

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0444

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121931). Claimant filed a timely request for hearing. On March 3, 2014, ALJ Shoemake conducted a hearing, and on March 4, 2014 issued Hearing Decision 14-UI-11568, concluding the employer discharged claimant, but not for misconduct. On March 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employers' written argument.

FINDINGS OF FACT: (1) Fir Crest Community Living employed claimant as a cook from October 9, 2013 to January 2, 2014.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify their supervisor no later than four hours prior to their scheduled start time. Claimant understood those expectations.

(3) The employer typically scheduled claimant to work Thursdays through Mondays, and not on Tuesdays and Wednesdays. However, the employer scheduled claimant to work on Wednesday, January 1, 2014. When claimant left work Monday, December 30, 2013, however, the employer had not yet posted the January 2014 work schedule. Claimant therefore did not know he was scheduled to work on January 1, 2014. He therefore did not report for work as scheduled that day, and did not notify his supervisor that he would be absent.

(4) The employer discharged claimant for failing to report for work as scheduled on January 1, 2014, and failing to notify his supervisor that he would be absent.

CONCLUSIONS AND REASONS: The employer discharged claimant, 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. 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 are not misconduct. OAR 471-030-0038(3)(b). An act is isolated if the exercise of poor judgment is 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).

In Hearing Decision 14-UI-11568, the ALJ found that the employer discharged claimant for failing to report for work as scheduled or notify the employer he would be absent on December 25, 2013 and January 1, 2014.¹ In written argument, the employer asserted that the employer also discharged claimant for violating the employer's dress code, insubordination, and abusive, unprofessional and violent language and conduct. At hearing, however, the employer's administrator testified that the final incident that led to the employer discharging claimant was his failure to report for work as scheduled on January 1, 2014. Transcript at 12. We therefore focus on claimant's conduct on January 1 as the reason for his discharge, and address prior incidents only if necessary to determine whether his conduct on January 1 was an isolated instance of poor judgment.

At hearing, claimant testified that he failed to report for work as scheduled on Wednesday, January 1, 2014 or notify the employer he would be absent because he did not know he was scheduled to report for work that day. Transcript at 27. It is undisputed that the employer typically did not schedule claimant to work on Tuesdays or Wednesdays. Claimant testified that when he left work on Monday, December 30, 2013, the employer had not yet posted the January 2014 work schedule. Transcript at 27. Although the employer asserted that it posted the January 2014 work schedule on December 18, 2013, that assertion was based on hearsay. Transcript at 36, 38. Absent a basis for concluding that claimant was not a credible witness, his first-hand testimony outweighs the employer's hearsay evidence to the contrary.

We therefore found in accordance with claimant's testimony that the employer had not yet posted the January 2014 work schedule when claimant left work on December 30, 2013. The employer therefore failed to show that claimant knew or should have known he was expected to report for work on January 1, 2014 or notify the employer that he would be absent. Absent such a showing, the employer failed to establish that claimant violated the employer's expectations willfully or with wanton negligence. It therefore is unnecessary to determine whether claimant's conduct on January 1, 2014 was an isolated instance of poor judgment.

¹ Hearing Decision 14-UI-11568 at 2-3.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-11568 is affirmed.

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

DATE of Service: April 17, 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.