EO: 300
BYE: 201518

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-1208

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123700). Claimant filed a timely request for hearing. On July 1, 2014, ALJ R. Davis conducted a hearing, and on July 9, 2014, issued Hearing Decision 14-UI-21081, affirming the Department's decision. On July 14, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In claimant's written argument, claimant included information that was not part of the hearing record. Under OAR 471-041-0090 (October 29, 2006), EAB may consider information not included in the hearing record if the party offering the information shows that circumstances beyond the party's reasonable control prevented the party from presenting the information at hearing. Claimant provided no explanation as to why the information in the written argument was not presented at hearing. In addition, claimant failed to certify that a copy of the written argument was provided to the other parties as required by OAR 471-041-0080(2)(a). Accordingly, we did not consider the claimant written argument in reaching this decision. Even if we had, the outcome of this decision would remain the same.

FINDINGS OF FACT: (1) Fuel-N-Go employed claimant as a gas station attendant from April 12, 2010 to May 12, 2014.

(2) The employer's attendance policy required employees to be ready and report to work at the beginning of their shifts. Claimant worked the graveyard shift and was expected to report to work by her starting time of 10:00 p.m. Claimant understood the employer's expectations.

(3) On January 24, 2014 claimant was 15 minutes late to work, and on February 10, and February 16, 2014, she was 30 minutes late to work. On February 18, 2014, the employer's office manager warned

claimant in writing that she was "continuously late" to work and that any future tardiness would result in a three day suspension or termination of her employment. (Exhibit 1).

(4) On March 7, 2014, claimant was 30 minutes late to work. On March 11, 2014, the employer's manager suspended claimant without pay for three days and warned claimant in writing that any future tardiness would result in her discharge. (Exhibit 1). On April 7, 2014, claimant was 30 minutes late to work.

(5) On more than one occasion, claimant was late to work because she had overslept. Audio ~ 16:33 to 16:45.

(6) On May 11, 2014, claimant was 34 minutes late to work because she overslept. Claimant had been visiting with family on that date, and had gotten to sleep later than usual. Audio ~ 21:34 to 22:05. Claimant had taken no steps, such as setting an alarm clock, to make sure she woke up in time to get to work by 10:00 p.m. Audio ~ 22:05.

(7) On May 12, 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) 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. Claimant understood the employer's attendance policy, was counseled repeatedly and suspended for three days because of her tardiness. The final incident occurred on May 11, 2014 when claimant failed to arrive at work at 10:00 p.m. as scheduled because she had been visiting with family, got to bed later than usual, and overslept. She arrived at 10:34 p.m., causing other employees to work overtime to cover her shift until she arrived. The record shows that claimant made no effort to make sure she got to work on time on May 11, either by setting an alarm clock or otherwise ensuring she got up to report for her shift at 10 p.m. 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 report to work on May 11 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, prior to May 11, 2014, she had been late to work due to oversleeping on more than one occasion. The record is devoid of evidence that on these prior occasions of tardiness, claimant had taken any steps to make sure she woke up in time to report for her 10 p.m. shift. Accordingly, claimant's prior attendance violations were wantonly negligent. Thus, her failure to report to work on May 11, 2014 was not a single or infrequent occurrence and cannot be excused as an isolated instance of poor judgment.

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

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

DECISION: Hearing Decision 14-UI-21081 is affirmed.

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

DATE of Service: July 29, 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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