

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0225

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71049). Claimant filed a timely request for hearing. On February 9, 2015, ALJ Triana conducted a hearing, and on February 11, 2015 issued Hearing Decision 15-UI-33298, affirming the Department's decision. On February 26, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Alpine Food Distributing, Inc. employed claimant from August 30, 2013 to December 2, 2014 as a warehouse order selector.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer before their shift started. Claimant understood the employer's expectations because he had read them posted above the time clock at work.

(3) On November 28 and 29, 2014, claimant was scheduled to start work at 7:00 a.m. He failed to report for either shift because he was adjusting to walking without a crutch after suffering a foot injury. Claimant failed to notify the employer before the start of his shifts that he would be late or absent.

(4) On December 2, 2014, the employer discharged claimant because he did not report for work or notify the employer he would be tardy or absent on November 28 and 29, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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. 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 conduct and knew or should have known that his 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, good faith errors, and absences due to illness or other physical disabilities 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, in part, because he violated the employer's attendance policy on November 28 and 29, 2014 by failing to report to work. Barring illness or other exigent circumstances, the employer had a right to expect claimant to report to work as scheduled. Claimant understood the employer's expectations. Claimant failed to report to work on November 28 and 29 because he was adjusting to walking without a crutch after suffering a foot injury. Absences due to illness or other physical disabilities are not misconduct.

The employer also discharged claimant, in part, because he failed to notify the employer before his shifts started that he would be tardy or absent from work. Claimant understood the employer's reasonable expectation that he notify the employer. The parties' testimony differed regarding whether claimant contacted the employer on November 28 and 29. The employer's witnesses testified that claimant never contacted the employer. Audio Record at 13:29 to 13:34. Claimant testified that he called the employer's attendance line at 11:30 a.m. on November 28, and at 9:53 a.m. on November 29, and reported he would be absent. Audio Record at 30:29 to 31:33. However, it is undisputed that claimant failed to comply with the employer's expectation that he call before his shifts started.

Claimant testified that he did not call to report he would be late before his shifts began because he was "dealing with some other stuff" and had not yet decided if he would report to work due to his injured foot. Audio Record at 41:25 to 41:57. However, the record fails to show that claimant's injury or other exigent circumstances prevented claimant from notifying the employer that he would be tardy, and possibly absent from work. In failing to contact the employer before his shifts started, claimant consciously engaged in conduct he knew or should have known probably violated the employer's expectations. Claimant's conduct demonstrated indifference to the consequences of his actions, and therefore was, at best, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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 wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant consciously neglected to contact the employer in a timely manner on two consecutive days. His exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant understood he was expected to notify the employer before the start of his shifts that he would be tardy or absent from work. The record fails to show claimant sincerely believed, or had a rational basis for believing, that the employer would excuse or condone his failure to comply with that expectation on November 28 and 29, 2014.

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

DECISION: Hearing Decision 15-UI-33298 is affirmed.

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

DATE of Service: April 15, 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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