

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0214

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 135313). The employer filed a timely request for hearing. On February 2, 2016, ALJ M. Davis conducted a hearing, and on February 9, 2016 issued Hearing Decision 16-UI-52578, concluding claimant's discharge was for misconduct. On February 24, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, the outcome of this matter would remain the same because claimant's arguments were duplicative of, or consistent with, the evidence in the hearing record.

FINDINGS OF FACT: (1) Sherm's Thunderbird Market, Inc. employed claimant as a cake decorator from January 22, 2003 to November 20, 2015.

(2) Claimant had a history of working unauthorized overtime, particularly on Saturdays, in order to meet workload demands. On August 17, 2015, the employer placed claimant on a last-chance agreement. The agreement stated, in pertinent part, that claimant was required to "[c]ome in when scheduled and go home when scheduled." Exhibit 1. Claimant understood that from that point forward she was not allowed to work overtime without authorization.

(3) In August 2015 and September 2015, claimant asked permission every time she wanted to work overtime. Beginning October 2015, claimant resumed working overtime without permission. Claimant stopped asking for permission even though she knew doing so was not acceptable to the employer.

(4) On November 20, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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 had the right to expect claimant to work her scheduled shift, and not to work overtime without authorization. Claimant understood the employer's expectation. Claimant admitted that she worked overtime without authorization. Audio recording at ~16:05. She also agreed at the hearing that was "sure" she "did not have approval" to work overtime in October and "did not" think it would be acceptable to the employer if she worked outside her scheduled shift without authorization. Audio recording at ~16:31, 22:05. She violated the employer's expectations on six distinct occasions in October and November 2015.

Claimant argued that she worked overtime because it was not possible to complete her work on Saturdays without working overtime, and that she "slipped into" her "old habits" of working overtime in order to complete her work. *Id.* Claimant's conduct was not inadvertent or accidental, however. She intentionally and repeatedly worked overtime without authorization. Each time she decided to do so, she would have had to make a separate decision or judgment to report to work well before her scheduled shift began or continue working after it ended.

Claimant also argued that she chose not to seek permission in October and November because she "just figured they knew" she needed overtime and it was "becoming a broken record" to ask for authorization. Audio recording at ~18:40, 19:10. Claimant's argument does not make sense because the employer "knew" of her overtime use just as well in August and September as it did in October and November, and if the employer no longer wanted claimant to ask permission to work overtime despite the last-chance agreement, presumably the employer would have told her to stop asking. Claimant chose to repeatedly and willfully violate the employer's expectations.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant knew she was working overtime when she did it, she knew she lacked authorization, and she did not believe the employer would condone her doing so. She was not laboring under a sincere but mistaken belief about her conduct.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). Claimant formed separate poor judgments in this case, once each time she decided to work overtime without first obtaining permission. On this record, claimant exercised poor judgment at least six times in October and November 2015 when she willfully violated the employer's prohibition against working unauthorized overtime. Her conduct was not isolated, so it cannot be excused as an isolated instance of poor judgment.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-52578 is affirmed.

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

DATE of Service: March 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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