

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0629

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not misconduct (decision # 144421). The employer filed a timely request for hearing. On March 26, 2014, ALJ Holmes-Swanson conducted a hearing, and on March 27, 2014, issued Hearing Decision 14-UI-13615, affirming the Department's decision. On April 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Barch Inc. employed claimant as a temporary direct caregiver from March 2013 to July, 2013, and as a full-time direct caregiver from July 2013 until January 26, 2014.

(2) The employer expected claimant to report for work when scheduled and to comply with the employer's policy which required that an employee contact the employer at least four hours prior to the start of a shift if the employee was going to be absent. Claimant understood the employer's expectations and policy.

(3) In November or December, 2013, claimant requested January 25, 2014 off for her birthday. The employer typically allowed employees to take their birthdays off. During the week of January 12 through January 18, 2014, the employer denied claimant's request to take January 25 off, because the employer was "extremely shorthanded." Transcript at 9.

(4) Claimant was scheduled to work a nocturnal shift that began at 11 p.m. on January 25, 2014, and ended at 7 a.m. on January 26, 2014. On January 24, the employer's administrator noticed that claimant "was making quite a few mistakes" and decided to schedule claimant for retraining during her January 25 shift. Transcript at 8.

(5) The employer's administrator and her assistant were concerned that claimant might not report for her January 25 shift. On January 24, 2014, the administrator's assistant called claimant and reminded her that she was scheduled to work on January 25. During that conversation, claimant requested telephone numbers of other employees so she could attempt to trade her shift with that of another staff member. The administrator's assistant told claimant that she needed to come in on January 25 for retraining. The January 24 phone call was the first time claimant learned that she needed be retrained. Transcript at 17.

(6) At approximately 5 p.m. on January 25, 2014, claimant called the administrator's assistant and asked if her name was still on the schedule to work that night because she had heard from her grandmother that her (claimant's) name was crossed off the schedule. The administrator's assistant told claimant she was still on the schedule, but had been assigned to work in a house different from the one to which she was normally assigned so that she could be retrained. Transcript at 14. At 10:01 p.m. on January 25, 2014, claimant sent a text message to the administrator's assistant stating "I will not be able to make it tonight." Transcript at 14.

(7) On January 26, 2014, the employer's administrator called claimant and told her not to report for her scheduled shift on that date. The administrator told claimant she should come in on January 27 and pick up her final paycheck.

(8) On January 27, 2014, claimant arrived at work and picked up her last check. The employer discharged claimant for "jeopardizing the health and safety of staff and residents" by failing to notify the employer that she would be absent at least four hours before the time her shift was scheduled to begin on January 25, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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. 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 instance 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). Acts that violate the law, that are tantamount to unlawful conduct, that create irreparable breaches of trust in the employment relationship, or that otherwise make a continued relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

The employer discharged claimant because she failed to notify the employer she would be absent at least four hours before the start of her scheduled shift on January 25, 2014. The employer's policy and expectation was that an employee would report to work for a scheduled shift, and notify the employer at least four hours prior to the employee's shift if the employee was unable to work. The employer's

policy and expectations were reasonable. The employer reasonably expected that on January 25, 2014, claimant would report to work for an assigned shift scheduled to begin at 11 p.m. Claimant was well aware that the employer expected her to work her shift on January 25 because she had spoken with the administrator's assistant about the shift on January 24, and 25, 2014. The issue for purposes of determining whether claimant is disqualified from unemployment benefits is whether claimant's failure to report that she would be absent four hours before her scheduled shift on January 25, 2014, constituted a willful or wantonly negligent violation of the employer's policy and expectations.

Claimant's failure to notify the employer that she would be absent within four hours of the time her January 25 shift was scheduled to start was, at best, a wantonly negligent violation of the employer's policy. Claimant testified at hearing that because it was her birthday on January 25, 2014, and "things [were] happening all that day," she unsuccessfully attempted to get another staff member to cover her shift, but ultimately decided that she was not going to report for work; at 10:01 p.m., she informed the employer that she would be absent. Transcript at 18 and 19. Claimant believed that she would not be discharged for her failing to notify the employer of her absence four hours before her shift started because she "had never been in trouble for this before" and "more than a few staff have not even call in and just haven't shown up and were still working. Transcript at 19. Claimant therefore consciously engaged in conduct she knew violated the employer's expectations and policy.

We agree, however, with the ALJ's conclusion that claimant's conduct on January 25, 2014, constituted an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Although the employer's administrator contended that claimant's job performance did not meet the employer's standards, and asserted that claimant's performance issues had been discussed with claimant on a number of occasions, there is no evidence that claimant violated the employer's attendance policy prior to January 25, 2014. Accordingly, claimant's conduct on January 25 was a single occurrence. Claimant's failure to tell the employer she would be absent at least four hours before the start of her shift was not so egregious an act that it caused an irreparable breach of trust in the employment relationship, or otherwise made a continued employment relationship impossible. Thus, claimant's conduct did not exceed mere poor judgment.

In sum, we conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-13615 is affirmed.

Susan Rossiter, Tony Corcoran and J.S. Cromwell, *pro tempore*;
D.E. Larson, not participating.

DATE of Service: May 20, 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.