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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1267

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 104250). Claimant filed a timely request for hearing. On October 16, 2015, ALJ Holmes-Swanson conducted a hearing. Both parties participated in the hearing. On October 21, 2015, ALJ Holmes-Swanson issued Hearing Decision 15-UI-46285, concluding the employer discharged claimant, but not for misconduct. On October 26, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written argument to EAB. EAB considered the entire hearing record and both parties' arguments, to the extent they were based on the record. The employer asked in its argument if EAB considered documents it provided to the Department. EAB did not consider those documents because they were not part of the hearing record. The Notice of Hearing served on the parties on October 2, 2015 stated that the documents enclosed with the notice were the only documents that would be considered by the ALJ at hearing unless a party provided copies of other documents to all the parties and to the ALJ at the Office of Administrative Hearing (OAH) prior to the date of the hearing. Neither party offered additional documents at hearing.

FINDINGS OF FACT: (1) Access Technologies Inc. employed claimant from October 10, 2006 to August 31, 2015 as an assistant technology specialist.

(2) Claimant's duties included recording the activities he completed for the employer in the employer's database and preparing a report for each assessment and training he conducted for clients. The employer expected claimant to complete these duties by the employer's deadlines. Claimant understood the employer's expectations.

(3) The employer approved claimant's request for a week-long vacation to begin on Monday, August 31, 2015. On August 25, 2015, the employer gave claimant a list of database entries to complete and a report to finalize. Claimant understood the employer expected him to complete these duties before he

began his vacation on August 31, 2015. The employer's president relied on claimant to meet his deadlines so that she could meet the employer's obligations in a timely manner.

(4) On Friday, August 28, 2015, claimant experienced computer problems with the employer's database, but believed he had finished the list of database entries before he left work that day. Claimant had completed a draft of the report he was expected to finalize, and sent it to the employer's president. The president sent claimant an email asking him to make some revisions. Claimant did not complete the revisions before he left work on August 28, 2015. Instead, he sent the president an email saying he would complete the revisions when he "had a clear head." Transcript at 20. Claimant took a work computer home with him to use to complete the report. The president did not respond to claimant's email or otherwise tell claimant he was no longer expected to complete the revisions before he began his vacation.

(5) Claimant did not work over the weekend and had doctor appointments scheduled for August 31, 2015. Claimant did not request permission to miss work on August 31 even though he had not finished the revisions to the report.

(6) By the morning of August 31, 2015, the employer's president had not received a revised report from claimant, and believed claimant had also failed to complete six database entries. Claimant did not report to work. The employer's office manager called claimant that morning and asked him if he was coming to work to complete the unfinished work before he began his vacation. Claimant responded that he would not report to work because he had doctor appointments that day, but would revise the report via email between his appointments. He told the manager he completed the database entries before he left work on August 28.

(7) After his first doctor's appointment on August 31, claimant tried to access his work email account so he could revise the report, but was unable to do so because the employer had blocked his access to the account. He then listened to a voicemail message left by the employer's president during his first doctor's appointment stating the employer was discharging him for failing to complete his duties before he began his vacation.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but 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 complete his job duties by their deadlines. Claimant understood that expectation. A finding of wanton negligence requires evidence the actor consciously

disregarded a known expectation, and may not be inferred from results alone. The record does not establish that claimant consciously failed to complete the database entries. Although the employer testified that claimant failed to complete six entries, the record does not show claimant was conscious of that failure, having believed he had completed all the entries on the list provided to him by the employer. However, by failing to complete the revisions to the report before he began his vacation on August 31, 2015, claimant demonstrated conscious indifference to both the employer's expectation that he meet his assigned deadline and the consequences of his behavior. His conduct in failing to complete the report on time was wantonly negligent.

However, isolated instances of poor judgment 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 conduct, and must not exceed mere poor judgment. OAR 471-030-0038(1)(d). The record contains no evidence to show claimant had engaged in other acts of willful or wantonly negligent conduct before the final incident. Therefore, claimant's conduct in the final incident cannot be considered a repeated act or part of a pattern of other willful or wantonly negligent behavior, making claimant's exercise of poor judgment in the final incident an isolated instance.

Isolated instances exceed mere poor judgment when the conduct is unlawful or tantamount to an unlawful act, causes an irreparable breach of trust in the employment relationship, or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The record fails to show that claimant's failure to report to the workplace constituted an unlawful act or was tantamount to an unlawful act. Nor did the employer establish that claimant's single exercise of poor judgment was either likely to reoccur or was so egregious that the employer could no longer trust claimant to perform his duties in accordance with the employer's expectations. The record therefore fails to show that claimant's conduct exceeded mere poor judgment.

In a discharge case, the employer bears the burden to establish misconduct under ORS 657.176(2)(a) by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because claimant engaged in a single wantonly negligent act by failing to complete a report before he began his vacation on August 31, and that act did not exceed mere poor judgment, the employer failed to satisfy its evidentiary burden. The employer discharged claimant for an isolated instance of poor judgment and not misconduct. Claimant is not subject to disqualification from unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-46285 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>November 19, 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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