

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0204

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 100145). The employer filed a timely request for hearing. On January 28, 2016, ALJ McGorin conducted a hearing, and on February 4, 2016 issued Hearing Decision 16-UI-52313, reversing the Department's decision. On February 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Graphic Packaging International, Inc. employed claimant from June 23, 2014 until July 30, 2015, last as a relief press helper. In this position, claimant was a union member.

(2) The employer expected employees to verify their final work schedules for the upcoming week after 2:00 each Friday and to report for work as set forth in the final schedule. Section 7.01 of the collective bargaining agreement (CBA) between the employer and the employees' union stated, "Employees who are not in the [employer's] facility after 2:00 p.m. on Friday are responsible for checking their work assignment for the upcoming week after 2:00 p.m. on Friday." Audio at ~13:59. If an employee was not able to report for work as scheduled, the employer expected the employee to call in to report his or her absence no later than one hour after the scheduled start of the employee's shift. Claimant was aware of the employer's expectations.

(3) On Tuesday, May 26, 2015, claimant did not report for work at 6:30 a.m. as set out in the employer's final work schedule and did not call to report his absence. Claimant had neglected to check the employer's final schedule for that week after 2:00 p.m. on Friday, May 22, 2015 and did not know he was scheduled to work on May 26, 2015. On June 3, 2015, claimant's supervisor met with him and issued a warning. During the meeting, claimant promised he would be "diligent" in checking the employer's final work schedule on Fridays after 2:00 p.m. to confirm the dates and times he was scheduled to work in the upcoming week. Audio at ~16:38, ~33:26.

(4) On Thursday, July 23, 2015, the employer issued a preliminary work schedule for the upcoming week. The preliminary schedule showed the next day claimant worked was July 27, 2015, beginning at 2:30 p.m. On Friday, July 24, 2015 at 12:30 p.m., claimant called the employer to check his work schedule and was given the information on the preliminary work scheduled. Between 12:30 p.m. and 2:00 p.m. on July 24, 2015, the employer issued its final work schedule. The final work scheduled showed that claimant worked next on July 26, 2015, beginning at 10:30 p.m. Claimant did not verify his final work schedule after 2:00 p.m. on Friday, July 24, 2015.

(5) On July 26, 2015, claimant did not report for work at 10:30 p.m., as was shown on the employer's final work schedule. At 10:50 p.m. that night, an employer representative called claimant, told him he had missed the start of his shift and asked if he was going to report for work. Claimant said he was not aware he was scheduled to work at 10:30 p.m. and was not going to report for work. The representative told claimant to call the employer's attendance line to report his absence.

(6) On July 30, 2015, the employer discharged claimant, in part, for failing to report for work on July 26, 2015 at 10:30 p.m.

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. 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 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 testified at hearing that he was aware that the CBA required him to check the employer's final work schedule on Fridays after 2:00 p.m., and he had this awareness before the employer issued the warning to him for missing a shift on May 26, 2015. Audio at ~42:09. However, claimant contended that when his supervisor met with him on June 3, 2015 to discuss his failure to report for work on May 26, 2015, he raised with the supervisor some confusion he had about whether he was expected to verify his work schedule after 2:00 p.m. on Fridays as the CBA provided or after 2:30 p.m. as the employer's attendance policy required, and the supervisor told him "on Fridays," which he interpreted to mean any time on Fridays. Audio at ~19:34, ~20:34, ~21:00, ~29:26, ~29:57, ~30:51, ~31:08, ~31:32, ~31:46. However, claimant conceded the supervisor never told him he was allowed to ignore the requirements of the CBA or the employer's policy documents outlining the time after which he needed to verify his schedule on Fridays. Audio at ~42:24, ~42:49, ~43:53. The employer's witness, claimant's supervisor, disputed he ever told claimant he was allowed to call in at any time on Fridays to learn his final work schedule for the upcoming week, and in light of the undisputed fact that the employer's final work schedule was not issued until 2:00 p.m. on Fridays and the plain language of the CBA and the employer's policy, it is unlikely the supervisor told claimant anything that could be reasonably

construed as such.. Audio at ~10:22, ~14:42, ~39:18. The preponderance of the evidence shows that claimant was aware or reasonably should have been aware that he needed to verify his work schedule after the employer's final schedule was issued, on Fridays sometime after 2:00 p.m. at the earliest. Given that claimant called in at 12:30 p.m. on Friday, July 24, 2015, before the employer's final schedule was issued, the fact that claimant might have been confused about whether 2:00 p.m. or 2:30 p.m. was the time after which he should have called to check the final schedule is not relevant since he called well before either time. In neglecting to check the schedule after 2:00 p.m., claimant, with indifference to the consequences of his actions, consciously engaged in conduct he knew or should have known would probably result in his failure to report for work as scheduled. His conduct therefore was wantonly negligent.

Claimant's wantonly negligent behavior on July 26, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To excuse behavior as an "isolated instance of poor judgment," it 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). Here, on May 26, 2015, only two months before the wantonly negligent behavior at issue, the employer warned claimant after he missed a shift due to his failure to verify his final work schedule on a Friday. Claimant testified that, at that time, he was aware he needed to verify his final schedule on Fridays after 2:00 p.m. and he did not do so. Audio at ~16:16, ~42:09. Claimant's failure to report for work as scheduled on May 26, 2015 therefore was wantonly negligent. Claimant's exercise of poor judgment in July 2015 therefore was a repeated act, and may not be excused from constituting misconduct as an isolated instance of poor judgment.

Claimant's wantonly negligent behavior on July 26, 2015 is also not excused as a good faith error under OAR 471-030-0038(3)(b). The excuse of good faith error generally requires a claimant to have undertaken behavior that violated the employer's standards in the mistaken belief the employer would allow it. For the reason discussed above it is unlikely that claimant sincerely believed the employer would condone him verifying his final work schedule on Friday, July 24, 2015 at 12:30 p.m., which was well in advance of when the employer's final schedule was issued and well in advance of the 2:00 p.m. or 2:30 p.m. times set out in the CBA and the employer's attendance policy. On this record, the excuse of good faith error is inapplicable to claimant's behavior.

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

DECISION: Hearing Decision 16-UI-52313 is affirmed.

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

DATE of Service: March 11, 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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