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State of Oregon

Employment Appeals Board

875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0885

Reversed
Disqualification

PROCEDURAL HISTORY: On May 18, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 113257). The employer filed a timely request for hearing. On, June 25, 2015 ALJ Seideman conducted a hearing, and on July 2, 2015 issued Hearing Decision 15-UI-41040, affirming the Department's decision. On July 22, 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) Securitas Security employed claimant as a security officer from July 17, 2001 until March 17, 2015.

(2) Absent exigent circumstances, the employer expected claimant to arrive on time for scheduled work. Claimant was aware of the employer's expectations.

(3) Claimant lived in McMinnville, Oregon, which was approximately 35 miles from the employer's workplace in Aloha, Oregon. Claimant commuted to work using her car. Claimant often reported between 5 and 20 minutes late for her scheduled work shift, which began at 7:00 a.m. Exhibit 1 at 1; Exhibit 5 at 5. On January 30, 2014, an employer representative issued to claimant the employer's evaluation of her performance for the year ending January 27, 2014. Exhibit 5 at 1. On the evaluation, it was indicated that claimant was doing well on all performance criteria except reliability in reporting for work on time, noting that she had been tardy to work on 13 occasions. Exhibit 5 at 6.

(4) On October 14, 2014, claimant reported for scheduled work 15 minutes late, and on October 15 and 16, 2014 was 10 minutes late. Exhibit 1 at 1. On October 22, 2014, the employer issued a warning to claimant for reporting late to work on 12 work days since August 14, 2014. Exhibit 3 at 1-2. On November 3, 2014, claimant reported 10 minutes late for scheduled work, on November 6, 2014, reported for work 10 minutes late, and on November 24, 2014 reported 10 minutes late. Exhibit 1 at 1.

On December 11, 2014, claimant reported 8 minutes late to work, on December 17, 2014 was 20 minutes late, on December 18, 2014 reported to work 13 minutes late, and on December 29, 2014 was 11 minutes late. Exhibit 1 at 1. On December 29, 2014, the employer issued to claimant a final written warning for tardiness in arriving for work, noting that she had reported for work late seven times beginning in November 2014. Exhibit 2 at 1-2. The warning advised claimant that further tardiness in reporting for work could result in disciplinary action up to and including discharge. Exhibit 2 at 3. Claimant's had various excuses for her late arrivals at work, including road construction and traffic congestion during her commute, trucks and buses on the road, heavy traffic and a train stopped at a railroad crossing. Exhibit 2 at 2. Sometime within approximately the time period that the warnings were issued, the employer's human resources manager told claimant that her tardiness was a "constant" problem that "needs to be improved," and asked claimant what steps she was taking to arrive on time for work. Transcript at 8-9. Claimant told the manager that she was "not a punctual person [and] I never had been. I've tried readjusting, going to be[d] earlier. I'm not good with time." Transcript at 9.

(5) On March 11, 2015, claimant reported 8 minutes late for her shift. On March 16, 2015, the employer intended to suspend claimant, effective March 17, 2015, for her tardiness on March 11, 2015, but the employer's human resources representative was unable to contact claimant to inform her of the suspension. Claimant otherwise was scheduled to work on March 17, 2015 beginning at 7:00 a.m., and the employer determined that she arrived at the workplace at 7:07 a.m., which was 7 minutes after the scheduled start of that shift. When claimant arrived at work, her supervisor told her that she was suspended for tardiness, and that she needed to call the human resources manager for a more complete explanation.

(6) On March 17, 2015, the employer discharged claimant for chronic tardiness in reporting for work at the scheduled start of her shift.

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. 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.

In Hearing Decision 15-UI-41040, the ALJ concluded that the employer did not discharge claimant for misconduct. He reasoned that, because the employer intended to suspend claimant before her shift started on March 17, 2015, claimant's failure to arrive on time on March 17, 2015 was not work-related misconduct since she was already suspended and under no obligation to report for work. Hearing Decision at 15-UI-41040 at 3. Alternatively, the ALJ reasoned that, in light of claimant's testimony at hearing that she thought she arrived on time for work on March 17, 2015, the employer did not demonstrate that she was tardy even if she was obliged to actually report for work that day. Hearing Decision 15-UI-41040 at 3. We disagree.

For purposes of this decision, we assume that the ALJ was correct and the employer had suspended claimant prior to her arrival at work on March 17, 2015. That the employer initially decided to suspend claimant for her tardiness on March 11, 2015 did not, however, preclude the employer from reconsidering its disciplinary sanction in light of its belief that claimant arrived late on March 17, 2015 for a shift that, as far as she knew, she was scheduled to work. The employer's initial decision also did not preclude the employer from deciding on March 17, 2015 that the appropriate sanction was to discharge claimant for her tardiness on March 11, 2015. *See* Transcript at 20-21, 22. In light of the testimony of the employer's human resources manager about the final incident for which the employer discharged claimant, the focus of our misconduct analysis is claimant's late arrival for work on March 11, 2015.

Claimant did not dispute that had received many warnings from the employer about her tardiness in arriving for work before she was discharged. With respect to her tardiness in arriving for work on March 11, 2015, claimant did not dispute that she arrived at least a "few minutes late" that day. Transcript at 12, 16, 17. Claimant contended that the "only thing" that might account for her tardiness that day was that she had re-set the clocks in her home to daylight savings time on March 8, 2015, and the one clock she consulted at her home on March 11, 2015, before leaving for work, must have lost a few minutes when it was re-set due to the fact that it did not have a "fresh" battery. Transcript at 17. We are not aware of such a phenomenon commonly, or even rarely, occurring when a clock with old batteries is reset to daylight savings time. Moreover, claimant's explanation was speculative at best, and appears to have been an attempt to account for her tardiness in a way that deflected blame from herself. That the reliability of claimant's explanation is suspect is further suggested by the fact that she did not apparently provide it to the employer to account for her lateness on March 11, 2015. *See* Transcript at 7. On balance given the implausibility of claimant's explanation and its unreliability, it is more likely that not that claimant had no good reason for arriving late to work on March 11, 2015. Given the employer's many warnings and cautions about her tardiness beginning well before March 11, 2015, it was wantonly negligent of claimant not to have, at a minimum, taken some precautions to safeguard against tardiness, which she did not contend that she did. Absent a plausible explanation of an exigent circumstance to account for her tardiness, claimant's failure to arrive on time for work on March 11, 2015 was a wantonly negligent violation of the employer's standards, as was her likely failure to take reasonable steps against such tardiness when, in view of her history of warnings, such tardiness was reasonably foreseeable. On either ground, claimant's behavior in reporting late for work on March 11, 2015 was a wantonly negligent violation of the employer's standards.

Claimant's behavior in reporting late for work on March 11, 2015, and her failure to take reasonable precautions against tardiness were not excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means 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). In this case, in the five months preceding her discharge, claimant arrived after the scheduled start of her shift on at least 10 different days, and received two written warnings about tardiness. While some of these late arrivals might plausibly have been caused by unforeseeable events, it is unlikely that all, or even a majority of them were, particularly since claimant was habitually tardy by less than 10 minutes. As well, in light of claimant's pattern of tardiness and the explanations that she gave for that tardiness, claimant should have been on notice of, foreseen and reasonably taken precautions against circumstances that would cause her to be late to work.

Given the number of times claimant was tardy beginning on October 14, 2014, and what she should reasonably have foreseen, a significant number of claimant's 10 tardies occurring between October 14, 2014 and March 11, 2015 likely were the result of wantonly negligent behavior. Because claimant's wantonly negligent behavior on March 11, 2015 was not isolated or infrequent, her behavior on that day cannot be considered an isolated instance of poor judgment, or excused on that ground.

Nor was claimant's wantonly negligent behavior on March 11, 2015 excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not contend that her tardiness on March 11, 2015 was attributable to a mistake in understanding the employer's standards, or that she sincerely but erroneously believed that the employer would condone her tardiness that day. Since claimant's behavior on March 11, 2015 did not meet the threshold requirements for a good faith error, it is not excused on that ground.

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

DECISION: Hearing Decision 15-UI-41040 is set aside, as outlined above.

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

DATE of Service: <u>August 31, 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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