EO: 990
BYE: 201701

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0410

Reversed
Disqualification

PROCEDURAL HISTORY: On February 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153704). The employer filed a timely request for hearing. On March 16, 2016, ALJ Menegat conducted a hearing, and on March 22, 2016 issued Hearing Decision 16-UI-55537, affirming the Department's decision. On April 11, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant as a produce clerk from October 23, 2014 until January 3, 2016.

(2) The employer expected claimant to call in and speak personally with the person-in-charge before his scheduled shift began if he was going to be absent. Exhibit 1 at 1. Claimant understood the employer's expectation.

(3) On September 26, 2015, the employer issued a written associate warning notice to claimant about his failure to personally notify a person-in-charge of absences on September 23 and 24, 2015. Exhibit 1 at 4. That warning advised claimant that he needed to notify a person in charge of an absence before the scheduled start of each shift he missed. *Id.*

(4) Claimant was scheduled to work on December 26, 27, 28, 29 and 30, 2015 and on January 1, 2016. On Saturday, December 26, 2015, before his shift began, claimant notified his supervisor, the produce manager, by text message that he would be absent from work that day due to an automobile collision. Audio at ~21:22. In that message, claimant stated he would be out for a few days. Audio at ~23:26. Claimant did not give a date when he expected to be able to report for work.

(5) On Sunday, December 27, 2015, claimant did not report for work and did not notify a person-in-charge before his shift began that he was going to be absent. Employer representatives called claimant that day about his absences and when they were unable to reach him left at least one message. In the message or messages, the representative(s) informed claimant that if his absences were the result of the collision, he needed to obtain a doctor's note or to arrange for a leave of absence to excuse any failures to report for work. Claimant acknowledged the message(s) by sending text message(s) or email(s) to the produce manager or the food manager after the end of his scheduled shift. Audio at ~26:00.

(6) On Monday, December 28, 2015, claimant did not report for work and did not notify a person-in-charge before his scheduled shift began. After his shift was over, claimant sent an email to the employer's human resources manager inquiring about how he could arrange for a leave of absence to cover the time he was away from work as a result of the automobile collision. The human resources manager replied by email and set out the steps claimant needed to follow to have a leave authorized, and noted claimant was required to obtain a medical authorization or physician's note excusing him from work. The manager also told claimant that, until the leave was approved or he provided a medical excuse to the employer, he was required to notify a person in charge in advance of each scheduled shift he was going to miss. Audio at ~13:19. Claimant replied by stating he would obtain the necessary medical authorization or excuse "ASAP" and would call in to report his absences until he provided it to the employer. Audio at ~13:56.

(7) Claimant did not report for work on December 29 and 30, 2015 or on January 1, 2016. Claimant did not personally notify a person-in-charge of his absences on those days. Claimant did not provide a medical excuse to the employer before he missed any of those shifts.

(8) On January 2, 2016, claimant visited the workplace, where he met with the food manager and the employer's human resources representative. Claimant brought in two medical notes covering his absences through January 1, 2016. During that meeting, claimant stated he did not provide medical documentation earlier because he had not obtained it, and he did not notify a person-in-charge of in advance of those absences because "he was out of it." Audio at ~16:30, *see also* Audio at ~25:10, ~26:17. The food manager suspended claimant on that day because he had not called in to report his absences from shifts and had not obtained a medical excuse before missing work.

(9) On January 3, 2016, the employer discharged claimant for not personally reporting his absences before his scheduled shifts began to a person-in-charge on December 27 through December 30, 2015 and on January 1, 2016 and had not provided a medical note in advance of those shifts, which would have removed the requirement of personally calling in.

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 prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-55537, the ALJ concluded the employer did not demonstrate it discharged claimant for misconduct. The ALJ reasoned that, although the employer had notified claimant he was to call in and personally speak with a person-in-charge before each day he was absent, claimant "attempted to keep employer informed." Hearing Decision 16-UI-55537 at 3. Based on these alleged attempts, the ALJ concluded that even if claimant had violated the employer's policy, those violations did not rise to the level of a wantonly negligent disregard of the employer's standards. *Id.* We disagree.

Claimant contended he notified the produce manager by text message on December 27, 2015 that he was going to be absent for some period of time, and at one point stated that he wrote in the text message that he was going to miss work for a week (from December 25 through January 2, 2016). However, when he was questioned about the specifics of the text message, claimant referred only to telling the manager he was going to be out for "some time." Audio at ~21:34, ~22:38, 21:12. Whatever claimant wrote to the manager about the length of his anticipated absence, he did not dispute that he exchanged emails with the human resources manager one day later, on December 28, 2015, and that manager clearly told him he needed to make personal contact with a person-in-charge before any absences until he had provided a medical authorization or a physician's note to the employer. Audio at ~13:19. Claimant did not contend he did not understand what this manager told him on December 28, 2015 about how and until when the employer wanted to receive personal notices of his absences after that day. As well, claimant testified that he failed to personally contact the employer about his absences and failed to obtain the necessary medical documents because he was "pretty banged up" or "pretty messed up." Audio at ~23:50, ~25:10, ~26:17. However, claimant's explanation is significantly undercut by his ability to exchange emails with the supervisor, which strongly suggests he was not so sick or injured that he was unable to call in each day until he provided a medical excuse to the employer or until a medical leave was approved. On this record, the employer demonstrated claimant likely knew after December 28, 2015 that he needed to personally call in each day he was absent until he provided a medical excuse or authorization for absences to the employer. Based on this knowledge and the lack of a persuasive reason that claimant was reasonably unable to call in after December 28, 2015, claimant's failure to do so on December 29, 2015 through December 30, 2015 and on January 1, 2016 was at least a wantonly negligent violation of the employer's standards, as stated to him by the human resources manager on December 28, 2015.

Claimant's wantonly negligent failure to personally call in after December 28, 2015 was not excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To qualify as an isolated instance of poor judgment, claimant's wantonly negligent behavior 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. Here, claimant violated the employer's expectations with wanton negligence on at least three separate days, December 29 and 30, 2015 and January 1, 2016, after he was explicitly notified the employer wanted him to call in expected absences pre-shift until he provided the employer with medical documentation to support it. Since claimant's wantonly negligent behavior in violation of the employer's standards was not isolated, it may not be excused from constituting misconduct under OAR 471-030-0038(3)(b).

Nor were claimant's wantonly negligent violations excusable as a good faith error under OAR 471-030-0038(3)(b). Good faith errors generally involve behavior that violates the employer's standards under circumstances where claimant sincerely believed the employer would excuse the conduct underlying the violation of the employer's standards. After the December 28, 2015 email exchange, it is implausible that claimant believed the employer was exempting him from the requirement that he call in each day to

report his absences until he had obtained a medical excuse or authorization. For this reason, claimant's behavior falls outside that which is excusable as a good faith error.

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

DECISION: Hearing Decision 16-UI-55537 is set aside, as outlined above.

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

DATE of Service: May 12, 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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