

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0880

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 74710). The employer filed a timely request for hearing. On June 23, 2016, ALJ Monroe conducted a hearing, and on July 18, 2016 issued Hearing Decision 16-UI-63959, concluding the employer discharged claimant for misconduct. On July 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the written arguments of claimant and the employer, and the entire hearing record.

FINDINGS OF FACT: (1) Nature Bake/Dave's Killer Bread employed claimant from June 19, 2011 to April 27, 2016 as a lead and trainer in the employer's mix department.

(2) Claimant was permitted to take a 10-minute break for every four hours worked, and a 30-minute lunch break for every shift of six hours or more. Exhibit 1 at 3. The employer expected claimant to clock out at the beginning of each break and return to his work area and clock in on time after breaks. Exhibit 1 at 16. The employer expected claimant to refrain from engaging in conduct that was unbecoming of a lead worker. Claimant understood the employer's expectations.

(3) Claimant knew the clock in the smoke break area was not synchronized with the time on the time clock and that employees had been considered late reporting back to work from breaks for that reason. Claimant had a cellular telephone.

(4) On October 18, 2015, the production manager warned claimant he was prohibited from taking extended or extra breaks. Exhibit 1 at 8.

(5) On December 6, 2015, claimant took a 44 minute lunch break without the employer's permission and without clocking out. After returning, claimant clocked out, returned to work, clocked back in 30 minutes later, and returned to work again. Because claimant had prior attendance violations, the

production manager gave claimant a final written warning for violating the employer's break policy that day. Exhibit 1 at 8.

(6) On April 10, 2016, claimant took an extra break without the employer's permission. Claimant's supervisor found claimant in the smoke break room smoking a cigarette during that break. Claimant's supervisor warned claimant that he was to refrain from violating the employer's break policy and that his conduct was unbecoming of a lead worker.

(7) On April 17, 2016, claimant's assistant supervisor reviewed recent employee time clock records and found that claimant returned to work from his lunch break five minutes late on April 15, 2016. Claimant's supervisor reviewed claimant's time cards and found that claimant returned from his break one minute late on April 16, and one to three minutes late on 16 other occasions from February 27 to April 13, 2016. Exhibit 1 at 2-3.

(8) On April 27, 2016, the employer discharged claimant for violating its break policy.

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

The employer had a right to expect claimant to limit his breaks and lunch periods to the time permitted under the employer's break policy. Claimant was five minutes late returning to work after a break on April 15, and after reviewing claimant's time clock records, claimant's supervisor found claimant had repeatedly been late returning from his breaks since February 27. Claimant asserted at hearing that he was late returning to work because the clock in the smoke break area where he took his breaks was not synchronized with the time clock, and he did not know how long he had been on his break. Transcript at 25-27, 34. However, claimant also testified that he knew the time shown on the break area clock differed from the time clock, and that failing to return from his breaks on time as measured by the time clock could lead to termination. Transcript at 32. Claimant did not provide a plausible reason for why he did not observe when his break started and how long he had been on his break to abide by the break time limits in the employer's policy and clock in and return to work on time. Nor did claimant allege that he was late because he was unable to access the time clock on time. By failing to take precautions to return to work within the break time limits, claimant consciously engaged in conduct he knew or

should have known violated the employer's expectations, and was indifferent to the consequences of his actions. Claimant's conduct therefore was, at best, wantonly negligent.

Claimant's failure to clock in on time after breaks cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered "isolated," it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). The record shows claimant had engaged in a pattern of taking extra minutes for his breaks, having done so 17 times during the last eight weeks of his employment. Moreover, on December 6, 2015 took an unauthorized extended break, and April 10, 2016, took an unauthorized extra break, during his shift. On both occasions, claimant willfully violated the employer's break policy and expectations. Thus, claimant engaged in a repeated act and pattern of willful or wantonly negligent violations of the employer's break policy. Because claimant's conduct on April 15 and 16, 2016 was not isolated, it cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Although claimant may not have believed he would be discharged, without prior warning, for returning from breaks a few one to three minutes late, the record does not show he sincerely believed, or had a factual basis for believing, that the employer condoned such behavior. Claimant's conduct therefore was not the result of an error in his understanding of the employer's break policy or expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-63959 is affirmed.

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

DATE of Service: August 23, 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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