

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0080

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164656). Claimant filed a timely request for hearing. On December 30, 2015, ALJ Triana conducted a hearing, and on December 31, 2015 issued Hearing Decision 15-UI-50374, affirming the Department's decision. On January 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she sought to present facts that she did not offer at the hearing. Claimant did not explain why she was unable to present this new information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant presented. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Bank of the Cascades employed claimant from November 1, 2002 until September 17, 2015, last as a builder finance loan officer.

(2) Although claimant was a salaried, exempt employee who was not required to record the hours she worked, the employer expected claimant to notify her supervisor if she was not going to work on a work day or if she was going to work less than eight hours. Claimant understood the employer's expectations.

(3) Sometime before August 2015, the employer provided equipment to claimant that allowed her to access the employer's electronic systems remotely and enabled her to work from home. The employer did so when health problems prevented claimant from physically reporting to the workplace. The employer never gave claimant permission to work remotely for any other reason or on a regular basis.

(4) On August 17, 2015 through August 22, 2015, claimant took an approved vacation. Claimant was expected to return to work on Monday, August 24, 2015. Sometime shortly before August 24, 2015,

claimant learned that her uncle had died. The deceased uncle had been the caregiver for his elderly mother, who was claimant's grandmother. As a result of her uncle's death, claimant was called upon to provide care and to arrange future care for her grandmother.

(5) On August 24, 2015, claimant reported for work. At work, claimant left a voicemail message for her supervisor informing him that, because of her uncle's death, she needed to take at least three days off from work, and might need the entire work week off. Claimant also sent an email to her supervisor and to the employer's human resources department that summarized the voicemail message. Claimant's supervisor called claimant in response to her voicemail message or email, but was unable to reach her directly. The supervisor left claimant a voicemail in which the supervisor discussed work matters that needed to be addressed during claimant's absence. On August 25, 2015, a representative from the employer's human resources department claimant an email informing her that the time she needed to take off might be eligible for a protected leave under the Family Medical Leave Act (FMLA) and asking her to call the representative for more information. Claimant did not call the representative. Claimant did not report to the workplace on August 25, 2015 through August 28, 2015 and did not perform any work remotely.

(6) On August 31, 2015, claimant did not report to the workplace for work. Claimant did not report to the workplace from Monday, August 31, 2015 through Friday, September 4, 2015 or on Monday, September 7, 2015. Claimant did not inform her supervisor that she would not be able to report to work on these days, and did not seek permission for her absences on these work days or seek permission for failing to work less than eight hours on each of these work days. During this time, claimant performed some "work activities" remotely for the employer, but did not work eight hours each day. Transcript at 34. Claimant did not inform or seek the permission of her supervisor to work remotely. Transcript at 33.

(7) On September 8, 2015, claimant sent an email to her supervisor from an offsite location stating she was still out of the office. Claimant also sent two other work-related emails that day, one to a coworker and one to the employer's records department. Claimant did not work for eight hours on that day, and did not have her supervisor's permission to work a less than an eight hour day. On September 9, 2015, claimant did not report to the workplace for work, did not notify her supervisor that she was going to be absent from the workplace, did not work an eight hour day and did not seek permission from her supervisor to work less than an eight hour day.

(8) Sometime before September 10, 2015, the human resources representative called and left a voicemail message for claimant since claimant had not called in response to her August 25, 2015 email about FMLA. On Thursday, September 10, 2015, the representative from the employer's human resources department sent claimant another email about the employer's FMLA leave policy. This email stated "since you have missed more [work] time [since August 25, 2015], I want to make sure you know that your time off is not protected leave [under FMLA]." Transcript at 23. In the email, the representative asked claimant to contact her, either by telephone or email, to discuss her situation. On September 10, 2015, claimant did not report to the workplace, did not work an eight hour day and did not seek or have her supervisor's permission to work remotely or to work less than eight hour day. Between September 11, 2015 and September 14, 2015, the human resources representative called claimant and left a voicemail message asking that claimant call her to discuss her absences and FMLA. Claimant did not return the representative's call. Between August 31, 2015 and September 13, 2015, claimant's

supervisor called her at least twice to determine her status and why she was not reporting to the workplace. When the supervisor was unable to reach claimant directly, he left voicemail messages for her. Claimant did not return his messages.

(9) Sometime before September 14, 2015, the employer prepared a letter informing claimant she was discharged for not reporting to the workplace, not reporting absences and for not responding to inquiries from her supervisor and the human resources representative. Before the letter was sent, claimant appeared in the workplace on September 14, 2015. That day, claimant sent an email to her supervisor requesting permission to telecommute to work in the future from her home. Claimant also sent an email to the human resources representative asking about the documents she needed to submit to obtain a FMLA leave. The human resources representative responded by email asking claimant to call her directly to discuss her situation. Claimant never called the representative. On September 14, 2015, claimant worked less than an eight our day. Claimant did not have her supervisor's permission to work less that an eight hour day.

(10) On September 15, 2015, claimant reported to the workplace and worked less than an eight hour day. She did not have her supervisor's permission to work less than an eight hour day.

(11) On September 16, 2015, claimant worked for approximately one hour in the office and a few more hours remotely. Claimant did not have her supervisor's permission to work less than an eight hour day.

(12) On September 17, 2015, claimant did not report to the workplace for work, although she contacted a loan assistant remotely on that day. Also on September 17, 2015, the employer sent claimant the letter that it had begun preparing sometime before September 14, 2015. The letter informed claimant she was discharged for multiple absences from the workplace without notifying the employer or seeking approval for the time off, stating that claimant's final absences were on September 16, 2015 and September 17, 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. 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).

In her written argument, claimant contended that because the employer did not mail her the letter it completed on September 14, 2015 and which purported to discharge her for absences up to that time, the employer must have discharged her solely for her alleged absences on September 15, 16 and 17, 2015. Claimant's Written Argument at 1. However, the employer's witness testified that claimant's unexpected appearance in the workplace on September 14, 2015 caused the employer to delay any final decision about claimant's status, and did not state that the employer intended to excuse all absences prior to September 14, 2015. Transcript at 11. The witness also testified that the employer would, most likely, have discharged claimant for absences prior to September 14, 2015 even if she had started

reporting to work as expected beginning on September 14, 2015. Transcript at 15. There is no basis in the evidence for concluding that by the delayed sending of the letter from September 14, 2015 until September 17, 2015, the employer waived disciplining or discharging claimant for any absences prior to September 14, 2015. Likely, the events that precipitated claimant's discharge were her physical absences from the workplace between August 31, 2015 and September 17, 2015, her failure to notify the employer of them and if she was working remotely, her failure to notify the employer and her failure to work eight hour days.

At hearing, claimant agreed she understood the employer required her to report her absences from the workplace, but contended that she was not truly "absent" on the days the employer alleged since she was performing "work activities" remotely. Transcript at 33 *et seq.* However, claimant testified that the employer had previously allowed her to work remotely due to health issues (that apparently had been resolved by August 2015) and there was no indication that claimant had been given permission to work remotely for any other reason, or was allowed to telecommute as she chose. Transcript at 54. In addition, that claimant asked her supervisor for permission to telecommute on September 14, 2015 strongly implies she knew that she needed to physically report for work at the workplace, or explain why she was absent until or unless she had permission to regularly telecommute. As matter of common sense, it is not plausible that claimant reasonably thought she was exempted from notifying the employer of her absences from the workplace simply because she possessed the equipment that allowed her telecommute. As well, accepting claimant's testimony as accurate that she did perform "work activities" remotely on many of the days that the employer contended she was physically absent from the workplace, she readily admitted that she was not engaged in a full eight hours of work activity on those days, and by her own estimate "worked" around five hours or less. Transcript at 35, 41-44. While the employer might not, as a matter of routine, have rigorously monitored claimant's work schedule to ensure she was working eight hour days or forty hours per work week, it is implausible that she thought because she was a salaried, exempt employee she was allowed to decide, in her discretion and without permission, that she could work less than full-time and continue to receive her full salary. Transcript at 42. As a matter of common sense, claimant reasonably understood that the employer expected her to work on average eight hours per day, and if personal exigencies prevented her from doing so, to notify her supervisor and to request personal time off. By not informing her supervisor or other manager that she was not going to report for work in the workplace on and after August 31, 2015, and by not seeking permission to work less than eight hours on work days after August 31, 2015, claimant violated the employer's standards with at least wanton negligence.

Claimant's wantonly negligent behavior from August 31 through September 17, 2015 may be 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" means, among other things, 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). Here, claimant's wanton negligence in violation of the employer's standards occurred on eighteen separate days between August 31 and September 17, 2015 and comprised eighteen distinct acts. Claimant's wantonly negligent behavior may not be excused as an isolated act or poor judgment because it was not a single or infrequent occurrence.

Nor was claimant's wantonly negligent behavior excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). In light of the email the human resources representative sent to claimant on September 10, 2015 and the September 14, 2015 email that claimant

sent to her supervisor seeking approval to telecommute, it is implausible that claimant sincerely, but erroneously believed that the employer would allow her to telecommute whenever she wanted and without prior permission. It is also implausible that claimant mistakenly believed that the employer approved of her working less than eight hour work days whenever she chose to do so. Claimant's wantonly negligent behavior was not the result of a good faith error.

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

DECISION: Hearing Decision 15-UI-50374 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: February 26, 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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