EO: 200
BYE: 201550

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0396

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 5, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision #112643). The employer filed a timely request for hearing. On March 19, 2015, ALJ M. Davis conducted a hearing in which claimant did not participate and issued Hearing Decision 15-UI-35461, concluding that the employer discharged claimant for misconduct. On April 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant included a letter in which he asked for an opportunity to present evidence regarding his work separation. Claimant stated that he was unable to participate in the hearing because he "suffered a loss of cellular service" when he attempted to call in for the hearing. Claimant's request is considered a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new evidence if the party presenting the information shows that circumstances beyond its reasonable control prevented it from presenting the information at the hearing. In support of his request, claimant explained that on the day of the hearing, he was attending a family gathering in an area where a loss of cellular phone service could unexpectedly occur at any time. Claimant also provided a letter from his father, who stated that cellular phone service "is spotty and non-existent" in the area where the family gathering was held. Claimant knew or should have known that he would have difficulty obtaining reliable cellular phone service on the day of the hearing. Because the loss of service he suffered was reasonably foreseeable, we cannot conclude that circumstances beyond his reasonable control prevented claimant from participating in the hearing and presenting evidence he now wishes to offer. Claimant's request to present new information is therefore denied.

FINDINGS OF FACT: (1) Rinella & Son Produce employed claimant as a driver from January 13, 2012 to September 21, 2014.

(2) The employer expected its employees to report for work as scheduled or notify the employer if they would be absent or tardy. Claimant knew and understood this expectation.

(3) Claimant normally worked Monday through Friday for the employer. In August 2014, however, he worked on three Saturdays for the employer.

(4) On August 15, 2014, claimant was scheduled to work. He did not report for work and did not notify the employer that he would be absent.

(5) On Saturday, September 20, 2014, claimant was scheduled to work. He did not report for work and did not notify the employer that he would be absent.

(6) On September 21, 2014, claimant reported for work. He told the employer that he had not reported for work on September 20 because he did not know he was scheduled to work on that day. The employer then discharged claimant because he was a "no call no show" on September 20.

CONCLUSION AND REASONS: We disagree with the ALJ. 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. 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 or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. 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). Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

We agree with the ALJ that claimant's failure to report for work on Saturday, September 20, 2014 and failure to notify the employer that he would be absent was a wantonly negligent violation of the employer's reasonable expectations. Although claimant regularly worked Monday through Friday, he had worked on three Saturdays for the employer in August 2014. As a result, claimant knew or should have known that it was possible the employer would schedule him to work on a Saturday. At the very least, his failure to verify his work schedule shows indifference to the consequences of an action that violated the employer's reasonable expectations regarding attendance.

We disagree, however, with the ALJ and conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. An act involves poor judgment if, in pertinent part, it involves "[a] conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior." OAR 471-030-0038(1)(d)(C). An act is isolated if the

exercise of poor judgment is 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). An isolated act exceeds mere poor judgment only if it violates the law, is tantamount to unlawful conduct, creates an irreparable breach of trust in the employment relationship, or otherwise makes a continued employment relationship impossible. *Id.*

Here, the ALJ concluded that claimant's failure to report for work on September 20, 2014 or contact the employer to report his absence resulted from poor judgment but was not a "single or infrequent occurrence rather than a repeated act or pattern" because claimant did not report for a scheduled shift on August 15, 2014. The record fails to show why claimant was a "no call no show" on that date, however. The employer therefore failed to meet its burden to demonstrate that claimant's behavior on August 15 resulted from claimant's conscious decision to take action that resulted in a wantonly negligent violation of the employer's expectations. Claimant's conduct on September 20 was therefore a single occurrence. His behavior did not violate the law, was not tantamount to unlawful conduct, and, viewed objectively, was not so egregious that it created an irreparable breach of trust in the employment relationship. Finally, the employer did not assert, and the record does not show, that claimant's conduct otherwise made a continued employment relationship impossible.

We conclude that the employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from the receipt of benefits based on this work separation.

DECISION: Hearing Decision 15-UI-35461 is set aside, as outlined above.

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

DATE of Service: <u>May 29, 2015</u>

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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