EO: 700
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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-0634

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120404). Claimant filed a timely request for hearing. On May 18, 2015, ALJ Clink conducted a hearing, and on May 21, 2015 issued Hearing Decision 15-UI-38870, affirming the Department's decision. On May 29, 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 not offered during the hearing. Claimant did not explain why he did not offer this new information at the hearing and otherwise failed to show that factors or circumstances beyond his reasonable control prevented him from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider claimant's new information. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant from March 18, 2011 until March 19, 2015, last as a store manager. The employer promoted claimant to the position of a store manager in approximately March 2014.

(2) As manager, claimant was responsible for scheduling all employees at his store for work, including himself The district manager, who was claimant's immediate supervisor, largely left the day-to-day operations of the store that claimant managed up to claimant. The district manager visited claimant's store infrequently.

(3) The employer expected claimant to report for work as scheduled unless he was sick or had permission from the district manager to take time off. The employer expected claimant to notify the district manager in writing if he anticipated taking vacation or other time away from work, and to list the specific dates that he wanted off when he gave that notice. Claimant was aware of the employer's

expectations about requesting time off as a result of specific instructions given to him by the district manager.

(4) Sometime before February 11, 2015, claimant mentioned to the district manager at a conference both were attending that he wanted to take a vacation to visit his father in Montana. The district manager told claimant that he needed to submit a written request to him for the days that he wanted off. On February 11, 2015, claimant sent an email to the district manager requesting time off from February 19, 2015 until February 27, 2015. After claimant took this vacation, he did not have any paid vacation time available to him.

(5) Sometime after February 11, 2015, claimant told the district manager that he needed to take some days off from work in March 2015, but did not yet know the exact dates. The district manager told claimant that he needed to request the specific days he wanted off in writing.

(6) After claimant spoke with the district manager about taking the days off in March 2015, he never submitted a written request, and did not tell the district manager which days in March he was going to take off.

(7) On March 2, 2015, the district manager was notified that the employer's tip line had received an anonymous complaint about the amount of time claimant was taking off from the store he managed. The district manager decided to investigate the time that claimant was away from work. In this investigation, the district manager learned that claimant's 13, 14 and 15 year-old sons had been seen moving some of the employer's supplies on the store premises. The district manager concluded that the activities of claimant's sons violated safety regulations of the Occupational Health and Safety Administration (OSHA) because of their ages and the type of supplies they moved. The district manager was also later informed that, although the store's work schedule showed that claimant was expected to work on March 16, 17 and 18, 2015, he did not report for work on those days, did not notify any employer representative that he was sick and had not requested those days off from the district manager. The district manager was concerned because claimant had left himself on the work schedule for days he had taken off, which made it appear that he was actually had worked on those days.

(8) On March 19, 2015, the district manager went to claimant's store to investigate why claimant was not reporting for work. Claimant was at the store that day. In response to the district manager's questions, claimant agreed that he had taken March 16, 17 and 18, 2015 off from work. Claimant denied that he allowed sons to move hazardous chemicals on the store premises. That day, the employer discharged claimant for taking time away from work without submitting a written request for time off and without the permission of the district manager. The employer also discharged claimant for allegedly allowing his sons to engage in activities at the store that violated OSHA safety standards.

CONCLUSIONS AND REASONS: 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. 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).

Although the employer's witness generally contended that the employer discharged claimant both for the circumstances surrounding his time away from work on March 16, 17 and 18, 2015 and for allegedly allowing his sons to engage in workplace activities that violated OSHA standards, the predominant focus of the witness's testimony was on claimant's absences from work. Audio at ~10:37, ~15:12, ~15:29, ~16:50. Claimant denied his sons engaged in the activities that the employer's witness contended, and disputed any awareness that his sons' activities might violate OSHA standards. In addition, the employer's witness did not identify how claimant reasonably might have been made aware of the OSHA prohibitions. We therefore conclude that the employer did not meet its burden to show, more likely than not, that claimant knew that allowing his sons to handle some of the employer's supplies was prohibited by the employer's standards, which incorporated OSHA prohibitions. Audio at ~24:42, ~26:03, ~35:40. The misconduct analysis will be limited to the circumstance under which claimant was absent from work on March 16, 17 and 18, 2015.

Claimant did not dispute that he did never gave the employer's district manager written notice that he was going to be away from work on March 16, 17 and 18, 2015. Claimant justified his failure to do so on the ground that a previous district manager had required only verbal notice. Although claimant agreed that his current manager had told him at the conference around February 11, 2015 that he wanted requests for time off in writing, claimant asserted that he thought the district manager's instruction applied only to time off that was credited against claimant's accrued paid vacation leave and not to time off that claimant intended to make up by later flexing his time and working longer hours. Audio at ~26:28, 26:50, ~31:29, ~38:21. If claimant understood the current manager's instructions in this way, his interpretation was patently unreasonable. It makes little sense that claimant plausibly thought that the employer would allow employees, even store managers, to schedule the number of hours they worked at will, to take time off as they freely chose, whether or not they had accrued vacation leave, and to make up for the time that they took off informally, without accountability or safeguards to ensure that the time was actually made up. It also makes no sense that the claimant plausibly thought that the employer would encourage his behavior in leaving himself on the work schedule when he knew he was going to be away from work and taking time off. The current district manager's instruction to claimant about making requests for time off in writing was quite clear, and it appears that claimant's strained interpretation of it was intended only to excuse his failure to notify the employer in writing that he was taking time off. Because claimant reasonably was aware of the employer's and the district manager's expectations, his failure to provide written notice of the three days he took off as vacation was at least a wantonly negligent violation of these expectations.

Claimant's behavior in taking three days off without a written request to the district manager was not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as an isolated instance of poor judgment, claimant's behavior must have been a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). In this case, claimant repeated his wantonly negligent behavior on three successive days, under circumstances when he reasonably was aware that the employer required written notice for each day that he was taking off.

Because claimant's behavior comprised three repeated acts, it was not a single or infrequent occurrence. For this reason, claimant's behavior is not excused as an isolated instance of poor judgment.

Nor was claimant's wantonly negligent behavior on March 16, 17 and 18, 2015 excused from constituting misconduct as a good faith error. To qualify as a good faith error, claimant's violation of the employer's standards must have resulted from a sincere belief that the employer would condone his conduct. Given the clarity of the district manager's instruction to claimant, it is implausible that claimant misunderstood it in good faith.

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

DECISION: Hearing Decision 15-UI-38870 is affirmed.

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

DATE of Service: <u>July 28, 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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