

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0642

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On February 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104022). Claimant filed a timely request for hearing. On March 20, 2014, ALJ Shoemake conducted a hearing, and on March 31, 2014 issued Hearing Decision 14-UI-13862, affirming the Department's decision. On April 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Bank of the Pacific employed claimant as a real estate loan originator from September 7, 2012 to December 27, 2013.

(2) Claimant's job duties regularly took her out of the office. The employer expected claimant to notify the branch where she worked and her supervisor if she was going to be out of the office during regular work hours. The employer also expected claimant to notify the employer when she was going to be absent from work.

(3) Prior to September 25, 2013, claimant was out of the office without notifying the branch or her supervisor. On September 25, 2013, the employer issued claimant an oral warning that included the instruction, "any time you were away from the . . . branch during regular work hours; you were to email the branch and copy" her supervisor.

(3) Between September 25, 2013 and October 9, 2013, claimant was absent from work for several days without notifying the branch staff or her supervisor. On October 9, 2013, the employer issued claimant a written warning that included a warning for that behavior.

(4) On October 23, 2013, claimant was absent from the branch without notifying branch staff or her supervisor. On October 24, 2013, the employer issued claimant a final written warning for that conduct,

which claimant signed. The warning included an admonition that future occurrences would result in claimant's termination from work.

(5) Claimant last worked for the employer on approximately December 20, 2013. She left work without notifying the branch staff or her supervisor, and did not return to work thereafter. Claimant had domestic problems and had moved from the home she shared with her husband to Beaverton, Oregon. She was absent from work from December 21, 2013 through December 26, 2013, without notifying her supervisor or the branch staff of her absence.

(6) On December 26, 2013, claimant emailed her supervisor a letter stating that she was 'unable to fulfill my employment duties at this time.' Exhibit 1. Claimant did not indicate that she planned to return to work, or had a date on which she planned to return to work. On December 27, 2013, the employer discharged claimant because of her prolonged absence from work without notice to the branch staff or her supervisor.

CONCLUSIONS AND REASONS: The employer discharged claimant 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.

The employer had the right to expect claimant to report to work when scheduled, and to notify the branch staff and her supervisor when she was going to be away from the branch during regular business hours. Claimant knew, or should have known, that expectation, because her supervisor had orally warned her and issued two written warnings to her that included admonitions for violating that expectation.

Between December 20th and December 26th, claimant was away from the branch without notifying branch staff or her supervisor that she was going to be away. Claimant was having some domestic problems during that time which understandably preoccupied her. However, there is nothing in this record suggesting that claimant failed to understand she was scheduled to work during the period at issue, and claimant's failure to notify the branch and her supervisor that she was going to be out of the office during that period of time demonstrated her indifference to the standards of behavior the employer had the right to expect of her. Her conduct was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error or an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Claimant did not sincerely believe that the employer would condone her conduct, given she had in the three months prior to the final incident been given an oral and two written warnings for similar conduct.

For conduct to be excused as an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant had, on two prior occasions after having been warned September 25th, been absent from the branch for one or several days without notifying the branch staff or her supervisor that she was going to be out of the office. There is nothing in this record suggesting claimant was not conscious of her conduct on those occasions, and, given the succession of warnings she received, she knew or should have known the conduct would probably violate the standards of behavior the employer had the right to expect of her, making her absences between September 25th and October 9th and her absence on October 23rd wantonly negligent. Therefore, claimant's conduct in the final incident was a repeated act or pattern of other wantonly negligent behavior, and cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-13862 is affirmed.

Tony Corcoran and J.S. Cromwell, *pro tempore*;
Susan Rossiter and 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.