

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1900

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105226). Claimant filed a timely request for hearing. On November 21, 2014, ALJ Vincent conducted a hearing, and on November 26, 2014 issued Hearing Decision 14-UI-29395, affirming the Department's decision. On December 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Gray & Company employed claimant as a sales director from March 20, 1995 until November 25, 2013.

(2) The employer expected all employees to report for work as scheduled unless they had made prior arrangements for the day off or they were ill. If an employee was ill, the employer expected him to notify his supervisor that he was not able to report for work. Claimant was aware of the employer's expectations.

(3) On Monday, November 11, 2013, claimant was scheduled to work. Claimant did not report for work that day, had not arranged to take the day off as a vacation day, and did not notify his supervisor, the employer's president, that he was going to be absent due to illness. When claimant did not report for work, the employer's president's sent claimant a text message asking where he was and why he was not at work. In response, claimant sent the president an email stating that he had not reported for work because it was the Veteran's Day holiday. The employer had never celebrated Veteran's Day as an office holiday during claimant's employment. The president later called claimant on the phone and told him that he was not entitled to take November 11th off as a paid holiday. Sometime later on November 11, 2013, claimant sent the president an email stating that he was taking that day off as a vacation day. Claimant did not state during that call that he did not intend to report for work on November 12, 2013.

(4) On Tuesday, November 12, 2013, claimant again did not report for work. As on the previous day, claimant had not arranged to take the day off as a vacation day and did not report to the president that he was absent due to illness. The president called claimant twice that morning to determine why he was not at work. Claimant returned the president's messages at approximately 11:00 a.m. and spoke with the president. In that conversation, the president was unable to obtain a clear explanation from claimant about why he had had not reported for work. The president thought that claimant sounded "distraught" during the call. Audio at ~ 8:04. Their call concluded with claimant agreeing to meet with the president in the president's office on November 13, 2013 at 8:00 a.m. to explain the reason for his absences on November 11 and 12, 2013.

(5) On Wednesday, November 13, 2013, claimant did not report for his meeting with the president at 8:00 a.m. Sometime after 8:00 a.m., claimant sent the president an email stating that he was going to arrive at work at 9:30 a.m. Claimant did not appear at 9:30 a.m. or at any later time that day. Claimant did not communicate with the president or anyone else in the office to arrange to take that day off as a vacation day or to report that he was unable to work due to illness. After 9:30 a.m., the president tried unsuccessfully to reach claimant throughout the day.

(6) On Thursday, November 14, 2013, claimant again did not appear for work. Claimant again neither arranged to take the day off as a vacation day nor notified the president that he was unable to report for work due to illness. The president had no communications with claimant on that day.

(7) On Friday, November 15, 2013, claimant was scheduled for work and did not report. Claimant again neither arranged to take the day off as a vacation day nor notified the president that he was unable to report for work due to illness. Sometime after 8:00 a.m., claimant's wife sent an email to the president's assistant telling the assistant that she was worried about claimant and planned to take him to the doctor later that day. Audio at ~9:49. Sometime later that day, claimant sent a message to the president which stated that he was able to meet with the president to discuss his absences on Monday, November 18, 2013. The president and claimant scheduled a meeting for that Monday in the president's office at 10:00 a.m. Later in the day on November 15, 2013, the president sent a message to claimant changing the meeting at 10:00 a.m. from an in-person meeting to a telephone conference.

(8) On Monday, November 18, 2013, the president and claimant spoke on the phone for approximately twenty minutes. During the call, the president was unable to obtain a clear explanation from claimant about what he had been doing between November 11 and November 15, 2013 and why had had not reported for work. The president thought that claimant sounded "distraught" and "frustrated" during their conversation. Audio at ~11:08. At the end of the call, the president told claimant that he was suspended with pay as a result of unexplained absences from November 11, 2013 through November 15, 2013. Sometime later, the president arranged to meet with claimant in the workplace on Monday, November 25, 2013.

(9) On Monday, November 25, 2013, claimant met with the president and the employer's attorney. Claimant told the president that he had been absent from work during the work week of November 11, 2014 through November 15, 2013 because he was "very stressed out" and "didn't feel well enough" to work. Audio at ~12:57. Other than referring to "stress" and not "feeling well," claimant did not tell the president that he had any specific physical or mental health conditions that prevented him from attending work that week or reporting his absences to the president. Audio at ~12:57, ~13:17, ~13:26.

At that meeting, the employer discharged claimant for failing to report for work during the week of November 11, 2013 through November 15, 2013 and failing to notify the president that he was going to be absent on those days.

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. Absences due to illness or other physical or mental disabilities 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).

Claimant's testimony appeared less than forthcoming. It was, at times, evasive and appeared purposefully vague. Although claimant initially took the extreme position that he was not aware of any requirement that he notify his supervisor if he was going to be absent from work, when the ALJ pointed out that he had received at least one prior warning for attendance policy violations, he ultimately agreed that he knew of such a requirement. Audio at ~15:15, ~15:32, 17:52. While claimant first took the position that he did not report for work or notify the employer of his absence on November 11, 2013 because he thought that Veteran's Day was an office holiday, upon the ALJ's further questioning, he admitted that, although he had taken a few prior Veteran's Days off from work, he had done so only after obtaining approval for his absence as a personal vacation day. Audio at ~18:18, ~19:04. When he was unable to explain why he thought that he did not need approval to take Veteran's Day 2013 off from work when he had always done so before, he changed his explanation to be that he did not need to notify the president that he was not going to report to the workplace on November 13, 2013 because he was actually working from home that day. Audio at ~19:28. Upon further pointed questioning from the ALJ, claimant agreed that he "sometimes" needed to obtain approval from the employer to work remotely from home, but he asserted that the employer's policy was "very open," suggesting that he had not obtained such an approval on November 11, 2013. Audio at ~20:01, ~20:05. When claimant was unable to articulate the circumstances under which he needed approval to work from home, he reversed the apparent direction of his testimony and contended that on November 13, 2013 he notified the employer's main office that he was working at home that day. Audio at ~19:36. This final position is impossible to reconcile with claimant's prior testimony because, if he thought that November 11, 2013 was an office holiday or he had taken that day off as a personal vacation day, there was no need to notify anyone that he intended to work from home and, assuming he actually notified the "main office," he would have been expected to reply to the president's communications on November 11, 2013 with the explanation that he had reported his whereabouts and work status to the main office, which he did not contend that he had done. Given the successive adjustments in claimant's testimony to account for the ALJ's later questioning, and the logical inconsistencies in that testimony, it does not appear reliable. For this reason, and because it appears internally consistent and makes logical sense, we have accepted the testimony of the employer's witness in making our findings of fact.

The employer's president conceded that if claimant had been ill during the week of November 11, 2013 through November 15, 2013 and that illness reasonably prevented him from calling in to report his

absences, the employer would excuse both claimant's absences and his failure to notify the employer. Audio at ~11:37; *see also* OAR 471-030-0038(3)(b). While claimant testified that he had a fever when he failed to attend work or call in on November 12, 2013 through November 15, 2013 and noted that he saw his doctor on November 15, 2013, he was unable to describe what conditions his doctor treated him for other than that he needed medicine for a "fever and chills" and had some blood drawn. Audio at ~28:19, ~29:10. Notably, claimant did not state that his doctor advised him not to report for work. Although claimant testified that he told his doctor during that appointment that he "felt stressed out" and the doctor told him "to take it easy," he denied that the doctor treated him for any mental health conditions or that he had any mental health impairments during that week. Audio at ~29:29, ~29:50, ~30:07. Again, claimant did not allude to any medical advice that he stay away from work as a result of any such conditions or impairments. Although the ALJ attempted through repeated questioning of claimant to extract information that might support claimant's broad contention that he was "physically and mentally" unable to report for work or notify the employer of his absences on November 11, 2013 through November 15, 2013, the ALJ was not able to do so. Audio at ~31:46. On the facts in this record, and given claimant's inability to articulate a medical basis, or diagnosis, for his absences from work, claimant's broad contention that he was too ill to report for work or notify the employer of his absences is not convincing. Because claimant was aware of these requirements, and there is no reliable evidence to excuse him from compliance with them, claimant's failure to report for work during the week of November 11, 2013 through November 15, 2013 or to notify the employer that he was absent due to illness was least a wantonly negligent violation of the employer's standards.

Claimant's wantonly negligent behaviors between November 11, 2013 and November 15, 2013 were not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To constitute an "isolated instance of poor judgment," claimant's behavior 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). Here, claimant's wantonly negligent violations of the employer's standards occurred on five separate days, November 11, 12, 13, 14, 15, 2014. Because claimant's behavior was repeated it does not meet the requirements to be excused as an isolated instance of poor judgment. Nor was claimant's behavior excusable as a good faith error under OAR 471-030-0038(3)(b). To the extent claimant's testimony can be construed as contending that he mistakenly believed that he was not required to report for work as scheduled or notify the employer of his absences, any such belief as an explanation for his noncompliance with the employer's standards is implausible.

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

DECISION: Hearing Decision 14-UI-29395 is affirmed.

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

DATE of Service: February 5, 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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