

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0062

Reversed
Disqualification

PROCEDURAL HISTORY: On November 25, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 120947). Claimant filed a timely request for hearing. On December 30, 2015, ALJ Seideman conducted a hearing, and on January 5, 2016 issued Hearing Decision 16-UI-50490, reversing the Department's decision. On January 19, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pacific Northwest Petroleum employed claimant as a manager at a fuel station from January 23, 2012 until October 15, 2015.

(2) The employer expected claimant to work Mondays through Fridays from 8:00 a.m. until 5:00 p.m. Claimant understood the employer's expectations.

(3) Sometime before October 9, 2015, the mother of claimant's husband became very ill. The mother lived in Lebanon, Oregon and claimant and her husband lived in Sisters, Oregon, which were 87 miles in driving distance from each other and required approximately two hours of driving time.¹ Claimant's husband spoke with his mother's doctor about the type of care the mother required. Claimant's husband began travelling regularly to Lebanon to check in on his mother and to provide care for her. At some point, claimant's husband decided to move to Lebanon to care for his mother.

(4) Sometime before October 9, 2015, the employer's chief financial officer (CFO) received reports from employees that claimant was often not on the work premises for lengthy periods during her shifts.

¹ <http://drivingcalculator.com/US/distance-between-Sisters-OR-and-Lebanon-OR>. EAB takes notice of these generally known facts which were obtained from an authoritative source. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

When the CFO called claimant at the station, she often was not there. If the CFO called the manager of the employer's hotel, which was adjacent to the station and from which the manager was able to view claimant's whereabouts at the station, the hotel manager often stated that she was not able to see claimant at work on the station premises during her shifts. The CFO and the employer's owners became concerned that claimant was not working her regular shift, but was "coming and going [from work] as she pleased." Audio at ~22:05.

(5) On October 9, 2015, the employer's CFO and its two owners drove to claimant's station to discuss with her the employer's standards for her attendance at work and its expectation that she would be on the premises of the station from 8:00 a.m. through 5:00 p.m. on Mondays through Fridays. They had not informed claimant that they were coming. After they arrived, claimant started to cry. Claimant told them her husband's mother was ill and she had her husband had been taking turns driving to Lebanon to care for the mother during work hours. Claimant stated that she was unable to continue trying to work while caring for her husband's mother. The CFO stated the employer was willing to try to accommodate claimant and her husband's needs during the illness of the mother, but claimant refused to consider any accommodations. Claimant told the CFO and the two owners that she was resigning from work, and her last day would be October 23, 2015. Claimant decided to leave work because she wanted to accompany her husband when he moved to Lebanon to care for his mother.

(6) Monday, October 12, 2015 through Friday, October 16, 2015 was the first week of claimant's two-week notice period. From Monday through Thursday of that week, claimant generally ended her work days between noon and 12:30 p.m., rather than at 5:00 p.m. Claimant told other employees she was leaving early to pack for her upcoming move to Lebanon. The hotel manager saw claimant putting boxes in her car and driving away from work during most of the days she worked in this week at around noon or 12:30 p.m. and not returning. During this week, some employees from the station sent emails to the CFO telling her that claimant was leaving work early.

(7) On Thursday, October 15, 2015, the employer discharged claimant for not working the complete shifts for which she was scheduled on October 12, 2015 through October 15, 2015.

CONCLUSIONS AND REASONS: the employer discharged claimant for misconduct.

In Hearing Decision 16-UI-50490, despite the parties' agreement that the employer discharged claimant on October 15, 2015, the ALJ concluded that the work separation was a voluntary leaving, and that claimant showed good cause for leaving work when she did since it was necessary to preserve the "marital relationship." Hearing Decision 16-UI-50490 at 2. With respect to his treatment of the work separation the ALJ stated, without citation to any relevant authority, that, although the employer's discharge of claimant on October 15, 2015 intervened to terminate the employment relationship before claimant's planned voluntary leaving date of October 23, 2015, "it is appropriate to move the quit date up to October 15, 2015 and treat it [the work separation] as a voluntary quit rather than a discharge." Hearing Decision 16-UI-50490 at 3. We disagree with the ALJ about the nature of the work separation and disagree that claimant was not disqualified from receiving benefits.

ORS 657.176(8) sets forth the very limited circumstance when a discharge that occurs after an individual has notified the employer that the individual plans to leave work may be disregarded and the separation adjudicated as if it were a voluntary leaving. To ignore the discharge, the discharge must,

among other things, have occurred within 15 days of the planned voluntary leaving and must not have been for misconduct. ORS 657.176(8)(b). This statutory authority is exclusive. Despite the ALJ's assertion, there is no authority that allowed him to "move the quit date up to October 15, 2014," the date of the discharge, or to treat the separation as a voluntary leaving, even if it would otherwise have been for good cause if the discharge was for misconduct. We turn to the issue of whether the employer discharged claimant on October 15, 2015 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant did not dispute she understood the employer expected her to be at the station between 8:00 a.m. and 5:00 p.m. on Mondays through Fridays. Claimant did not contend she was not at work between these designation times on October 12, 2015 through October 15, 2015 because she was ill or because she had been given permission to be away from work. Claimant's first position was that, on those days, she was at the station from 8:00 a.m. through 5:00 p.m. "to the best of my abilities," which she later modified to the absolute position that she was at the station between the designated hours. Audio at ~30:59, ~32:36, ~33:10. While the ALJ disregarded the testimony of the employer's two witnesses because he contended that it was "mostly hearsay," that was not so. One of the employer's witnesses testified she had first-hand knowledge of claimant's absences during work hours in the final week of employment, as well as claimant's statements to her that she was going home early to pack and her observations of claimant leaving the workplace early with boxes. Audio at ~26:30, ~28:34, ~33:25. The emails the second witness received from other employees during claimant's final week corroborated the first witness's testimony about claimant's statements to the hotel manager that she was going home early during her final week to pack up her house. Audio at ~32:45. In light of the consistency of the evidence supplied by the employer's two witnesses and the sincerity with which they testified, the preponderance of the evidence shows that claimant was not working complete work shifts between October 12, 2015 and October 15, 2015. Absent evidence that claimant's absences from work were due to exigent circumstances or the employer gave her permission for them, which claimant did not contend, claimant's failure to work complete days between October 12, 2015 and October 15, 2015 was a wantonly negligent violation of the employer's standards.

Claimant's wantonly negligent violation of the employer's standards during her final week of employment may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is an "isolated instance of poor judgment" if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0039(1)(d)(A). Here, claimant's wantonly negligent behavior occurred over four work days. It does not qualify to be excused as an isolated instance of poor judgment since it was repeated occurrence that formed a pattern of wantonly negligent behavior in violation of the employer's standards.

Nor was claimant's wantonly negligent behavior during her final work week excused as a good faith error under OAR 471-030-0038(3)(b). Here, claimant did not contend that she failed to work complete work days during her final week because she sincerely misunderstood the employer's attendance standards, or she mistakenly believed the employer would permit such behavior. There is insufficient evidence to support that claimant's behavior in not complying with the employer's attendance expectations may be excused as a good faith error.

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

DECISION: Hearing Decision 16-UI-50490 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 8, 2016

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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