

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1327

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On August 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133856). Claimant filed a timely request for hearing. On October 14, 2015, ALJ Holmes-Swanson conducted a hearing, and on October 20, 2015 issued Hearing Decision 15-UI-46199, reversing the Department's decision. On November 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Platt's Oak Hill Dairy, LLC employed claimant from December 15, 1999 until June 29, 2015, last as a member of the irrigation team.

(2) The employer expected claimant to report for work as scheduled, to follow the employer's instructions when he was scheduled on short notice to work a weekend, and to inform the employer if the employee was not able to report for work as scheduled or as instructed. Claimant understood the employer's expectations as a matter of common sense.

(3) On Friday, May 22, 2015, the employer's owner and its manager told claimant they did not intend to irrigate the fields on Saturday, May 23, 2015. Because this decision meant that claimant's workload would be light on that day, he asked the manager to have May 23, 2015 off. The manager, who had the authority to give permission for days off, agreed to claimant's request. Later, the employer reversed this decision and decided to irrigate the fields on May 23, 2015. When claimant did not report for work on May 23, 2015, the employer thought he was absent without permission and that he had failed to call in to report his absence.

(4) Other than on May 23, 2015, the employer did not consider claimant to have violated its attendance policy during the 2015 growing season until June 29, 2015.

(5) On Saturday, June 28, 2015, the employer's owner told claimant that he needed to report for work on Sunday, June 29, 2015 because the fields needed to be watered. Without notifying the employer, claimant did not report for work on June 29, 2014.

(6) On June 29, 2015, the employer discharged claimant for failing to report for work on June 29, 2015.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment 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).

The employer's witness contended that claimant was instructed to report for work on June 29, 2015 and claimant contended that he never received such an instruction. Transcript at 9, 17, 19. For purposes of this decision, we assume that the testimony of the employer's witness was accurate. Accepting the employer's testimony, claimant's failure to report for work on June 29, 2015 or to notify the employer that he was going to be absent after the employer had instructed him to report for work on that day was a willful or wantonly negligent violation of the employer's standards.

Even if claimant's behavior on June 29, 2015 would otherwise have been misconduct, it is excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is willful or wantonly negligent behavior that 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). To excuse behavior as an isolated instance of poor judgment, it must also not have been, among other things, the type of behavior that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

In this case, the employer's witnesses identified only claimant's failure to report for work on May 23, 2015 as a prior act of willful or wantonly negligent behavior during the 2015 growing season. Transcript at 11, 12. Claimant contended that he did not violate the employer's standards on May 23, 2015 because his manager had given him permission on May 22, 2015 to take that day off. Transcript at 17. While the employer's witness contended that it was unlikely that the manager claimant identified as having given him permission to take May 23, 2015 had actually done so, since that manager was not involved in irrigation and did not work weekends, the witness conceded that the identified manager had been delegated the authority to allow employees like claimant to take time off from work. Transcript at 20. The testimony of the parties was in stark conflict, and there is no reason in the record to doubt the credibility of either. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty

in a discharge case must be resolved against the employer since it is the party who carries the burden of persuasion. On the facts in this record, the employer did not meet its burden to show that claimant's supervisor did not give him permission to take May 23, 2015 off from work, or that claimant's failure to report for work or to call in on that day was a willful or wantonly negligent violation of the employer's expectations. As a result, claimant's willful or wantonly negligent behavior on June 29, 2015 was a single occurrence in violation of the employer's standards. That behavior meets the first standard to be excused from constituting misconduct as an isolated instance of poor judgment.

Claimant's behavior on June 29, 2015 was also not the sort of behavior that causes an irreparable breach of trust in the employment relationship. At hearing, claimant explained that the owner initially told him to report for work on June 29, 2015, but then told him that members of the irrigation team had every fourth weekend off. Applying this guideline, claimant was due for to be off on the weekend of June 28 and 29, 2015 and was understandably confused about whether he should or should not report for work on June 29, 2015. As well, claimant regularly attended work when he was scheduled, and his absence on June 29, 2015 was unusual. Weighing claimant's single day of absence against the backdrop of his established attendance record, that absence was a minor event in the employment relationship and unlikely to cause a fundamental rupture of it. A reasonable employer would not have concluded, based on a single absence, that it could not trust claimant to attend work in the future or that this absence caused an irreparable breach of trust in the employment relationship. Claimant's willful or wantonly negligent behavior on June 29, 2015 meets the second criterion to be excused from constituting misconduct as an isolated instance of poor judgment. Because it meets all applicable criteria, claimant's behavior on June 29, 2015, even if it would otherwise have been misconduct, is excused from being disqualifying misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-46199 is affirmed. *Decisión de la Audiencia 15-UI-46199 queda confirmada.*

Susan Rossiter and J. S. Cromwell

DATE of Service: December 15, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.