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

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0690

Hearing Decision 15-UI-38875 Reversed – Disqualification
Hearing Decision 15-UI-39002 Reversed - Disqualification

PROCEDURAL HISTORY: On April 14, 2015, the Oregon Employment Department (the Department) served notices of two administrative decisions, one concluding the employer suspended claimant for misconduct (decision #94751) and the other concluding the employer discharged claimant for committing a disqualifying act (decision #91640). Claimant filed timely requests for hearing. On May 14, 2015, ALJ R. Davis conducted a consolidated hearing, and on May 22, 2015 issued Hearing Decision 15-UI-38875, concluding claimant was suspended, but not for misconduct, and 15-UI-39002, concluding claimant was discharged, but not for misconduct. On June 8, 2015, the employer filed applications for review of Hearing Decisions 15-UI-38875 and 15-UI-39002 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-38875 and 15-UI-39002. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0690 and 2015-EAB-0691).

FINDINGS OF FACT: (1) Morasch Meats employed claimant as a maintenance worker from April 27, 2013 to February 9, 2015.

(2) The employer expected employees to obey the reasonable instructions of their supervisors and managers. Claimant understood that employer expectation as a matter of common sense. The employer also had a "lockout/tag out" policy and procedure that was based on federal and state safety requirements. Transcript at 12-15. Under the policy, if a machine or electrical device became dangerous because of disrepair or defect, a maintenance employee applied a lockout/tagout device to the machine or device to prevent further use and included information on the tag that identified the employee's name, contact number and description of the problem. The lock had only one key that remained in possession of the employee who applied the lockout/tagout device and other employees were prohibited from removing the lockout/tagout device without authorization, under threat of immediate termination for violating that prohibition. Transcript at 12-15, 80-81. Claimant received

training on the employer's "lockout/tag out" policy and procedure at hire and periodically thereafter and acknowledged in writing that he was aware of it. Claimant understood the employer's expectations.

(3) On November 12, 2014, claimant installed a light fixture, intended for another project, in a maintenance area of the employer's premises, despite previous instructions to him from both an owner and a supervisor to not install the fixture, because he "[did not] care." Transcript at 11. The employer suspended claimant for five days for his conduct but later reduced it to three after claimant requested the employer "be a little more forgiving of his attitude." Transcript at 11.

(4) On January 14, 2015, claimant and other maintenance workers were in the process of repairing a meat grinding machine that had broken down, interrupting the employer's production line. When claimant prepared to take his lunch break, his supervisor instructed claimant to delay taking his break for a short time and finish the repair to enable the employer to resume production. Claimant "felt that the matter was under control", ignored the supervisor's instruction and took his break without delay. Transcript at 42. On January 20, 2015, the employer suspended claimant four days for his insubordination.

(5) On January 29, 2015, a maintenance supervisor applied a lockout/tagout device to an electrical junction box because he determined that a problem within an electrical cord in the box caused intermittent "short[s]" and losses of power that were potentially dangerous. During the next shift, claimant saw the lockout/tagout device on the junction box but wanted to use the junction box to perform some repair work. Claimant did not make any inquiries about the lockout/tagout device and cut it off of the junction box. He then tested the outlet and did not notice a problem with it. He did not report his actions to management or prepare a written report regarding them although he did not believe the employer "would be okay" with what he had done without at least a report. Transcript at 40. When the maintenance supervisor returned to work, he noticed that his lockout/tagout device had been removed without his knowledge or authorization and reported it to management. The employer conducted an investigation during which claimant admitted his conduct was a "serious safety violation" and could have caused injury, but that he "did it anyway 'cuz [he] didn't think it was that important." Transcript at 13-14.

(6) On February 9, 2015, the employer terminated claimant's employment for removing the lockout/tagout device from the junction box in violation of its policy and safety regulations.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer suspended claimant for misconduct and discharged claimant for misconduct.

ORS 657.176(2)(b) and (2)(a) require a disqualification from unemployment insurance benefits if the employer suspended or 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a suspension or discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Suspension. The employer suspended claimant from January 20 through 23, 2015 for disregarding the instruction of his supervisor on January 14 and taking an unauthorized lunch break. In Hearing Decision 15-UI-38875, after finding that claimant's insubordination on January 14 was at least wantonly negligent, the ALJ concluded the employer suspended claimant for an isolated instance of poor judgment and not misconduct, reasoning, "claimant did not understand that his [November] conduct would be a violation of the employer's expectations…and used his best efforts…about installing a light in his work area." Hearing Decision 15-UI-38875 at 3. We disagree.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly conduct. By stating to his supervisor on the November date in question that he "[did not] care" what the light fixture was for, before he installed it, and asking the employer's human resources manager to "be a little more forgiving of his attitude" and reduce his original suspension, after he was suspended, claimant demonstrated and acknowledged that he was indifferent to the consequences of his actions and was at least wantonly negligent in installing the fixture contrary to instructions. Because claimant's poor judgment on January 14 was part of a pattern of other willful or wantonly negligent conduct, it was not isolated and cannot be excused as such.

Accordingly, the employer suspended claimant for misconduct and claimant is disqualified from receiving unemployment insurance benefits based on his suspension.

Discharge. The employer discharged claimant for removing the lockout/tagout device from the junction box on January 29 in violation of its policy and safety regulations. In Hearing Decision 15-UI-39002, after finding that claimant understood the employer's lockout/tagout procedures and that his conduct in removing the lockout/tagout device someone else had installed from the junction box was a "willful violation of the employer's policy", the ALJ concluded the employer discharged claimant for an isolated instance of poor judgment and not misconduct. Hearing Decision 15-UI-39002 at 4. The ALJ reasoned, "the employer did not present persuasive evidence that in the past claimant willfully or with wanton negligence violated the employer's safety policy." *Id.* We disagree because the ALJ misinterpreted OAR 471-030-0038(1)(d)(A).

As a preliminary matter, we agree with the ALJ that claimant's conduct in removing the lockout/tagout device someone else had installed from the junction box was a "willful violation of the employer's policy." Claimant did not dispute that he received repeated training regarding the employer's lockout/tagout policy and procedures and that it was a terminable offense to remove a lockout/tagout device someone else had applied without authorization. Claimant admitted that he removed the device without speaking to anyone and that he understood that the employer "would [not] be okay" with what he had done without at least a report of some kind which he failed to provide. On this record, claimant's violation of the employer's policy was willful.

As previously explained, OAR 471-030-0038(1)(d)(A) provides that 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 conduct.* (Emphasis added.) In reasoning as he did, the ALJ ignored his own conclusion in Hearing Decision 15-UI-38875, issued on the same day and based on the same hearing record, that claimant's insubordination on January 14 was at least wantonly negligent. Hearing Decision 15-UI-38875 at 3. Accordingly, claimant's January 29 conduct was part of a pattern of other willful or wantonly conduct, was not isolated, and cannot be excused as such under OAR 471-030-0038(3)(b).

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decisions 15-UI-38875 and 15-UI-39002 are set aside, as outlined above.

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

DATE of Service: <u>August 3, 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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