

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0595

Reversed
Disqualification

PROCEDURAL HISTORY: On April 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 92721). The employer filed a timely request for hearing. On May 11, 2016, ALJ Dorr conducted a hearing, and on May 12, 2016 issued Hearing Decision 16-UI-59417, affirming the Department's decision. On May 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Western Construction Systems, LLC employed claimant as a field technician repairing concrete from June 1, 2015 until February 16, 2016.

(2) The employer expected claimant to remain in communication with it and to notify the employer before his shift started if he was going to be absent from or late to work. Claimant understood the employer's expectation.

(3) In August or September 2015, the employer warned claimant for failing to notify it when he was going to be absent from or late to work. When it discussed the warning with claimant, the employer told him he needed to communicate in advance of his shift if he was "not [going to] show up to work." Audio at ~21:02. The warning resulted from claimant's failure to call in on several occasions to alert the employer in advance when he was going to be absent from or late to work.

(4) On Thursday, February 11, 2016, claimant did not report for work and did not call the employer to notify it of his absence. The employer called claimant after the 6:00 a.m. start of his shift. Claimant told the employer he was going to be absent from work because he had been up sick "all night." Audio at ~18:03. Claimant told the employer he had not called to notify it before the start of his shift because he was "not feeling well." Audio at ~31:23. Claimant told the employer he was going to see a doctor that day and would notify the employer later about his ability to work. Claimant did not call the employer later that day. The employer called claimant several times throughout that day, but claimant did not return those calls.

(5) On Friday, February 12, 2016, when claimant did not arrive at the job site at his usual time of shortly before 6:00 a.m., the employer called him at 5:50 or 5:55 a.m. Claimant told the employer he was still feeling unwell and would not be reporting for work.

(6) On Sunday, February 14, 2016, claimant sent a text message to the employer stating he still felt unwell and was going to miss work on Monday, February 15, 2016. At that time, the employer decided it would discharge claimant for failing to report for work or to call the employer to report his absences on February 11 and 12, 2016. The employer wanted to inform claimant of his discharge in person.

(7) Claimant did not report for work on February 15 and 16, 2016. On the evening of February 16, 2016, the employer telephoned claimant at home and told him he was discharged for his absences on February 11 and 12, 2016 and his failing to clean his tools.

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 Hearing Decision 16-UI-59417, the ALJ concluded that the employer failed to demonstrate claimant missed work on February 11 or 12, 2016 in light of claimant's testimony that he was at work on both of those days. The ALJ reasoned that the employer offered no reason that persuaded him that the conflicting evidence from the parties should be resolved in the employer's favor, and also reasoned that the employer did not provide a plausible reason for why it did not discharge claimant immediately after he missed work on February 12, 2016 if his absences were the true reason for the discharge. Hearing Decision 16-UI-59417 at 3. We disagree and conclude the employer met its burden to show that it discharged claimant for misconduct.

At the outset, claimant generally contended he reported for work on February 11 and 12, 2016, while the employer's witnesses contended he did not and did not call to notify it of his absences. Audio at ~12:56, ~28:58, ~33:38, ~40:38. Both employer witnesses testified consistently about claimant's absences on those two days, and their testimony was further supported by the written statement that the employer submitted as Exhibit 1. Audio at ~12:56; ~25:38; Exhibit 1 at 1. When claimant questioned one of the employer's witnesses about whether he might have been at work on either February 11 or 12, 2016, the witness independently verified from the "calendar" that claimant was not at work and stated that the payroll department had confirmed that claimant was absent. Audio at ~24:25. We give greater weight to the credible evidence presented by the employer's witnesses than to claimant's testimony. Moreover, while the employer did not discharge claimant until February 16, 2016, its explanation, that it waited because it wanted to inform claimant in person when he was next at the job site, is plausible. Certain individuals believe it is courteous, respectful and appropriate to deliver important information, such as a discharge from employment, personally. That belief is not so unusual or contrary to human experience that it is a sufficient ground to discount the testimony of both employer witnesses. Viewing this record

as a whole, the preponderance of the evidence shows that claimant did not report for work on February 11 or 12, 2016.

Claimant did not dispute that he understood he was expected to notify the employer as soon as possible in advance of his shift if he was going to be absent. Since it was claimant's position that he was at work on February 11 and 12, 2016, he did not raise any exigent circumstances that prevented him from calling the employer in advance of those shifts. As well, claimant was able to speak with the employer by phone on both days when the employer was finally able to reach him, and it did not appear, if he was feeling unwell, that it reasonably prevented him from using the phone to speak or send text messages to the employer. By failing to contact the employer to report his absences in advance of his shifts on February 11 and 12, 2016, by waiting for the employer to contact him about his status and whereabouts on both of those days, and by not communicating with the employer in response to its phone calls to him about his doctor's visit on February 12, 2016 and his work status, claimant violated the employer's standards with at least wanton negligence.

While claimant's behavior on February 11 and 12, 2016 may have been wantonly negligent, it 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" is, 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, claimant's behavior constituted three separate occurrences on two different days: the wantonly negligent failure call the employer to report his absence in advance of his shift on February 11, 2016; the wantonly negligent failure to call the employer to report his absence on February 12, 2016 and notifying it of his absence only in response to its call to him; and the wantonly negligent failure to respond to the employer's calls after his doctor's visit on February 12, 2016. Because claimant's wantonly negligent violations of the employer's standards were several and formed a pattern, none of them may be excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant's behavior excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b). Here, claimant did not assert or present evidence showing that he sincerely believed the employer would permit him to miss work without notifying it of his absences or would allow him to fail to respond to its inquiries on February 12, 2016. There is insufficient evidence in this record to conclude claimant's behavior on February 11 and 12, 2016 arose from a good faith error.

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

DECISION: Hearing Decision 16-UI-59417 is set aside, as outlined above.

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

DATE of Service: June 24, 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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