

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1840

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142435). Claimant filed a timely request for hearing. On November 13, 2014, ALJ Seideman conducted a hearing, and on November 18, 2014 issued Hearing Decision 14-UI-2889, affirming the Department's decision. On December 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Shields Painting Corporation employed claimant as a painter from July 26, 2014 until September 20, 2014.

(2) The employer expected that if an employee was going to be absent from work the employee would personally notify his supervisor or the employer's office. The employer's policy expressly stated that leaving a voicemail message or telling another staff member of an absence was not an acceptable method of notifying the employer. Claimant was aware of the employer's expectations.

(3) In September 2014, claimant and his wife were divorcing. Sometime before September 17, 2014, claimant observed that the car of a male acquaintance was parked in the driveway of his and his wife's house. Claimant concluded that the male was visiting his wife. Claimant entered the residence and told the male to leave. When the male did not, claimant became angry. Claimant then broke the windows in the male's car.

(4) Claimant was scheduled to work on September 17, 18 and 19, 2014. At approximately 5:00 a.m. on September 17, 2014, claimant was preparing to ride to work with a coworker. At that time, claimant received a cell phone call from a Roseburg police officer notifying him that the police wanted to issue a citation to him arising from the incident in which he broke the windows of the car parked in his driveway. The officer told claimant to report to the police station for booking and to receive the citation. Claimant told his coworker that he was going to the police station and might not be able to report for work. Although claimant had the phone number of the employer's supervisor, he did not call him to

notify him of the absence. After claimant reported to the police station for processing, he called his brother, who also worked for the employer, and asked him to call the employer's office, explain the situation and tell the employer that he was going to be absent from work. Claimant did not report to work any time during the workday of September 17, 2014.

(5) On September 17, 2014, sometime between 1:00 p.m. and 3:00 p.m., claimant was released from police custody. At the time of his release, claimant was told that he had a court appearance on the criminal charge scheduled for 8:30 a.m. on September 19, 2014. Claimant did not call the employer's supervisor or the employer's office at any time after the court appearance to notify either of the situation or that he might not be able to attend work on September 18, 2014. On September 18, 2014, at approximately 6:30 p.m., claimant called one of the employer's lead workers and left a voicemail message describing his situation. The lead worker did not return claimant's call and did not relay any information from the message to the employer's office or the supervisor.

(6) On September 18, 2014 and September 19, 2014, claimant did not report for work and did not call the employer's supervisor or the employer's office to notify the employer of his absences.

(7) On September 20, 2014, claimant sent a text message to the employer's supervisor inquiring about his job. On that day, the supervisor replied to claimant's message and told claimant that he was discharged for failing to report for work beginning on September 17, 2014 and failing to give the employer acceptable notice of his absences.

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. The employer has 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).

At the outset, the parties disagreed about whether claimant missed work on September 17, 2014, with the employer's witness contending that he did and claimant vigorously contending that worked that day. Audio at ~ 5:20, ~10:06. The employer's supervisor based his testimony on the employer's payroll records and claimant based his on his memory of those days. Audio at ~13:42. Ultimately, the ALJ asked the supervisor to call the employee in charge of payroll to resolve the parties' dispute. That employee testified that the employer had no time cards for claimant showing that he worked after September 16, 2014. Audio at ~22:38. When claimant suggested that he must then have written an incorrect date on the time card he intended to turn in for September 17, 2014, the payroll employee noted that that this was unlikely since employees turned in and initialed their timecards daily. Audio at ~23:11. On balance, the employer's payroll records appear more reliable than claimant's recollection about events that occurred two months before the hearing. More likely than not, the first day claimant was absent due to the criminal matter was September 17, 2014.

When an employee is unable to comply with an employer's attendance policy as a result of incarceration (or presumably other police detentions), the relevant issue for purposes of a misconduct analysis is whether claimant willfully or with wanton negligence created the situation that made it impossible for him to attend work or to comply with the requirements of the attendance policy. *Weyerhauser v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991) (so stating). Here, claimant contended that at least for the day of September 17, 2014 he was unable to give the required notice of his absence because he was in custody or involved in the booking process. Audio at ~10:06, ~11:25. As claimant described the crime for which he received the citation, it appears likely that he engaged in some degree of criminal mischief. *See* ORS 163.345 (criminal mischief in the third degree) (interfering with another's property intending to cause substantial inconvenience when the perpetrator has no reasonable grounds to believe he has the right to do so), ORS 163.354 (criminal mischief in the second degree) (same intent requirement but damage must be in an amount of at least \$500). It is likely that claimant knew what he was doing when he broke windows of the male's car, particularly since he did not contend that he carelessly or mistakenly broke the windows or that he acted other than with an intention to break them in anger. Under these circumstances, claimant was at least reasonably aware that breaking the windows was unlawful and likely to lead to involvement with the police and the criminal process. More likely than not, the initial behavior that resulted in claimant's legal difficulties was at least the result of claimant's wantonly negligent, if not willful, behavior. Accordingly, that claimant might not have been able to comply with the employer's attendance and notice of absence policy does not justify his noncompliance.

Claimant did not dispute that he was aware that he needed to notify the employer's supervisor or its office staff of his absences from work. Nor did he dispute that he did not do so on any of the days when he was absent. *See* Audio at ~12:12, ~16:20. Although claimant contended that he did try to communicate information about his absences to the employer through his brother and through the lead worker, these contacts were not sufficient to comply with the plain terms of the employer's attendance policy. Audio at ~6:14, ~12:21, ~16:05. In addition, claimant's purported justification that he did the best that he could to relay information about his absences directly to the employer does not explain why he did not call the employer's supervisor after the police released him on September 17, 2014 and why he did not call the supervisor or the employer's office on September 18, 2014 or September 19, 2014 to report his absences. Claimant's failure to notify directly the supervisor or the employer's office staff of his absences from work on September 17, 18 and 19, 2014, when he was conscious of the expectation that he do so and capable of complying with it, were at least wantonly negligent violations of the employer's standards.

Claimant's wantonly negligent violations of the employer's notification policy from September 17 through September 19, 2014 are not excusable as isolated instances of poor judgment under OAR 471-030-0038(3)(c). To constitute an isolated instance of poor judgment claimant's behavior in violation of the employer's standards must have been, among other things, 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 behavior also must not have been the type 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)(D). In this case, claimant's wantonly negligent failure to comply with the employer's attendance and notification standards occurred on three separate days, September 17, 2014, September 18, 2014 and September 19, 2014, and involved several distinct opportunities to comply with the employer's standards that claimant failed to take. Claimant's behavior was not isolated.

Moreover, claimant did not dispute the supervisor's testimony that, after claimant's brother told the employer of claimant's apparent incarceration on September 17, 2014, the employer did not receive further information clarifying the length of time that claimant was expected to remain in custody or when claimant would be able to return to work until claimant called the supervisor on September 20, 2014. Because an employer requires reasonably certain and reliable information about an employee's availability to schedule work, claimant's failure to give that notice to the employer also made a continued employment relationship impossible. For these reasons, claimant's repeated wantonly negligent violations of the employer's attendance and notice standards cannot be excused as an isolated instance of poor judgment.

Nor were claimant's wantonly negligent violations excused as good faith errors under OAR 471-030-0038(3)(b). Claimant did not assert or present any evidence showing that his noncompliance with the employer's standards was caused by a sincere belief that the employer would allow him to deviate from those standards on September 17, 18 and 19, 2014. Because claimant did not make this threshold showing, the excuse of good faith error does not apply to his wantonly negligent violations of the employer's standards.

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

DECISION: Hearing Decision 14-UI-28849 is affirmed.

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

DATE of Service: January 20, 2015

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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