

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1400

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 74900). The employer filed a timely request for hearing. On August 11, 2014, ALJ Frank conducted a hearing, and on August 19, 2014 issued Hearing Decision 14-UI-23721, affirming the Department's decision. On August 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) New System Laundry employed claimant from June 20, 1994 to June 14, 2014 as a janitor and custodian.

(2) The employer expected employees to perform work, and refrain from engaging in personal activities, during paid work time. Claimant understood the employer's expectations.

(3) Claimant was paid on an hourly basis. He took a 15-minute break every four hours, and a 30-minute lunch break, during his shift. Claimant did not have designated times for his breaks, and did not always take his breaks at the same time. He was not required to bathe as part of his work duties.

(4) On June 13, 2014, claimant began work at 5:45 p.m. Claimant normally worked until approximately 4:30 or 4:45 a.m. On June 14, 2014, at 2:15 a.m., a fire alarm began to sound at the building where claimant worked. Claimant did not hear the alarm because he was sleeping on a couch in an office. The alarm was not as loud in the office as in the main building. The fire department called the owner and he went to the employer's building. At approximately 2:45 a.m., the owner found claimant sleeping, did not wake him, and left the office area to speak with fire department personnel.

(5) The owner returned to the office, and claimant was no longer there. The owner looked for claimant again, and at approximately 3:10 a.m., encountered claimant undressed in a bathroom, taking a sponge bath.

(6) On June 14, 2014, the employer discharged claimant for sleeping and taking a sponge bath during paid work time.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude the employer discharged claimant, 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). 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 for engaging in personal activities during paid work time. The employer reasonably expected claimant to refrain from engaging in personal activities at work other than during a break or lunch. Claimant understood the employer's expectations as a matter of common sense. Claimant testified that he slept and bathed only during break time on June 14, 2014. Transcript at 20, 23. However, claimant was engaged in personal activities, at minimum, for 50 minutes, from when the alarm began at 2:15 until 3:10 a.m. when the owner found claimant in the bathroom. Even at 3:10 a.m., he was undressed and not yet ready to return to work. Thus, the preponderance of evidence shows that claimant was still engaged in personal activities at work after he had been on break for at least 50 minutes. Claimant's failure to return to work on time was a conscious and a wantonly negligent violation of the employer's reasonable expectation.

Although claimant's failure to return to work on time on June 14, 2014 was a wantonly negligent disregard of the employer's expectations, 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), (D). The employer did not establish that claimant had misused work time other than on June 14, 2014, or engaged in a pattern of other willful or wantonly negligent conduct. Claimant worked for the employer for nearly 20 years and had no disciplinary history. Nor did claimant's conduct exceed mere poor judgment, because it was not unlawful or tantamount to unlawful conduct, or so egregious 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 unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-23721 is affirmed.

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

DATE of Service: September 25, 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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