

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0957

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On April 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135441). Claimant filed a timely request for hearing. On May 27, 2014, ALJ Clink conducted a hearing at which the employer did not appear, and on May 28, 2014 issued Hearing Decision 14-UI-18543, affirming the Department's decision. On June 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a letter from a court drug treatment program verifying that he was enrolled in that program at the time of the absences from work for which the employer discharged him. While ORS 657.176(2)(f) states that any absence from work that is a result of unlawful drug use is not misconduct if a claimant was participating in a recognized drug rehabilitation program at the time, there is no evidence in the record that claimant's absences from work were caused by drug use or the attendance requirements of a drug treatment program. EAB did not consider that letter because the facts adduced at hearing do not support its relevance to the absences for which claimant was discharged. *See* OAR 471-041-0090(2)(a) (October 29, 2006). EAB considered only evidence received into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Medallion Industries, Inc. employed claimant as a night truck loader from July 13, 2013 until approximately January 31, 2014.

(2) The employer expected claimant to report for work as scheduled. Claimant was aware of this expectation as a matter of common sense.

(3) Sometime before January 31, 2014, the Circuit Court for Columbia County, Oregon ordered claimant to participate in its drug treatment program. One of the conditions of the program was that claimant report for weekly drug urinalysis tests.

(4) Sometime before January 31, 2014, claimant was out of town and did not report for the mandatory weekly drug urinalysis test. Claimant did not make arrangements with the court or the drug treatment program to enable him to miss the urinalysis test. When it determined claimant had failed to report for the urinalysis, the court ordered that claimant be arrested.

(5) On approximately January 27, 28, 29, 30, 2014, claimant was scheduled to work but was absent. Claimant was unable to attend work on those days because he was incarcerated in the Columbia County jail for failure to report for the required urinalysis.

(6) On January 31, 2014, claimant went to the workplace to collect his paycheck. On that day, the employer discharged claimant for his absences from work on January 27 through January 30, 2014.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). *Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) holds that when a claimant is involuntarily absent from work as a result of an incarceration, it is work-related misconduct if claimant willfully or with wanton negligence created the situation that led to his incarceration.

Claimant did not dispute that he was aware that the employer expected him to report for work. Claimant also did not dispute that he knew he was required to report for weekly urinalysis tests. Claimant did not contend that he missed the urinalysis as a result of some confusion or error, and did not assert that his incarceration for missing the test was not anticipated. Claimant's only explanation for the reason he missed the mandatory urinalysis was that he might have been "out of town or something." Audio at ~8:48. Absent a plausible explanation, we must assume that claimant consciously knew he was violating a condition of the court when he failed to report for the urinalysis test and that he reasonably knew he might be jailed as a result. Since claimant conceded that he did not make any arrangements to miss the mandatory testing, and he did not contend that some exigent circumstance caused him to fail to do so, we also must assume either that claimant's behavior in failing to at least try to make alternative arrangements for the testing, was at a minimum wantonly negligent. Audio at ~ 8:56. On these facts, claimant's absences from work, and his inability to comply with the employer's attendance standards, were caused by his own wantonly negligent behavior.

Claimant's absences from work were not excused from constituting misconduct under OAR 471-030-0038(3)(b) as an isolated instance of poor judgment. An "isolated instance of poor judgment" means a single or infrequent occurrence rather than a repeated act or pattern of willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant's wantonly negligent absences from work

continued for over four separate days. Because claimant's behavior was prolonged and continuing, it was not "isolated." As such, claimant's absences do not fall within the type of behavior that is excused as an isolated act of poor judgment. Nor was claimant's behavior excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that he missed work between January 27 and January 30, 2014 as a result of any misunderstanding of the employer's attendance standards. Claimant thus did not make a threshold showing that an excuse of a good faith error applied to his behavior.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-18453 is affirmed.

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

DATE of Service: July 14, 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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