December 18, 2013, claimant notified the employer that he would be unable to work for 30 days due to his incarceration. The employer discharged claimant because he was unavailable for work for 30 days.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, that 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. 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. 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).

In Hearing Decision 14-UI-12470, the ALJ found as fact that the employer discharged claimant for allegedly violating its attendance policy, which required "employees to find another employee to cover any shift that the employee is scheduled for, but unable to work."¹ In his opinion, however, the ALJ found that the employer actually discharged claimant because he notified the employer he would be unable to work his scheduled shifts for 30 days because he was incarcerated.² The ALJ concluded that claimant's discharge was not for misconduct because he had not yet violated the employer's attendance policy, and did not inform the employer that he would not find other employees to cover his shifts.³

However, the record clearly shows that the employer discharged claimant because he was unavailable for work for 30 days, and not because he allegedly violated the employer's attendance policy by failing to find other employees to cover his shifts. An employer has the right to expect an employee to be available for work. The issue, therefore, is whether claimant consciously engaged in conduct he knew or should have known would probably result in his incarceration and unavailability for work. Claimant knew or should have known that violating the terms of his parole by missing a required AA meeting, and falsely stating that he had attended the meeting, would have that result. Claimant's conscious decisions not to attend the meeting, and falsely state that he had, demonstrated indifference to the consequences of his actions, and therefore was wantonly negligent.

¹ Hearing Decision 14-UI-12470 at 1.

² *Id.* at 3.

³ *Id.*

Claimant's conduct cannot be excused as an isolated instance of poor judgment. For an act 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). Acts that violate the law or that otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). In the present case, claimant exercised poor judgment when he failed to attend the AA meeting, and again when he falsely stated in writing that he had attended the meeting. The record also shows that claimant's conduct was part of a pattern of other willful or wantonly negligent behavior, his repeated failure to report for work as scheduled, and notify the employer when he was going miss work. Claimant's exercised of poor judgment therefore was not a single or infrequent occurrence. In addition, claimant's parole violation violated the law, and his inability to report for work for an entire month made a continued employment relationship impossible. Claimant's conduct therefore exceeded mere poor judgment and does not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct cannot be excused as a good faith error. Claimant understood the employer expected him to be available for work. His conduct therefore was not the result of a good faith error in his understanding of the employer's expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from the receipt of benefits.

DECISION: Hearing Decision 14-UI-12470 is set aside, as outlined above.

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

DATE of Service: April 8, 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.