

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0915

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 85252). The employer filed a timely request for hearing. On May 5, 2014, ALJ Holmes-Swanson conducted a hearing, and on May 9, 2014 issued Hearing Decision 14-UI-17254, concluding the employer discharged claimant for misconduct. On May 27, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Northwest Publishing employed claimant as a telemarketer from January 28, 2014 to February 18, 2014.

(2) The employer expected claimant to report to work no later than five minutes after her scheduled shift or to call the employer's attendance line at least one hour before every scheduled shift when she would be late or needed to miss work due to illness. Claimant received the employer's attendance policy at hire. Claimant had violated the employer's attendance policy during prior periods of employment with the employer. The employer warned claimant verbally and in writing when it rehired claimant on January 28 that the employer would not tolerate attendance violations.

(3) Claimant failed to call the attendance line or report to work on January 28, January 29, January 31, February 4, and February 6, 2014. Claimant reported to work late without calling the attendance line on January 30 and February 5, 2014.

(4) On February 11, 2014, the employer told claimant it planned to discharge her for violating the employer's attendance policy. Claimant "begged" for the employer to allow her to continue working. Audio Record ~ 45:28 to 45:37. The employer allowed claimant to continue working.

(5) On February 12 and February 14, 2014, claimant failed to call the attendance line or report to work. On February 17, 2014, claimant did not call the attendance line before her shift and reported to work 32 minutes late. Claimant did not give the employer an explanation for having reported to work late.

(6) On February 18, 2014, claimant did not call the attendance line or report to work.

(7) On February 18, 2014, the employer discharged claimant for violating its attendance policy.

CONCLUSIONS AND REASONS: We agree with 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). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because she violated its attendance policy. Barring illness or other exigent circumstances, the employer reasonably expected claimant to report to work for her scheduled shifts or to notify the employer before her shift if she was unable to work or report to work on time. Claimant understood the employer's attendance policy because she received a copy of it at hire, had been warned on February 6, 2014 regarding violations of the policy, and as a matter of common sense. The final incident occurred on February 18, 2014 when claimant failed to contact the employer or report for work that day. There is no evidence in the record to show that claimant failed to contact the employer or report to work on February 18 due to illness or other circumstances beyond her control. Because claimant showed indifference to the consequences of her conduct when she knew her actions would probably violate the employer's reasonable attendance expectations, claimant's failure to call the employer or report to work on February 18 was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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's conduct was not isolated under OAR 471-030-0038(1)(d)(A) because she had violated the employer's attendance policy repeatedly, having been late for work without explanation three times, and having missed work without excuse seven times, before February 18, 2014. Claimant's prior attendance violations were wantonly negligent. Thus, her failure to notify her employer or report to work on February 18, 2014 was not a single or infrequent occurrence and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-0030-0038(3)(b). The record does not show that claimant sincerely believed, or had a factual basis for believing, that the employer would excuse her failure to contact the employer or report to work.

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

DECISION: Hearing Decision 14-UI-17254 is affirmed.

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

DATE of Service: July 1, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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