

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0968

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 17, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 134222). Claimant filed a timely request for hearing. On July 22, 2015, ALJ Seideman conducted a hearing, and on July 24, 2015, issued Hearing Decision 15-UI-41965, affirming the administrative decision. On August 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McCormick & Schmick employed claimant as a server at its Tigard restaurant from September 29, 2012 to May13, 2015.

(2) On December 23, 2014, claimant gave the employer's general manager a letter in which claimant explained that he had a disability and requested accommodation under the Americans with Disability Act (ADA). Claimant explained that his treatment sometimes caused complications, requiring rest and medical attention, and that during periods when he was experiencing these problems, he would "need a bit more time to begin my regular scheduled shifts." Exhibit 11. The general manager told claimant that she had no problem if he needed time off or could not arrive on time for a scheduled shift, but explained that it was essential that he notify the employer in advance if he could not work or if he was going to be tardy. Transcript at 10. Claimant subsequently gave the employer a doctor's note that confirmed his disability and supported his claim for accommodation under the ADA.

(3) On January 5, 2015, claimant failed to report for a scheduled lunch shift and failed to notify the employer that he was unable to work. Claimant gave the general manager a doctor's note that explained his absence was due to illness. The general manager told claimant that she had decided not to schedule him to work lunch shifts because it appeared that the medications he was taking made it difficult for him to work in the morning. Transcript at 9.

(4) On February 8, 2015, claimant failed to report for a shift which was scheduled to begin at 3:30 p.m. At 7 p.m., he sent the employer a text message stating that he was unable to work. Claimant told the employer that he tried to call the restaurant earlier to explain that he could not work that day, but that no one answered his call. Transcript at 7.

(5) On May 9, 2015, claimant failed to report for a shift which was scheduled to begin at 3:30 p.m. At 4:57 p.m. he called the general manager and told her he was unable to work. He told the general manager he was not feeling well, but initially thought he was not too ill to work. He also said that he tried to obtain medical care, but his doctor was unavailable because it was Saturday. He also said that he was unable to call because he left his telephone at home or because his phone was dead. The general manager told claimant that he was suspended, pending an investigation. Claimant then sent the general manager text messages in which he stated that he had been unable to contact the employer because he had not memorized the phone number of the restaurant, and that he had had a horrible day because something happened to a friend.

(6) On May 13, 2015, the general manager met with claimant and told him that she was discharging him for his failure to provide the employer with advance notice that he would be absent for his scheduled shift on May 9.

CONCLUSION AND REASONS: We agree with the ALJ. We conclude that 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 is conscious of his conduct and knew or should have known that his conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer expected that claimant would report on time for his scheduled shifts, and notify the employer in advance if he was unable to work or was going to be late for a shift. Claimant knew about and understood the employer's expectations, both as a matter of common sense and because the general manager emphasized that he needed to provide advance notice if he would be absent or late when they discussed the need to accommodate his disability in December 2014. On May 9, 2015, claimant

violated the employer's expectations by failing to contact the employer prior to the start of his scheduled shift to report he could not work.

At the hearing, claimant asserted that his failure to contact the employer in advance of his shift to explain that he would be absent was due to an illness. Claimant testified that "it didn't occur to me right away to call because I was that sick." Transcript at 17. According to claimant, he was unable to drive; a friend eventually decided he needed to go to "the hospital or, you know, Urgent Care or whatever," but claimant did not take his telephone with him. *Id.* Claimant's explanation for his conduct on May 9 is not credible. Although claimant provided the general manager with many reasons for his failure to contact the employer in advance of his May 9 shift, illness and a trip to obtain medical attention was not one of these reasons. To the contrary, claimant told the manager he was unable to see his doctor because it was a Saturday. In addition, the only evidence claimant provided regarding his illness on May 9 was a July 21, 2015 letter from health care providers at the Multnomah County Health Department which stated: "Please excuse [claimant] for his work absence on 5/9/15, related to an acute illness." Exhibit 10. The letter provides no contemporaneous, reliable evidence that claimant was so ill on May 9 that he was unable to contact the employer to report his absence. Finally, we note that claimant's explanation of his illness was inherently implausible. Claimant testified that by the time he called the general manager at 4:57 p.m. on May 9 to explain why he had not reported for a shift scheduled to begin at 3:30 p.m., "I was coherent and felt a lot better" and was ready to go to work, had the general manager allowed him to do so. Transcript at 18. We find it highly improbable that claimant would experience such a rapid recovery from an illness he claimed was so severe that it left him unable to drive and forced him to enlist the assistance of a friend in seeking immediate medical attention. For the above reasons, claimant's account of his conduct on May 9 was neither credible nor plausible. Absent any reasonable explanation for his behavior, we conclude that claimant's failure to contact the employer in advance of his shift to report he would be absent on May 9, 2015 constituted, at a minimum, a wantonly negligent violation of the employer's expectations.

We next consider whether claimant's conduct can be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). 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 behavior. OAR 471-030-0038(1)(d)(A). Prior to the May 9 incident, claimant failed to report for a February 8, 2015 shift that was scheduled to begin at 3:30 p.m.; he sent the employer a text message at 7 p.m., stating that he was unable to work. Claimant explained that he repeatedly tried to call the employer before his shift was scheduled to begin, but that no one answered the telephone. Claimant's explanation for his conduct on February 8 is not credible. We agree with the general manager: claimant did not explain why, if he was unable reach anyone at the restaurant in advance of his shift, he could not have sent the employer a text as he did three and one-half hours after his shift was scheduled to begin. Transcript at 24. Because claimant failed to offer any reasonable explanation for his failure to contact the employer on February 8, we conclude his conduct on that date was a wantonly negligent violation of the employer's standards. Claimant's conduct on May 9, 2015 was therefore not a single instance of wantonly negligent behavior and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct on May 9, 2015 cannot be excused as a good faith error under OAR 471-030-0038(3)(b). There is no evidence on the record that demonstrates that claimant sincerely believed the employer would excuse his failure to contact the employer in advance of a scheduled shift to report he would be absent. To the contrary, the record shows that claimant understood, as a result of his

December 2014 conversation with the general manager, that he was expected to contact the employer in advance if he was going to be tardy for a shift or was unable to work.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-41965 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 17, 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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