

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0628

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145715). Claimant filed a timely request for hearing. On May 13, 2015, ALJ Frank conducted a hearing, and on May 21, 2015 issued Hearing Decision 15-UI-38906, affirming the Department's decision. On May 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he sought to present additional information that he did not offer into evidence at the hearing. Although claimant asserted in his argument that the ALJ's questions "felt hurried" and "rushed," he did not suggest that he tried to present this information at the hearing and the ALJ's behavior or other factors deterred him from doing so. Because claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering this information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006), EAB did not consider it. *See* ORS 657.275(2). EAB considered only evidence entered into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Lanz Cabinet Shop, Inc. employed claimant as a milling operator from April 23, 2012 until February 25, 2015.

(2) The employer expected claimant to report for work as scheduled and, on each day he was absent, to call his manager or supervisor to notify one of them of his absence before his shift was scheduled to start.

(3) Sometime in 2013, claimant told the employer's human resources manager that he had an alcohol abuse problem and asked for her help. The human resources manager arranged for claimant to enter into a last chance agreement with the employer that required him to enter into an alcohol treatment program. Claimant successfully completed the alcohol treatment program and fully complied with the last chance agreement.

(4) By October 2014, claimant was living with his fiancé. Claimant had a turbulent relationship with his fiancé and she began engaging in outbursts of physical violence directed at him. When claimant's fiancé was angry or upset, in addition to physically attacking claimant, she also damaged, broke or destroyed his possessions and belongings. After October 2014, the police were called several times to claimant's house because of his fiancé's behavior. By February 2015, claimant's fiancé had taken a key and intentionally damaged the exterior of his car, had broken several of his telephones and damaged miscellaneous other items of his property.

(5) On Saturday, February 14, 2015, claimant's fiancé physically attacked claimant in their home, scratching and gouging his face and leaving a lump on his head. Claimant called the police to come to his house to control his fiancé. When claimant was phoning the police, his fiancé and he struggled, she wrested the phone he was using from him and broke the phone. The phone that claimant's fiancé broke was the last functioning phone that claimant had. Claimant's fiancé then fled the house. The police responded to claimant's call and claimant told them he wanted his fiancé arrested. The police were not able to locate claimant's fiancé in the days immediately following February 14, 2015. Sometime before Monday, February 16, 2015, claimant called his father about what had happened and his father loaned him a cell phone to use.

(6) On Monday, February 16, 2015 through Friday, February 20, 2015, claimant called and left messages for his supervisor telling him that he was going to be absent from work because he was sick. Claimant did not want to report for work because of the condition of his face and head, which indicated he had been involved in a physical altercation. Claimant was too "embarrassed and ashamed" about his domestic situation to inform his supervisor or any other employer representatives of the reason why he was not reporting for work. Audio at ~20:30. During that week, although claimant's fiancé was not staying overnight at his house, she sporadically showed up at the house and argued with him. Claimant was afraid that if he left his house to report for work, his fiancé would enter the house in his absence and damage or destroy his remaining possessions. Claimant did not know what to do other than to remain inside his house.

(7) Sometime on or before February 21, 2015, the police arrested claimant's fiancé. Audio at ~18:50. Claimant's fiancé was released from custody, and on approximately February 22, 2015, claimant's fiancé again appeared at claimant's house. Using the cell phone that his father had given to him, claimant tried to call the police. Claimant's fiancé physically confronted him and tried to take possession of the phone. That phone, the last phone that claimant had, was broken in the altercation.

(8) On Monday, February 23, 2015, claimant did not report for work because he was afraid of what his fiancé would do, and was afraid to leave his house unattended. Audio at ~23:46. He did not call the employer to report his absence because his fiancé had broken the last phone that he had. For the same reasons, claimant did not report for work on Tuesday, February 24 and Wednesday, February 25, 2015. On February 24, 2015, an employer representative attempted to call claimant using the phone number on file for him, but reached a recording stating that the "number was no longer in service." Audio at ~10:57. On the days that claimant missed work, claimant still did not know what to do and isolated himself in the bedroom of his house. Audio at ~ 25:50. Claimant not thinking clearly and did not consider calling the employer from a neighbor's phone to report his absences from work. Audio at ~

25:56. Claimant was still too embarrassed to confide his situation to his supervisor or any employer representatives. Audio at ~25:10.

(9) On Wednesday, February 25, 2015, the employer discharged claimant for failing to notify the employer of his absences on February 23, 24 and 25, 2015.

(11) Before February 23, 2015, the employer had no issues with claimant's work performance or his attendance. Audio at ~15:20.

(10) Sometime around February 26 or 27, 2015, claimant relapsed into alcohol abuse. On approximately March 18, 2015, after claimant's family helped him extricate himself from his relationship with his fiancé, claimant called the employer's human resources manager to apologize for any inconvenience he had caused the employer by his unexplained failure to report for work after February 20, 2015. Audio at ~28:24, ~30:09. While claimant did not disclose the situation with his fiancé that caused him to miss work, he did tell the manager that he had "relapsed" sometime after February 25, 2015. Audio at ~30:58, ~32:43.

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. Isolated instances of poor judgment and good faith errors 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).

In Hearing Decision 15-UI-38906, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant was aware that the employer expected him to call in each day to report his absences and he failed to do so on February 23, 24 and 25, 2015. The ALJ largely disregarded claimant's explanation that the behavior of his fiancé that caused him to fail to call in to the employer, finding that it was "confusing," "imprecise," "convoluted" and "difficult to understand." Hearing Decision 15-UI-38096 at 4. The ALJ further concluded that claimant's wantonly negligent violation of the employer's expectations that he call in to report his absences was not excused as an isolated instance of poor judgment because it occurred on three separate days, February 23, 24 and 25, 2015 and was therefore "repeated and not isolated." Hearing Decision 15-UI-38906 at 5. We disagree.

Assuming that claimant's failure to call in to report his absences on February 23, 24 and 25, 2015 was wantonly negligent, we disagree with the ALJ's conclusion that it was not excused from constituting misconduct as an isolated instance. A claimant's behavior is an "isolated instance of poor judgment" if it is, 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). To constitute an isolated act of poor judgment, in addition to being isolated, claimant's behavior also must not have "exceed[ed] mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0039(1)(d)(D).

Aside from claimant's failure to notify the employer of his absences on February 23, 24 and 25, 2015, the employer did not present any evidence of claimant's prior willful or wantonly negligent violations of the employer's standards. Accordingly, the first issue is whether claimant's three days of wantonly negligent behavior disqualifies that behavior from constituting an isolated instance of poor judgment. The ALJ's conclusion that claimant's behavior could not have been isolated because it involved three separate violations, occurring on three different days, disregarded the prevailing standard set forth in the appellate cases for determining if a claimant's behavior is isolated. The appellate decisions consistently hold that if a series of ostensibly separate acts arise from the same precipitating episode or cause, they are collectively considered a single, continuing instance of poor judgment for purposes of OAR 471-030-0038(3)(b). See *Perez v. Employment Department*, 164 Or App 356, 992 P2d 460 (1999) (when claimant willfully refused to comply with supervisor's instruction on one day and on the next day willfully engaged in a vulgar outburst when the same supervisor rebuked him for his behavior on the previous day, claimant's behavior on both days was a single isolated instance of poor judgment because each day's behavior was motivated by the supervisor's behavior on the first day and was a continuation of claimant's reaction to it); *Waters v. Employment Division*, 125 Or App 61, 865 P2d 368 (1993) (when claimant left several separate "harassing and abusive" messages on a coworker's answering machine following a conflict over work schedules, claimant's behavior, although comprising technically separate acts, was a single occurrence of poor judgment because all the messages were motivated by the same underlying conflict and each subsequent message was a continuation of claimant's reaction to the same conflict); *Goodwin v. Employment Division*, 35 Or App 299, 581 P2d 115 (1978) (when claimant argued with another manager, the supervising store manager told both claimant and the other manager to stop and then told claimant to "shut up" when claimant protested to the store manager about the other manager's behavior, and claimant followed the store manager upstairs loudly complaining about the other manager's behavior, claimant's behavior, although comprising ostensibly separate episodes of wantonly negligent behavior, was properly considered a single instance of poor judgment since each episode was motivated by the claimant's "continuing conflict" with the other manager and claimant's same continuing "hotheadedness").

Here, claimant testified that he did not call in to notify the employer of his absences on the three days of February 23, 24 and 25, 2015 for identical reasons: his last cell phone was broken, he was embarrassed and ashamed of the situation he was in with his fiancé, he was afraid to leave his home unattended and, presumably due to his upset and uncertainty about how to proceed in situation that he perceived as a personal crisis, he did not think to use a neighbor's phone or take other steps that would have allowed him to contact the employer. Audio at ~17:09, ~20:23, ~21:30, ~22:31, ~23:46, ~24:18, ~24:40, ~24:56, ~25:10, ~25:23. The same precipitating factors led to claimant's failure to call in to report his absences on each of the three days was a continuation of a single exercise of poor judgment that caused claimant not to take the reasonable steps that might have allowed him to preserve his job. Therefore, if claimant's explanation about his mental state and exercise of judgment in the relevant period, is accepted, his wantonly negligent behavior on February 23, 24 and 25, 2015 is properly viewed as a single, continuing instance of poor judgment and not three repeated, separate and distinct occurrences of wantonly negligent behavior.

Although the ALJ disregarded claimant's testimony about the circumstance involving his fiancé apparently because he thought that it lacked consistency and clarity, we disagree that claimant's testimony was "inconsistent," "convoluted" or "difficult to understand." Hearing Decision 15-UI-38906

at 4. From the outset of claimant's testimony, he was consistent in describing the behavior of his fiancé, his reactions of shame and embarrassment to it and the obstacles he perceived it to create in maintaining contact with the employer. Audio at ~16:28, ~17:09, ~18:10, ~19:30, ~20:23, ~21:09, ~25:23. There were no obvious inconsistencies claimant's testimony, nor was his testimony needlessly convoluted. The testimony may have appeared difficult to understand to the ALJ because it was an attempt to explain a complicated series of unusual interpersonal events compounded by claimant's inarticulateness and embarrassment in discussing those events. When claimant's testimony is reviewed, and placed in context, there is no apparent reason on its fact to question claimant's credibility or the accuracy of his explanation. Absent persuasive evidence undercutting it, claimant's explanation can only be accepted. While claimant's behavior in not notifying the employer of his absences on February 23, 24 and 25, 2015 may have been wantonly negligent, it was, by virtue of the identity of the factors underlying it, a single continuing incident for purposes of determining whether it was excused from constitution misconduct as an isolated instance of poor judgment.

Claimant's actions in not calling in to the employer to report his absences for three days was not the type of wantonly negligent behavior that exceeded mere poor judgment. Under the circumstances as recounted by claimant, and in light of his apprehension about his fiancé's possible behavior and his perception that he was experiencing a personal crisis, that his thought processes might have been lacking and that he did not consider pursuing alternate ways to notify the employer of his absences was understandable. There was no evidence suggesting that claimant's state of mind when he failed to notify the employer of his absences was of a type that evidenced intentional deceit, intent to harm the employer's interests or other forms of culpability usually required to show that a claimant's isolated act was of a level and magnitude that the single act exceeded mere poor judgment and is not excusable.¹ Given the unusual series of events that led to claimant's wantonly negligent behavior and claimant's lack of prior willful or wantonly negligent violations of the employer's standards, it was very unlikely that claimant's wantonly negligent behavior would recur in the future. On these facts, a reasonable employer would not have concluded that it could no longer trust claimant since his behavior evidenced a fundamental rupture of the employment relationship or that, given the reasons that he did not call in, a continued employment relationship with him was impossible. Assuming that claimant's behavior on February 23, 24 and 25, 2015 was wantonly negligent, it was isolated and did not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship

¹ See e.g., *Patricia M. Jensen* (Employment Appeals Board, 2013-EAB-2464, January 17, 2014) (dishonesty exceeded mere poor judgment when claimant lied in order to use another employee's greater employee discount and arranged for other employee to purchase merchandise intended for claimant); *Morgan J. Wichman* (Employment Appeals Board, 13-AB-1101, July 26, 2013) (dishonesty exceeded mere poor judgment when lied about internet searches); *Brenda D. Barnes* (Employment Appeals Board, 11-AB-0651, March 11, 2011) (dishonesty exceeded mere poor judgment when falsified a time card entry to employer's financial detriment); *Joseph A. Brucken* (Employment Appeals Board, 11-AB-0614, March 9, 2011) (dishonesty exceeded mere poor judgment when falsified a computer record to employer's detriment); *Tara R. Pape* (Employment Appeals Board, 10-AB-3851, December 30, 2010) (dishonesty exceeded mere poor judgment when falsified a certification card and lied that card was stolen); *Rhonda M. Gosso* (Employment Appeals Board, 10-AB-1294, June 7, 2010) (dishonesty exceeded mere poor judgment when lied during an employer investigation of wrongdoing); *Robert M. Bien* (Employment Appeals Board, 09-AB-0319, February 23, 2009) (dishonesty exceeded mere poor judgment when falsified job application in order to be hired); *Romaldo G. Munoz* (Employment Appeals Board, 08-AB-2007, November 3, 2008) (dishonesty exceeded mere poor judgment when lied about whether work was performed); *Richard T. Christie* (Employment Appeals Board, 08-AB-1566, August 28, 2008) (dishonesty exceeded mere poor judgment when falsified job application); *Jacob W. Smith* (Employment Appeals Board, 08-AB-1586, August 27, 2008), *Oregon Court of Appeals aff'd w/o opinion September 9, 2009* (dishonesty exceeded mere poor judgment when lied about whether work was performed).

impossible. Because it meets all the requisites, claimant's behavior was excused from constituting misconduct as an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 15-UI-38906 is set aside, as outlined above.

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

DATE of Service: July 22, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.