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BYE: 201652

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-0483

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 114638). The employer filed a timely request for hearing. On April 6, 2016, ALJ Yee conducted a hearing at which claimant did not appear, and on April 13, 2016 issued Hearing Decision 16-UI-57191, concluding the employer discharged claimant for misconduct. On April 26, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although claimant did not appear at the hearing, he submitted a written argument to EAB presenting facts that were not offered into evidence during the hearing because he did not participate in the hearing. EAB construes claimant's argument as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006,) which allows EAB to do so if factors or circumstances beyond claimant's reasonable prevented him from offering those facts into evidence during the hearing. Claimant did not explain why he did not participate in the hearing, or make a showing that he was unable to participate and present evidence during the hearing due to matters beyond his reasonable control. Absent such a showing, EAB did not consider the new information that claimant sought to offer. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Nature Bake/Dave's Killer Bread employed claimant as a machine operator from December 22, 2013 until December 29, 2015.

(2) The employer expected claimant to refrain from accumulating excessive absences that were not excused by a recognized leave. The employer also expected claimant to remain in reasonable contact with it, and to respond when it tried to communicate with him. Claimant understood the employer's expectations.

(3) Sometime before June 9, 2015, claimant developed sciatica. As a result of the sciatica, claimant's physician certified his condition, and the employer approved a leave under the federal Family Medical

Leave Act (FMLA) and the Oregon Family Leave Act (OFLA) beginning on June 9, 2015 and running through approximately September 1, 2015. As of September 1, 2015, claimant had exhausted all leave time that was available to him under FMLA and OFLA. After exhausting his leave, claimant returned to work.

(4) In November 2015, claimant began to miss work again due to his sciatica. November 21, 2015 was the last day claimant physically reported for work. Thereafter, claimant he called in to work to report his absences from work and he submitted several doctor's notes to account for the absences.

(5) By early December 2015, claimant was in danger of being terminated for excessive absences under the employer's attendance policy since his absences were not taken under an approved leave. On December 7, 2015, claimant met with the employer's human resources generalist at the workplace. The generalist told claimant of the status of his absences, told him his absences needed to be excused under a leave in order to protect his position and gave him paperwork for his treating physician to complete authorizing workplace accommodations for him under the Americans With Disabilities Act (ADA), including the accommodation of a further leave period beyond that available under FMLA and OFLA. The generalist told claimant he needed to return the forms completed by a physician by December 22, 2015. Thereafter, claimant did not communicate with the employer for two weeks.

(6) On December 22, 2015, claimant left a voicemail message for the human resources generalist stating that his physician had not provided the completed ADA accommodation paperwork to him. On December 23, 2015, the generalist called the number claimant left him a message since she was unable to reach him directly. The generalist's message asked claimant to call her to discuss extending the December 22nd deadline for returning the ADA paperwork. Thereafter, claimant did not contact the human resources generalist or any other employer representatives in response to the generalist's message.

(7) After December 22, 2015, the employer did not attempt to reach claimant's physician because it believed the physician was unable to discuss claimant's condition in light of the requirements of the Health Insurance Portability and Accountability Act (HIPAA) making patient information confidential without an authorization to release that information. On December 29, 2015, the human resources generalist again tried to reach claimant to discuss whether he required an extension of the time to return the ADA paperwork to the employer. The generalist was again unable to reach claimant directly and left another voicemail message for him.

(8) On December 29, 2015, when claimant did not communicate with the employer, the employer discharged him for failure to communicate with it after December 22, 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).

The employer made good faith efforts to enable claimant to continue working for it after he exhausted the leave time available under FMLA and OFLA by trying to arrange to protect his position under ADA despite his continued absences. There is no reason to doubt the testimony of the employer's witnesses that, although it gave claimant a deadline of December 22, 2015 for submitting the physician-completed ADA paperwork, it was willing to extend the deadline if claimant communicated such a request in response to the human resources generalist's telephone messages to him of December 23 and 29, 2015. Based on the unrebutted testimony of the human resources generalist, the messages that she left for claimant reasonably alerted him that he needed to communicate with her or the employer as soon as possible. There is insufficient evidence in the record to show that exigent circumstances likely prevented claimant from telephoning the generalist or other employer representatives in response to those messages. By failing to communicate with the human resources generalist or other employer representatives after December 22, 2015, claimant violated the employer's standards as stated in the generalist's phone message with at least wanton negligence.

Claimant's wantonly negligent failure to communicate with the employer after December 22, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior may be excused as an isolated act 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 471-030-0038(1)(d)(A). Here, on December 7, 2015, the human resources generalist put claimant on notice that he was going to be terminated under the employer's attendance policy if a further leave was not arranged to protect his position despite his continued absences. By not submitted the physician's paperwork to excuse his absence under ADA when FMLA and OFLA were no longer available to him, not communicating with the employer after December 22, 2015, and continuing to accrue unprotected absences, claimant repeatedly violated the employer's expectations. Because claimant's wantonly negligent behavior in violation of the employer's expectation was not a single or infrequent occurrence, it is not excusable as an isolated act of poor judgment.

Nor was claimant's wanton negligence after December 22, 2015 excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Given the clarity of the human resources generalist's phone message to him on December 23, 2015, it is not plausible claimant sincerely, but mistakenly believed, he was not required to communicate with her or the employer after December 22, 2015. Claimant's wantonly negligent behavior was not the result of a good faith error.

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

DECISION: Hearing Decision 16-UI-57191 is affirmed.

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

DATE of Service: <u>June 2, 2016</u>

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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