

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1183

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 134548). The employer filed a timely request for hearing. On June 9, 2014, the Office of Administrative Hearings (OAH) mailed the parties notice of a hearing scheduled for June 23, 2014. On June 23, 2014, ALJ Triana conducted a hearing at which claimant failed to appear, and on June 27, 2014 issued Hearing Decision 14-UI-20568, concluding the employer discharged claimant for misconduct. On July 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant asked to be allowed to present evidence about his work separation, asserting he did not receive the notice of hearing for the June 23, 2014 hearing until after June 27, 2014. Claimant's request is construed as a request to present new evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows he was prevented by circumstances beyond his reasonable control from presenting the information during the hearing. In support of his request, claimant stated that on approximately June 17, 2014, he received a mailing stating that information about a hearing date was forthcoming. Claimant stated further that he did not learn of the June 23 hearing until after June 27, when he went through the mail delivered to his address that his roommate had collected, and discovered a letter notifying him of the hearing date. However, claimant knew before the hearing that a hearing would take place, and that he should expect to receive notice of the hearing date. When he did not receive a notice, it was within claimant's reasonable control to verify the hearing date with the Department or OAH, and to check the mail received at his address, just as he did after June 27. Claimant failed to establish that he was prevented by circumstances beyond his reasonable control from presenting his information at hearing. Claimant's request for EAB to consider new information therefore is denied.

FINDINGS OF FACT: (1) Stream International, Inc. employed claimant from December 10, 2014 to January 9, 2014 as a technical support professional.

- (2) The employer's attendance policy required employees to report to work as scheduled. Claimant received a copy of the employer's written attendance policy at hire, and the employer reviewed the policy with claimant each time he received a warning for his absences. Claimant understood the employer's attendance expectations.
- (3) The employer gave claimant a series of warnings for absences, tardiness, and leaving early from work. On December 18, 2014, the employer gave claimant a final warning for attendance violations.
- (4) From January 3, 2014 to January 9, 2014, claimant was scheduled to work five shifts, and failed to report to work for all five shifts. Claimant told the employer he was unable to report to work because his car had been repossessed. The employer did not excuse claimant from missing work for this reason.
- (5) Claimant had coworkers who lived near him who were willing to provide claimant transportation for work. Claimant lived on a bus route between his residence and the workplace.
- (6) On January 9, 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, good faith errors, and absences due to illness or other physical or mental disabilities 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he violated its attendance policy. Barring illness or other exigent circumstances, the employer reasonably expected claimant to work his scheduled shifts. We infer claimant understood the employer's attendance expectations as a matter of common sense and because he received warnings about his attendance. Claimant knew that the employer had issued him a final attendance warning on December 18, 2014, and that additional absences could result in discharge. The employer discharged claimant because he failed to report to work for five consecutive shifts between January 3 and 9, 2014. Claimant told the employer he was unable to report to work because his vehicle had been repossessed and he did not have a vehicle to drive to work. It is reasonable to presume claimant may not have been able to arrange an alternate form of transportation for his shift on January 3, immediately after his vehicle was allegedly repossessed. However, once claimant knew he needed to arrange alternate transportation, claimant knew or should have known that his failure to do so and report for work as scheduled probably violated the employer's expectations. The record shows claimant had

carpool and public transportation options available. Claimant's failure to arrange for alternate transportation demonstrated his indifference to the employer's expectation that he report to work for his scheduled shifts, and therefore was 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). In this case, claimant exercised poor judgment each day he neglected to arrange for alternate transportation and report for work as scheduled. His exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

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 his failure to 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-20568 is affirmed.

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

DATE of Service: August 12, 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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