

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0427

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91543). Claimant filed a timely request for hearing. On March 25, 2015, ALJ M. Davis conducted a hearing, and on March 27, 2015 issued Hearing Decision 15-UI-35888, reversing the Department's decision. On April 15, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Nature Bake employed claimant as an oven operator from September 3, 2010 until January 16, 2015.

(2) The employer expected claimant to report for work as scheduled. The employer had an attendance policy under which employees accrued occurrence points each time they were absent from work, tardy to work or left work early. The employer's attendance policy stated that if an employee accrued seven occurrence points in a rolling twelve month period, the employee was subject to discharge. The employer also expected claimant to remain on the production floor and work throughout his shifts, except when he was taking authorized rest or meal breaks. In addition, the employer expected claimant to accurately record the time that he clocked into work and out of work. Claimant understood the employer's expectations and was aware of the requirements of its attendance policy.

(3) On Thursday, January 8, 2015, the employer issued a work schedule for the week of January 11, 2015 through January 17, 2015. Claimant did not look at that schedule, and he was away from work on regularly scheduled days off on January 9 and 10, 2015. The employer's work schedule set out that claimant was expected to report for work on January 11, 2015 at 2:00 p.m., two hours earlier than his usually scheduled start time of 4:00 p.m., for cross training at the pre-scale station. However, claimant assumed that his work schedule was not changed from what it usually was and that he did not need to

consult the work schedule issued for January 11, 2015. As of January 10, 2015, claimant had accrued 6.5 occurrence points under the employer's attendance policy.

(4) On January 11, 2015, claimant reported for work at 4:00 p.m., which was two hours later than the scheduled starting of time of 2:00 p.m. That day, claimant forgot to bring his time badge with him to clock in to the employer's automated time system. As a result, claimant needed to complete a time clock change request form and have it signed by his supervisor to record when he clocked in and when he clocked out from work on January 11, 2015. Because claimant's supervisor was going to leave work before the form needed to be turned in, the supervisor filled it out for claimant, signed it and sent it to the employer. Although claimant's shift was not ended when the supervisor turned in the form, the supervisor recorded on the form that claimant clocked out from his shift at 2:00 a.m. on January 12, 2015, the scheduled end of the shift. Sometime after claimant arrived at work, the shift supervisor told him that it might be possible for him to obtain the cross-training that he had missed later during his shift that night.

(5) Later on January 11, 2015, sometime before midnight, claimant asked his shift lead whether he could try to complete the scheduled cross training during the two hours that remained in his shift. The shift lead told claimant to check with a supervisor to determine if that was acceptable because another employee was also cross-training in the pre-scale station during that time. The lead also told claimant to learn from the supervisor what work claimant was expected to perform if the supervisor did not want claimant to cross-train. Claimant did not see the supervisor on the production floor, and left the floor to look for the supervisor in the café and the smoking area. Claimant did not find the supervisor at those locations and re-entered the production floor. For some period of time, claimant continued to look for the supervisor walking a circuit that included the production floor, the café and the smoking area. Claimant finally located the supervisor and spoke him. The supervisor told claimant that he did not want claimant to cross-train that night and claimant understood him to say that he should speak with the shift lead to learn what work the shift lead wanted him to perform for the remainder of his shift. Claimant then looked for the shift lead, but the shift lead had left the production floor, and claimant tried to locate him in the same places where he had previously looked for the supervisor. Claimant later learned that the shift lead had left his lunch break.

(6) Sometime after January 11, 2015, the ovens department supervisor reviewed videos from the workplace to verify the times that appeared on claimant's clock change request form from the shift starting on January 11, 2015. The videos showed that claimant left work at approximately 1:50 a.m. on January 12, 2015 and not at 2:00 a.m. as was shown on the time clock change request form. From the videos, the supervisor also observed that between 11:52 p.m. until 1:38 a.m., claimant was moving between the production floor, the café and the smoking area on several occasions without any apparent work purpose. The supervisor concluded that whenever claimant was off the production floor and in the café or the smoking area he was taking unauthorized rest breaks.

(7) On January 16, 2015, the employer discharged claimant because as a result of his late arrival for work on January 11, 2015, he had accrued seven occurrence points under the employer's attendance policy. The employer also discharged claimant because he had allegedly misrepresented the time he left work on January 11, 2015 and taken several unauthorized breaks away from the production floor between 11:52 p.m. and 1:38 a.m. on January 11 to 12, 2015.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment 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).

The employer's witness testified that one of the grounds for claimant's discharge was that his late arrival for work on January 11, 2015 caused him to accrue a seventh occurrence point, which was the level at which an employee was discharged. Transcript at 7. When a claimant is discharged because he or she exceeded the allowable number of points under an employer's attendance policy, the Department's policy provides that the last occurrence is analyzed as the reason for the discharge. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, claimant's tardiness on January 11, 2015 is the proper focus of this part of the misconduct analysis.

Claimant agreed that he was two hours tardy in arriving for work on January 11, 2015, and stated that he arrived late because he did not review the work schedule that the employer issued on January 8, 2015 and did not know that his start-time was scheduled two hours earlier than usual. Transcript at 19. Claimant did not suggest that he worked a set schedule or was prevented from obtaining access to the employer's work schedule covering January 11, 2015, and knew or should have known to check his work schedule in advance. When claimant did not look at the schedule the employer issued for the week that included January 11, 2015, although he knew it had been issued and could have, he made a conscious decision to disregard the employer's expectation that he look at the schedule and report to work as scheduled. Claimant reasonably should have known that his failure to look at the work schedule probably would result in his arriving late for work if the employer changed the start time of his shift to an earlier hour than usual. Claimant's conscious decision not to read the work schedule was at least a wantonly negligent violation of the employer's standards.

The employer's witness testified that a second ground on which the employer discharged claimant was because he misrepresented on the time clock change request form that he stopped work at 2:00 a.m., when the employer's videos showed that he actually left the workplace at approximately 1:50 a.m. Transcript at 14. The employer's witness focused on claimant's alleged misrepresentation of the time that he stopped working on the form, and did not assert that claimant was not permitted to leave work at 1:50 a.m. or at any time earlier than 2:00 a.m., the scheduled end of his shift. Transcript at 14. The employer's witness did not dispute that claimant was allowed to leave the production floor at 1:50 a.m.

to change out of his work clothes as claimant did after that shift, and did not dispute that if claimant changed his clothes more quickly than the ten minutes the employer allotted for this activity he was permitted to leave the workplace. Transcript at 14-15, 22. The employer's witness also did not challenge claimant's testimony that a supervisor completed the time clock change request form for him and turned it in to the employer, apparently not reviewed by him, before his shift was over on January 12, 2015 and before the time that he actually left work could be determined. Transcript at 22. Given the state of the evidence, it appears that claimant did not make any representation to the employer about when he stopped work on January 11, 2015, his supervisor did. Any discrepancy between the time for stopping work as shown on the form and the employer's videos were not attributable to claimant's own willful or wantonly negligent behavior.

The final basis for claimant's discharge were the several unauthorized work breaks he took between 11:52 p.m. on January 11, 2014 and 1:30 a.m. on January 12, 2015. Although the employer's witness testified about claimant's various trips from the production floor to the café and the smoking area during this time, claimant's behavior was consistent with his explanation that he was trying to locate the supervisor and later the shift lead in response their instructions to him. Transcript at 21, 30, 40. The employer's witness presented no evidence that challenged claimant's testimony that looked first for the supervisor because he understood that the shift lead had told him to do so to obtain instructions, could not find him, and when claimant finally located the supervisor, he understood the supervisor to tell him to get further instructions about the work he was to perform from the shift lead, after which claimant searched unsuccessfully for the shift lead. *Id.* Absent evidence demonstrating that the shift lead and supervisor did not tell claimant to look for the other to determine what work he was to perform, or that claimant's alleged understanding of what they told him to do was implausible, the employer did not demonstrate more likely than not that claimant was taking rest breaks when he was wandering all around the workplace between 11:52 p.m. and 1:38 a.m. or that he willfully or with wanton negligence violated the employer's standards about taking only authorized work breaks.

Claimant's tardy arrival to work on January 11, 2015 was the only willful or wantonly negligent violation of the employer's standards that the employer established at hearing. Claimant's violation may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance 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). To qualify as behavior that is an isolated instance of poor judgment, the behavior at issue also must not have caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Although the employer's witnesses presented evidence about other instances when claimant allegedly violated the employer's attendance policy and was issued oral or written warnings, the witnesses did not have sufficient information about the various past incidents to establish they were caused by claimant's willful or wantonly negligent behavior. Transcript at 8, 25, 35. To the best of claimant and the employer's witness's recollection at hearing it appeared that all of claimant's absences were due to illness. Transcript at 25, 26, 35. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). While claimant's prior absences might have violated the employer's attendance policy, the employer did not meet its burden to demonstrate that any of them were prior acts of willful or wantonly negligent behavior. Similarly, although the employer presented evidence about past warnings it had issued to claimant for poor work performance, it presented no evidence to show that the poor performance was caused by claimant's willful or wantonly negligent behavior. Exhibit 1 at 12. Accordingly, claimant's

wantonly negligent behavior in arriving late for work on January 11, 2015 was isolated. Nor was claimant's behavior on January 11, 2015, the type of behavior that reasonably caused a fundamental rupture in the employment relationship. While claimant should reasonably have looked at the recently issued work schedule to see when he was scheduled to start work on January 11, 2015, his assumption that the schedule was unchanged, and he did not need to review it for confirmation, was understandable. While claimant's state of mind may have been consciously indifferent, it was not dishonest, fraudulent or destructive of an integral employer interest. A reasonable employer would not objectively conclude that the nature of claimant's tardiness on January 11, 2015 caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Claimant's tardiness meets all of the requirements to excuse it from constituting misconduct as an isolated instance of poor judgment. Even though it was wantonly negligent, claimant's late arrival at work on January 11, 2015 was not misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-35888 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 11, 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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