

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1784

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 113014). The employer filed a timely request for hearing. On October 28, 2014, ALJ Seideman conducted a hearing and issued Hearing Decision 14-UI-27711, affirming the Department's decision. On November 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a section head from June 21, 2011 until August 24, 2014.

(2) The employer expected claimant to call and personally notify a person in charge (PIC) before her scheduled shift began if she was not going to report for work. Claimant was aware of the employer's expectations.

(3) For the week including January 6, 2014, the employer posted its employee schedule in the workplace. The employer did not give employees copies of its schedules or permit them to make photocopies of them. The employer expected its employees, including claimant, to make handwritten notes of their schedules if they wanted the schedules for future reference. Claimant made an error when she transcribed her schedule for January 6, 2014 and did not record the correct starting time for her shift. As a result, claimant did not report for her shift at the scheduled starting time and did not notify a PIC in advance of her absence. On January 8, 2014, the employer issued a warning to claimant for failing to call a PIC to report her absence on January 6, 2014. At that time, the employer advised claimant that if she did not comply with its PIC notification policy in the future she would be subject to discipline up to and including discharge.

(4) On August 20, 2014, claimant was scheduled to begin work at 4:00 a.m. When she awakened that day, sometime before 4:00 a.m., claimant was ill and could not report for work. Claimant did not call the PIC because it was her experience that night-shift PICs often did not answer the store phone when the store was closed. Instead, sometime before 4:00 a.m., claimant sent a text message to the associate who was scheduled to work with her that day and notified the associate that she was not going to report for work. The associate was in the store at that time, and claimant expected that the associate would notify the PIC of her absence. The associate replied to claimant's text message and acknowledged that she had received it. It is not known whether the associate notified the night-shift PIC of claimant's absence. When the day-shift PIC arrived at the store, sometime between 6:30 a.m. and 7:00 a.m., the associate notified him that claimant was not reporting for work that day. At 9:00 a.m. and 11:00 a.m., claimant called the store and asked to speak to the PIC to personally report her absence. Claimant was unable to reach the PIC.

(5) On August 24, 2014, the employer discharged claimant for failing to personally notify a PIC of her absence before her scheduled shift began on August 20, 2014.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Assuming that claimant's failure to personally notify a PIC of her absence from work on August 20, 2014 was a wantonly negligent violation of the employer's expectations, her behavior will not constitute misconduct if it is excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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 behavior and is not the type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A); OAR 471-030-0038(1)(d)(D). Regardless of the employer's argument that it was appropriate to discharge claimant for her behavior on August 20, 2014 because she was aware of the employer's notification policy, her behavior cannot be found to have been misconduct, which is required for a disqualification from benefits, if it falls within this exception. Employer's Written Argument at 1; Audio at ~27:09.

The only instance of claimant's allegedly willful or wantonly negligent behavior before August 20, 2014 was claimant's failure to call a PIC to report her absence on January 6, 2014. The employer did not challenge claimant's explanation that she did not call in to report her absence on January 6, 2014 because she had made an error in transcribing her work schedule and was not aware that she was scheduled to work that day. EAB has consistently held that, without additional evidence, the type of careless or negligent mistake that claimant made on January 6, 2014 is behavior of which an individual generally is not consciously aware and does not establish the mental state required to show willful or wantonly

negligent misconduct. *See Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not willful or wantonly negligent); *Marina V. Burlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not willful or wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence claimant was conscious of his failure to perform a task, the failure was not willful or wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not willful or wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010) (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not willful or wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not willful or wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not willful or wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent). Because the employer did not present any evidence of claimant's mental state on January 6, 2014 beyond the single fact that she failed to call the PIC to report her absence, the employer has not met its burden to demonstrate that claimant's behavior on that day was willful or wantonly negligent. Absent that demonstration, claimant's behavior on August 20, 2014 was isolated and therefore meets the first requirement to be excused as an isolated instance of poor judgment.

Claimant's behavior on August 20, 2014 was also not the of type that would reasonably cause an employer to objectively conclude that it resulted in an irreparable breach of trust in the employment relationship or made a continued employment relationship impossible. Claimant's explanation that she did not try to reach the night-shift PIC to report her absence because, in her experience, PICs working that shift did not answer the store phone was understandable and was not directly rebutted by the employer. Audio at ~15:32. Claimant's actions on August 20, 2014, to notify the PIC through the text message that she sent to her department associate, evidenced that she was not acting with indifference to the purpose of the employer's notification policy, as did her attempts to personally notify the PIC after the store opened. Audio at ~ 24:03. Claimant's candid admission that she had made a mistake on August 20, 2014 in not strictly complying with the employer's policy and not trying to personally notify the PIC of her absence in advance of her shift appeared sincere and credible. Audio at ~15:32. Moreover, it is also significant that, aside from the occurrence on January 6, 2014, claimant had no history of failing to comply with the employer's policies, including its attendance policy. On these facts, an objective employer would likely conclude that, although claimant's approach on August 20, 2014 was misguided, it was not intended to flout the employer's policies, and was not a sufficient basis to conclude that claimant would not comply with the employer's policies in the future or that her behavior caused an irreparable breach of trust in the employment relationship. Since claimant's behavior on August 20, 2014 met all requirements, it is excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b).

The employer discharged claimant but not for misconduct. Claimant is not disqualified from unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-27711 is affirmed.

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

DATE of Service: December 31, 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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