

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0687

*Reversed
Disqualification*

PROCEDURAL HISTORY: On January 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #131348). The employer filed a timely request for hearing. On April 16, 2014, ALJ A. Mann conducted a hearing, and on April 18, 2014 issued Hearing Decision 14-UI-15512, affirming the Department's decision. On April 25, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ron Tonkin Dodge, Inc. employed claimant from June 22, 2011 to December 26, 2013 as a salesperson.

(2) The employer expected claimant to remain at work during his scheduled shifts, and to obtain the employer's permission for absences from work. Claimant understood the employer's expectations.

(3) On approximately four occasions during October and November 2013, the employer gave claimant a verbal warning after claimant left work during his shift without telling the employer or asking for permission. In November 2013, claimant's manager told claimant the employer would discharge him if he violated any employer policy again.

(4) On December 20, 2013, claimant was scheduled to work until 5:00 p.m. The employer was open until 8:00 p.m. that day. At approximately 1:00 p.m., claimant received his paycheck, and the employer gave him permission to leave work for one hour to obtain additional money to pay his rent, which was due by 6:00 p.m. After leaving work, claimant did not contact the employer until 7:00 p.m., when he sent a text message to his supervisor stating he was upset because he had lost his money gambling. The supervisor sent claimant text messages stating, "Sorry bro, I tried to warn you many times. I even told you [the general manager] knew about you getting one hour and you still screwed up. Get in here in the next 15 [minutes] or take tomorrow off." Exhibit 1. Claimant did not return to work on December 20, 2013.

(5) On December 26, 2013, the employer discharged claimant for an unexcused absence from work on December 20, 2013.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for not returning to work on December 20, 2013 after he received permission to leave work for one hour before returning to complete his shift. The employer reasonably expected claimant to be at work during his scheduled shifts or, barring exigent circumstances, to obtain the employer's permission for absences. Claimant understood the employer's expectations.

In Hearing Decision 14-UI-15512, the ALJ concluded, and we agree, that claimant's failure to return to work after one hour was at least a wantonly negligent violation of the employer's expectations.¹ The employer permitted claimant to leave work for an hour to obtain additional money to pay his rent. He did not return to work that day or ask to be absent for an additional period of time. Claimant's failure to return to work showed indifference to his employer's expectation that he return to complete his shift. The ALJ further concluded, however, that the employer did not meet its burden to show claimant was discharged for misconduct, because claimant's conduct was excusable as a good faith error.² The ALJ reasoned that "[b]ecause the employer allowed him to leave work to take care of his rent, claimant could reasonably hold a good faith belief that the employer would condone his absence from work while he was still trying to take care of his rent," and, therefore, claimant's conduct was excusable as a good faith error.³

We disagree that the record shows claimant's failure to return to work was the result of a good faith error. Claimant testified at hearing that he did not know the employer expected him to return to work after one hour. Transcript at 27. However, the employer's evidence outweighs claimant's testimony regarding that issue. The employer's manager testified that he told claimant he was excused from work for only one hour. Transcript at 6. When claimant did not return to work after one hour, the manager instructed claimant, by text message, that the general manager knew claimant failed to return to work and to "[g]et in here in the next 15 [minutes], or take tomorrow off." Exhibit 1. Claimant failed to

¹ Hearing Decision 14-UI-15512 at 3.

² *Id.* at 3 to 4.

³ *Id.*

return to work. The manager's text messages to claimant corroborate his testimony that he warned claimant that he had only one hour off from work. Exhibit 1; Transcript 44. Moreover, it is undisputed that claimant sent the manager text messages after his shift ended explaining he was upset because he lost his wages gambling. Exhibit 1. If claimant's assertion that he did not know the employer expected him to return to work after one hour were true, there was no reason for him to contact the employer after his shift ended. Also, claimant's text messages show he had been gambling while he missed work. Exhibit 1. Claimant did not assert, and the record does not show, that claimant believed the employer would condone his missing work because he was gambling or upset that he lost his wages gambling. The preponderance of the evidence shows the final incident did not result from a good faith error.

Claimant's failure to return to work on December 20, 2013 was not an isolated instance of poor judgment. 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). Claimant was absent from work without permission four times during October and November 2013. The employer's manager testified that he verbally warned claimant "many" times for "disappearing" for hours. Transcript at 11. For the same reason claimant's failure to return to work or contact his manager on December 20, 2013 was wantonly negligent, his prior attendance violations were wantonly negligent. His attendance violations were repeated, not isolated, and therefore the final incident cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-15512 is set aside, as outlined above.

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

DATE of Service: May 28, 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.