

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1264

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131150). Claimant filed a timely request for hearing. On October 12, 2015, ALJ Murdock conducted a hearing, and on October 14, 2015 issued Hearing Decision 15-UI-45875, affirming the Department's decision. On October 24, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and she failed to show that factors or circumstances beyond her reasonable control prevented her from offering that new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Wal-Mart Associates, Inc. employed claimant from March 27, 2007 until August 22, 2015, last as a dry grocery associate.

(2) The employer expected employees to limit their rest breaks to fifteen minutes. The employer also expected employees to return from rest breaks within fifteen minutes after they left the work floor and to consider the time they spent in personal activities off the work floor to count against the time allocated for their breaks. Claimant understood the employer's expectations.

(3) On March 15, 2015, claimant was gone from the work floor for seventeen minutes on one of her rest breaks. Claimant was gone for two minutes longer than the time allocated for her rest break because she was cleaning, making coffee and doing miscellaneous things in the break room that she considered necessary to the proper functioning of the break room. As a result, the employer issued a written warning to claimant for violating its break policy. When claimant was given the warning, the employer explained its break policy to claimant.

(4) On August 9, 2015, claimant was gone from the work floor on one of her rest breaks for twenty-eight minutes. Claimant was gone for thirteen minutes longer than the time allocated for her rest break because she was again performing activities that she thought were needed in the break room. As a result, the employer issued a second written warning to claimant for violating its break policy and again explained that policy to claimant. Claimant told the employer representatives who gave her the warning that she did not think she exceeded the fifteen minutes of personal rest time set aside for her break because she sat at the break room table for fifteen minutes, and then, for the remaining thirteen minutes she was gone from the work floor, she had been performing activities in the break room that benefited all associates. The representatives told claimant that she should discuss those reasons with one of the employer's managers under the "open door" policy if she thought the warning was not justified. Audio at ~21:45. The manager claimant met with under the open door policy listened to claimant's justification for exceeding her allowed break time on August 9, 2015, did not retract or correct the warning and told claimant "there was nothing he could do as far as the break time [violation]." Audio at ~23:02.

(5) On August 21, 2015, claimant was gone from the work floor on one of her rest breaks for thirty-one minutes. After claimant left the work floor, she made a personal purchase then went to the break room. While in the break room claimant rested for some period of time and then performed miscellaneous tasks she thought were needed to keep the break room in proper order.

(6) On August 22, 2015, the employer discharged claimant for exceeding the time allowed for her rest break on August 21, 2015.

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).

Claimant's principal justification for exceeding the fifteen minutes allowed for her rest break on August 21, 2015, was she only on an "official break" for fifteen minutes, when she was resting in the break room, and during the remaining sixteen minutes she was gone from the work floor, she was making a personal purchase in the store and performing tasks that she thought were needed in the break room. Audio at ~15:40, ~19:28, ~20:10. Given that claimant had received two warnings for excessive break times before August 21, 2015, and had already unsuccessfully brought up during at least one of them that she had been performing activities she thought were needed in the break room, she should reasonably have been aware that that the employer did not consider her break room maintenance activities to be work time. Audio at ~15:13, ~16:24. When the manager told claimant that he could do nothing for her under the "open door" policy about the warning that she was issued on August 9, 2015, the only reasonable interpretation of his position was that he had rejected claimant's contention that performing tasks in the break room should function to extend the time she was allowed to be away from

the work floor on a break. Claimant's further contention that the time she spent making the personal purchase in the store on August 21, 2015 should not count as part of her fifteen minutes of "official break time" is not persuasive. Claimant conceded at hearing that making the personal purchase was not part of her work for the employer, and, given this understanding, it was both unreasonable and implausible that she actually believed that activities she engaged for her own personal benefit during what was otherwise her break time were, somehow, exempt from being considered part of her break. Audio at ~20:10, ~21:28. By exceeding the fifteen minutes allowed for her rest break on August 21, 2015 as a result of performing tasks she reasonably knew the employer did not consider exempt from the limited time it permitted for breaks and taking the additional time to make a personal purchase, claimant violated the employer's standards with at least wanton negligence.

Although claimant's behavior on August 21, 2015 was wantonly negligent, it may be excused from constituting misconduct if it was 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 on August 21, 2015 must have been, among other things, 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). By virtue of the written warning that claimant received on March 15, 2015, claimant was on notice that the employer did not consider her activities in the break room as extending the time she was allowed for breaks, and did not consider her activities part of her work duties. That claimant exceeded the allowable time for her break on August 9, 2015 for the same reason, and that claimant did so without seeking clarification from the employer that tasks she performed in the break room would not count against her break time was at least a wantonly negligent violation of the employer's standards. That claimant engaged in the same behavior, with the same justification on August 21, 2015, demonstrated that her behavior on August 21, 2015 was not a single or infrequent occurrence. As a result, claimant's behavior on August 21, 2015 is not excused as an isolated instance of poor judgment.

Nor was claimant's behavior on August 21, 2015 excused as a good faith error. A good faith error generally occurs when a claimant's behavior was based on misunderstanding the employer's standards. Here, given that the employer had already rejected claimant's excuse for extending her break time on August 9, 2015, it is not plausible that she believed the employer would allow her to do so for the same reason on August 21, 2015. Equally implausible was claimant's contention that she sincerely believed that the employer would not count as part of her fifteen minute break the time she spent in making a personal purchase on August 21, 2015 after she left the work floor. Claimant's behavior on August 21, 2015 was not attributable to a good faith error and cannot be excused on that ground.

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

DECISION: Hearing Decision 15-UI-45875 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: November 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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