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

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0810

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 122622). Claimant filed a timely request for hearing. On June 28, 2016, ALJ Shoemake conducted a hearing, and on July 1, 2016 issued Hearing Decision 16-UI-63015, concluding claimant was discharged but not for misconduct. On July 7, 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) Lane County Human Resources employed claimant as a dispatcher in the Lane County Sheriff's Office from February 5, 2002 until April 29, 2016.

(2) The employer expected that claimant would report for work on time unless her absence or tardiness was excused. The employer also expected that claimant would notify her supervisor if she was going to be absent from work or tardy in arriving to work. Claimant understood the employer's expectations.

(3) Between claimant's hire date and the end of 2014, the employer issued to claimant six warnings for violating the employer's attendance and punctuality standards. Audio at ~ 34:42; Exhibit 1 at 4-5.[1] In approximately July 2015, claimant reported one minute late to work because her commute was delayed by traffic. Since claimant had notified her supervisor in person of her tardy arrival that day, she did not send that supervisor an email to inform her of the tardy arrival. The employer considered claimant's

[1] Although the first page of the last chance agreement states that claimant was late to work eleven times between July 4, 2015 and August 31, 2015, we infer that the starting date was an error and probably should have been July 4, 2005 since the disciplinary warnings issued to claimant begin in 2005 and the employer's witness could only identify one late arrival by claimant in 2015. Exhibit 1 at 4-5; Audio at ~11:56. Also, since the last chance agreement and the employer's witness referred only to six total warnings issued to claimant, we infer the additional five of claimant's late arrivals to work were excused and did not violate the employer's attendance standards. Audio at ~34:47; Exhibit 1 at 4-5.

failure to send an email to the supervisor a violation of the notification standards in the employer's attendance and punctuality policy.

(4) Sometime before February 25, 2016, the employer intended to discharge claimant for her alleged lack of punctuality in arriving to work. The final occurrence on which claimant was tardy prior to February 25, 2016 was in July 2015. However, the employer allowed claimant to enter into a last chance agreement in lieu of discharge. Claimant the employer entered into the last chance agreement on February 25, 2016. It provided that if claimant had an unexcused absence or punctuality violation during the period February 25, 2016 through February 24, 2018, she could be immediately discharged. Exhibit 1 at 5. It also provided that the employer had the "sole discretion" to determine whether an absence or tardy was excused. *Id.*

(5) On March 26, 2016, claimant voluntarily signed up to work overtime on April 6, 2016 from 7:00 p.m. until 11:00 p.m. On April 6, 2016, claimant did not report for work until 7:10 p.m. That day, the employer placed claimant on administrative leave pending investigation of that tardiness and whether it was excused.

(6) On April 29, 2016, the employer discharged claimant because the employer had determined her tardy arrival to work on April 6, 2016 was not excused and claimant had violated the February 25, 2016 last chance agreement.

CONCLUSIONS AND REASONS: The employer discharged claimant but not 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, claimant presented an explanation for why she was late in reporting to work on April 6, 2016 which, if accepted, might render her tardiness not the result of misconduct. *See* Hearing Decision 16-UI-63015 at 3. Even assuming claimant's failure to report to work on time was at least a wantonly negligent violation of the employer's standards, however, claimant's behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b).

A claimant's wantonly negligent behavior is considered excusable as an "isolated instance 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). To be excusable, the behavior at issue must also not have been the type that causes an irreparable breach of trust in the employment relationship or makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant's conduct on April 6th, if wantonly negligent, was isolated. Although claimant had six prior absences or tardies that the employer did not excuse, those incidents occurred

over approximately fourteen years of employment, and none had occurred since sometime in July 2015, more than eight months prior to the final incident. Moreover, claimant's conduct prior to April 6th was, likely, not wantonly negligent. From the unrebutted explanation that claimant provided about the July 2015 tardiness, it appears, most likely, that claimant was late in arriving to work due to the exigent circumstance of traffic delays. Since there was no evidence that under the circumstances in which that incident occurred claimant should have foreseen that she would be delayed and taken reasonable precautions to avoid it, the employer did not show that claimant's late arrival to work that day was the result of her willful or wantonly negligent behavior. The employer presented no evidence about claimant's five unexcused absences or tardies before April 6, that would establish that they were willful or wantonly negligent. Without supporting evidence, the fact that the employer concluded those absences or tardies were not excused under its attendance and punctuality policy is not sufficient establish that they were the result of wanton negligence. Since the employer did not meet its burden to show that claimant's prior absences or tardies were caused by her willful or wantonly negligent behavior in violation of the employer's standards, the employer also did not show that claimant's behavior on April 6, 2016 was part of a repeated act or pattern of other willful or wantonly negligent conduct, or otherwise should be considered more than an isolated instance of wantonly negligent behavior.

As well, under the circumstances, an employer would not have objectively concluded that claimant's tardiness on April 6, 2016 caused an irreparable breach of trust or made a continued employment relationship impossible. Prior to April 6, 2016, the last time claimant was absent or tardy that might have been the result of willful or wantonly negligent behavior was sometime in 2014 - at least a year and a half before the incident that resulted in her discharge. On these facts, regardless of what the employer in this case decided, all reasonable employers would not have objectively determined that claimant's late arrival on April 6, 2016, the first after the February 25, 2016 last chance agreement was in effect, signified that it could not trust claimant in the future to arrive on time for work or otherwise not to comply with its standards. Thus, claimant's behavior on April 6, 2016 did not exceed mere poor judgment, and is excused from constituting misconduct as an isolated instance of poor judgment.

In its written argument, the employer cited several prior EAB decisions as supporting the proposition that claimant's tardiness on April 6, 2016 combined with her prior violations of the employer's attendance policy should result in her disqualification from benefits. However, each of the cited cases was based on an explicit determination that the conduct for which claimant was disqualified could not be excused as an isolated instance of poor judgment because one or more of the requirements to excuse it was not met. *See Appeals Board Decision,* 06-AB-1491, September 26, 2006 (attendance violation for which claimant was discharged was not excusable an isolated instance of poor judgment because it was not single or infrequent); *Appeals Board Decision,* 2015-EAB-0125, March 24, 2015 (claimant's prior tardiness inferred to be wantonly negligent and therefore conduct for which she was discharged was not excused as an isolated instance of poor judgment); *Appeals Board Decision,* 08-AB-1486, August 19, 2008 (claimant's tardy arrivals to work not excused as an isolated instance of poor judgment since they were willful violations of the employer's expectations). These cases are not instructive or dispositive in this case because, unlike in those other cases, we have concluded claimant's behavior on April 6, 2016 met all the requirements to be excused from being misconduct as an isolated instance of poor judgment.

Although the employer discharged claimant, it did not do so for unexcused misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-63015 is affirmed.

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

DATE of Service: August 19, 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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