

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0706

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143654). Claimant filed a timely request for hearing. On May 20, 2015, ALJ Murdock conducted a hearing, and on May 26, 2015 issued Hearing Decision 15-UI-39048, concluding claimant's discharge was not for misconduct. On June 10, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Nature Bake/Dave's Killer Bread employed claimant from October 28, 2012 to March 24, 2015.

(2) The employer expected employees to report to work on time. It had an attendance point policy under which employees were prohibited from accruing seven or more "points" in a rolling twelve month period. By February 7, 2015, claimant accrued 6.5 points under the policy, all of which were due to illnesses he had experienced since March 23, 2014.

(3) Shortly before March 9, 2015, the employer scheduled claimant to begin work at a different time than he was used to. Claimant reported to work on time for his new shift on repeated occasions. On March 9, 2015, claimant reported one minute late to work. On March 10, 2015, claimant left for work earlier than he had on March 9, 2015 and arrived on time. On March 11, 2015, left at the same time he had left on March 10, 2015 and arrived up to three minutes late due to a train or heavier-than-expected traffic. On March 12, 2015, claimant left for work at the same time he left on March 10 and March 11, and arrived up to three minutes late, again due to a train or heavier-than-expected traffic.

(4) On March 24, 2015, the employer discovered that claimant had seven or more attendance points because of his March 11 and March 12 tardy arrivals, and discharged him because of his attendance.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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.

The employer had the right to expect claimant to report to work on time, and claimant understood the expectation. On March 12, 2015, claimant reported to work late. Claimant had reported to work late on March 11, 2015, and knew or should have known on March 12 that he would need to leave for work earlier that day in order to arrive at work on time. His March 12, 2015 tardiness was, therefore, wantonly negligent.

However, isolated instances of poor judgment and attendance problems caused by illness are not misconduct. OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined to include a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d).

Although claimant had been tardy or had other attendance issues prior to March 12, 2015, those instances were not willful or wantonly negligent. His March 23, 2014 through February 7, 2015 attendance problems were due to illness, which is not considered misconduct. His March 9, 2015 tardiness was not willful or wantonly negligent because it was the first instance of tardiness while he was adjusting to a new shift, and the record fails to show that he knew or should have known leaving for work at the same time on March 9, 2015 as he had the other days since beginning his new shift would probably result in his tardiness. Likewise, his March 11, 2015 tardiness was not willful or wantonly negligent because he had left for work on March 11, 2015 at the same time he had left and arrived at work on time on March 10, 2015, and the record does not show that he knew or should have known that leaving at the same time on March 10, 2015 would probably result in his tardiness for that shift. For those reasons, we conclude that claimant's March 12, 2015 tardiness was an isolated instance of poor judgment.

Some conduct that exceeds mere poor judgment cannot be excused, regardless if it is isolated, including unlawful conduct, acts tantamount to unlawful conduct, conduct that causes an irreparable breach in the employment relationship or conduct that makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's single wantonly negligent instance of tardiness of less than three minutes was not unlawful or tantamount to unlawful conduct, and, objectively considered, was not the sort of conduct that an employer would reasonably consider to have caused a breach of trust or made a continued relationship with claimant impossible. Claimant's conduct therefore did not exceed mere poor judgment.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-39048 is affirmed.

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

DATE of Service: July 31, 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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