

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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0640

Reversed
Disqualification

PROCEDURAL HISTORY: On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 84710). Claimant filed a timely request for hearing. On May 3, 2016, ALJ Wiperman conducted a hearing, and on May 10, 2016, issued Hearing Decision 16-UI-59261, concluding that the employer discharged claimant, but not for misconduct. On May 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

Both claimant and the employer submitted written arguments, which we considered to the extent they were relevant and based on evidence in the record. We did not consider information contained in claimant's written argument that was not part of the hearing record, however, because claimant failed to show that factors or circumstances beyond his reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Fred Meyer Stores employed claimant from October 27, 1981 until March 22, 2016, last as a bakery manager.

(2) On October 29, 2015, claimant was scheduled to begin work at 7 a.m. She chose to come in 5 a.m. because she believed a manager had authorized her to do so. On October 30, 2015, claimant met three managers to discuss why she had changed her work schedule on the preceding day. Claimant was told that she had not been given permission to change her work schedule, and that her employment would be terminated if she ever again changed her work hours without obtaining a manager's approval to do so. Exhibit 1 at 2.

(3) The employer scheduled claimant to work from 7 a.m. to 5 p.m. on March 16, 2016. On March 15, claimant approached the employer's store director and fresh manager in the director's office and asked if she could change her schedule so that she could begin work at 6 a.m. on March 16. The store director

told claimant that he would not change schedules, and left his office. Claimant remained in the office and argued with the fresh manager why she wanted to start work at 6 a.m. on March 16. The fresh manager told claimant that her schedule would not be changed because a 7 a.m. to 5 p.m. shift was the ideal schedule for the bakery manager. Exhibit 1 at 4; Audio recording at 18:40.

(4) On March 16, 2016, claimant began work at 6 a.m. Claimant also changed the printed and posted bakery schedules maintained by the employer by crossing out her previously scheduled work hours of 7 a.m. to 5 p.m. on March 16, March 20, March 21, and March 22 and writing in work hours of 6 a.m. to 4 p.m. on those days. When the employer discovered that claimant had begun work at 6 a.m. on March 16, it suspended her pending an investigation into her conduct.

(5) On March 22, 2016, the employer discharged claimant for changing her work schedule without prior authorization.

CONCLUSION AND REASONS: We disagree with the Department, and not the ALJ, and conclude 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. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

In Hearing Decision 16-UI-59261, the ALJ found that claimant mistakenly believed that her manager had authorized her to begin work at 6 a.m. on March 16, 2016. The ALJ concluded that claimant's belief was "not unreasonable" based on a conversation with her manager, and therefore constituted a good faith error and not misconduct. Hearing Decision 16-UI-59261 at 3. We disagree.

Claimant and the employer presented entirely different accounts of the March 15 conversation at which claimant was supposedly authorized to alter her work schedule by beginning work at 6 a.m. on March 16. Claimant asserted that when she approached the store director in his office about changing her work hours, she was told that work schedules would "not just" be changed; a comment she took to mean that work schedules would be changed for a good reason. Audio recording at 25:52; Exhibit 2 at 2. Claimant contended that after making this remark, the director left the office; claimant then talked with the fresh manager, who approved claimant's request to begin work at 6 a.m. on March 16. Audio recording 29:05. 8:07. The fresh manager, however, testified that she never gave claimant permission to alter her work schedule during their March 15 discussion.

In addition to her testimony, the fresh manager provided a contemporaneous written account of her March 15 encounter with claimant. Exhibit 1 at 3. The store director's description of the March 15 discussion with claimant, which he emailed to the employer's human resources representative on March 16, was entirely consistent with the fresh manager's account. Exhibit 1 at 4. We also find it implausible that the fresh manager would agree to claimant's requested schedule change almost immediately after the store manager told claimant he would not permit it. Claimant's credibility is further undermined by the employer's posted work schedule for March 20 through 22. Claimant asserted that the fresh manager assented to her request for a change in her March 16 work schedule, but provided no evidence, either in her written statement or in her testimony at the hearing, that she ever discussed and obtained permission from a manager to alter her work schedules on March 20 through 22. Claimant's omission of any explanation as to how or why she obtained authorization to alter her March 20 through 22 work hours suggests that she never received such authorization. For these reasons, we find the employer's evidence more credible than that of the claimant, and base our findings on the employer's account of the March 15 meeting. We conclude it more likely than not that on March 15, the store director and fresh manager told claimant that she could not change her work hours on March 16 or any other day. Based on these clear directives from her manager, claimant could not have sincerely believed that the employer would excuse the alteration she made in her work hours on March 16, or permit the changes she made to the posted schedule for March 20 through 22. Claimant knew or should have known that her failure to obey her managers was a willful and wantonly negligent violation of the standards of behavior the employer expected of her.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under the exculpatory provisions of OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. An act that creates an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible also does not constitute an isolated instance of poor judgment. OAR 471-030-0038(1)(d)(D). Claimant exercised poor judgment on more than one occasion: she changed her work hours on March 16, and altered her work hours for March 20 through 22 on the employer's printed and posted schedule. Claimant instances of poor judgment were therefore neither single nor infrequent. In addition, claimant's conduct created an irreparable breach of trust in the employment relationship. As a result of her failure to obey her managers' directive, a reasonable employer could no longer trust that claimant would be able to continue performing her job duties because it could no longer have confidence that she would work scheduled hours.

The employer discharged claimant for misconduct, and she is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-59261 is set aside, as outlined above.

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

DATE of Service: July 1, 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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