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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0764

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82745). Claimant filed a timely request for hearing. On April 29, 2014, ALJ M. Davis conducted a hearing, and on May 1, 2014 issued Hearing Decision 14-UI-16645, concluding claimant's discharge was not for misconduct. On May 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cosmos Granite & Marble, LLC employed claimant as a warehouse associate from August 21, 2013 to March 7, 2014.

(2) The employer expected claimant to report to work as scheduled, clock out for lunch breaks, and refrain from handwriting on their time cards. Claimant generally understood those expectations.

(3) On March 4, March 5 and March 6, 2014, claimant did not clock out for his lunch breaks. Claimant was out of the employer's facility making deliveries and did not have access to the time clocks to clock out for his breaks. Claimant believed the employer deducted 30 minutes per shift each of those days to account for his unpaid lunch breaks.

(4) On March 6, 2014, claimant reported to work 52 minutes late. Claimant had obtained permission from his supervisor to do so. When claimant arrived at work that day and attempted to clock in, claimant saw that someone had already clocked him in at 8:12 a.m. With permission from his supervisor, claimant handwrote on his time card to reflect the time he actually reported to work, 8:52 a.m.

(5) Claimant had a history of tardiness, and had been spoken to about reporting to work on time. On March 7, 2014, claimant took an extended lunch break totaling 37 minutes because he left work, drove home, and was stuck in traffic. Prior to leaving for his extended lunch break claimant had asked his supervisor if he could combine his 30-minute unpaid lunch break with the 15-minute paid morning break he had not yet taken. The supervisor "said that it would probably be a problem with the company

if we were – if we would do that." Transcript at 14. However, because the supervisor "didn't tell me no," claimant decided to leave anyway despite the known risk he would return late from his lunch break. *Id.*

(6) On March 7, 2014, the employer discharged claimant for handwriting on his timecard, falsifying his time card, failing to clock out for lunches, and returning late from his lunch break on March 7th.

CONCLUSIONS AND REASONS: 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. 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). An isolated instance of poor judgment is defined as 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). Conduct that exceeds mere poor judgment, and cannot be excused, is defined to include unlawful acts, acts tantamount to unlawful, or conduct that causes an irreparable breach of trust in the employment relationship or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

To the extent the employer discharged claimant for handwriting on his time card, falsifying his time card, failing to clock out for lunches, or being tardy on March 6th, the employer did not prove misconduct. Claimant testified that most of the handwritten times on his time card were written by his supervisor, and, on the one occasion he wrote on his time card, he had permission to do so and did so for the purpose of making sure he was only paid for the hours he worked. *See* Transcript at 15, 16. Claimant failed to clock out for his lunch breaks because he was on duty and not present in the facility to clock out for lunch breaks, was not told how to clock out when in that situation, and acted in accordance with the employer's standard practices as he knew them, albeit mistakenly, making his conduct, at worst, a good faith error. *See* Transcript at 18. Claimant reported to work late on March 6th with his supervisor's permission. *See* Transcript at 17. In each of those instances, claimant acted contrary to the employer's operations manager's expectations. However, given that claimant either had authorization from his supervisor, or was acting on information and belief that his conduct was approved by his supervisor or in accordance with workplace standards, his conduct in those respects was not willful or wantonly negligent.

As for claimant's failure to return on time from his lunch break, however, claimant's conduct was wantonly negligent. Claimant knew that his plans for his lunch break were such that he ran the risk of exceeding the 30-minute break period he was allotted. Claimant also knew that returning late from his lunch break would violate the employer's expectations of him. Claimant asked his supervisor for

permission to combine his lunch and morning rest breaks, and was told "that would probably be a problem with the company." Although the supervisor did not expressly tell claimant "no," the supervisor's statement was enough from which claimant knew, or reasonably should have known, that neither the supervisor, nor the company, would approve or condone returning late from lunch. Nevertheless, claimant consciously took actions that could foreseeably result in his tardy return from lunch, despite his knowledge that doing so would violate the employer's expectations.

Although claimant's conduct in that instance was wantonly negligent, it is excusable as an isolated instance of poor judgment. An isolated instance of poor judgment is defined as a single or infrequent occurrence rather than a repeated act or pattern of other *willful or wantonly negligent* conduct that does not exceed mere poor judgment. OAR 471-030-0038(1)(d)(A) and (D) (emphasis added). Put another way, it is not enough that the employer show that previous violations might have occurred, the employer must also show that those violations were done either willfully or with wanton negligence. Here, as previously explained, the record fails to show that claimant's prior violations of the employer's expectations were willful or wantonly negligent. As such, claimant's late return from lunch on March 7th was an isolated wantonly negligent act. Claimant's tardy return from lunch did not exceed mere poor judgment because it was not unlawful or tantamount to unlawful conduct, and the record fails to show that being seven minutes late due to poor judgment and traffic was such egregious conduct as to cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 14-UI-16645 is affirmed.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: <u>June 11, 2014</u>

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.