

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0125

Reversed
Disqualification

PROCEDURAL HISTORY: On December 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 80229). The employer filed a timely request for hearing. On January 27, 2015, ALJ Frank conducted a hearing, at which claimant failed to appear, and on January 30, 2015, issued Hearing Decision 15-UI-32631, affirming the Department's decision but for a different reason. On February 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Bruce Packing Co Inc. (BrucePac) employed claimant as a quality control technician from August 4, 2014 to November 21, 2014.

(2) The employer had a written attendance policy that required employees to report for work as scheduled. Claimant received a copy of the employer's policy at hire and received several written warnings and one suspension for multiple violations of the policy between her date of hire and October 27, 2014. Claimant was aware of the employer's expectation.

(3) On September 30, 2014, the employer placed claimant on a 90-day attendance improvement plan for continually reporting late for work and warned her that additional instances of tardiness would result in discipline up to and including termination. On October 14, 2014, the employer gave claimant a written warning for reporting late for work on October 11 and extended her improvement plan until January 13, 2015. On October 27, 2014, the employer gave claimant another written warning and suspended her without pay for one day for failing to report for work on October 22.

(4) On November 21, 2014, claimant reported for work more than two hours late causing her to miss a mandatory morning meeting. Claimant explained to her manager that she reported late because she "didn't sleep well" and when confronted by a human resources employee about her tardiness that day

she gave the same explanation and offered no explanation for past attendance policy violations or efforts she had taken or planned to take to avoid additional violations. Exhibit 1; Audio recording at ~16:00 to 18:30. The human resources employee informed claimant the employer was discharging her that day for violating her attendance improvement plan by reporting late for work.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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 the 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the 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).

The employer discharged claimant for reporting late for work on November 21, 2014. Claimant explained to two supervisory employees that day that she reported late because she “didn’t sleep well” and reportedly told a coworker in passing that she had been late because she had been “drunk” the night before. Audio recording at ~17:00 to 18:30. In Hearing Decision 15-UI-32631, after finding that claimant’s alleged statement to her coworker about the reason she was late was “uncontroverted and credible,” the ALJ concluded claimant was tardy on November 21 due to her consumption of alcohol and because the record failed to show that claimant’s tardiness for that reason was her second such offense in one year, her discharge was not for misconduct under ORS 657.176(2)(g).¹ We disagree.

Claimant’s statement to the coworker was hearsay, vague, unaccompanied by any details, and the coworker to whom the statement was made was not a friend or confidante, any or all of which might have made the hearsay statement more credible. There was no evidence that claimant exhibited symptoms of drunkenness when she reported to work on November 21, and, although claimant’s statements to her supervisors that she “didn’t sleep well” the night before was also hearsay, we consider that explanation for her tardiness more credible because it was given to separate supervisory employees at separate times. Accordingly, we conclude claimant was late for work on November 21 because she “didn’t sleep well” the night before. Because claimant, apparently upon inquiry, also failed to explain to

¹ ORS 657.176(2)(g) provides, in relevant part:

(2) An individual shall be disqualified from the receipt of benefits...if the authorized representative designated by the director finds that the individual:

(g) Has been discharged or suspended for being absent or tardy in reporting to work and the absence or tardiness occurred as the result of the use of alcohol *on a second or any subsequent occasion within a period of 12 months* unless the person was participating in a recognized alcohol rehabilitation program at the time of the absence or tardiness, or is so participating within 10 days after the date of the discharge or suspension, and the person provides to the department documentation of program participation...

the human resources employee that she had ever taken any steps to avoid tardiness after numerous previous instances, we also conclude that claimant's tardiness on November 21st, following an extensive history of discipline for tardiness with no apparent effort on claimant's part to change her behavior, that her conduct demonstrated indifference to the consequences of her actions and was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or good faith error. For an act 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 was repeatedly tardy to work throughout her employment, making her tardiness in the final incident repeated. The number of instances, and the lack of evidence that claimant made any effort to improve her timeliness demonstrate that her conduct was, more likely than not, wantonly negligent. For instance, when the human resources employee asked claimant about her continual attendance violations on November 21, claimant offered no explanations for her conduct and failed to disclose any steps she had taken or planned to take to correct the problem, demonstrating she had been similarly indifferent to reporting for work as scheduled throughout her term of employment. Nor can claimant's conduct be excused as a good faith error. The record fails to show that she sincerely believed, or had a rational basis for believing, that the employer would condone reporting late for work after being given numerous warnings.

The employer discharged claimant for misconduct under ORS 657.176(2) and claimant is disqualified from the receipt of benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-32631 is set aside, as outlined above.

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

DATE of Service: March 24, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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