

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1224

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 121220). The employer filed a timely request for hearing. On October 3, 2016, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for October 17, 2016 at 1:30 p.m. to claimant at her address of record. On October 17, 2016, ALJ Triana conducted a hearing at which claimant did not appear, and on October 21, 2016 issued Hearing Decision 16-UI-69716, reversing the Department's decision and concluding the employer discharged claimant for misconduct. On October 29, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a request to EAB asking that a new hearing be scheduled so she could present evidence on her own behalf since she did not appear at the hearing. EAB construes claimant's request as one to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows that it was prevented by factor or circumstances beyond its reasonable control from presenting the information at the hearing. Claimant's primary reason for missing the hearing was that she did not know about it, from which we infer that claimant is arguing that she did not receive the Notice of Hearing mailed to her on October 3, 2016. However, documents sent through the U.S. Postal Service are, generally, presumed to have been received by the addressee, unless there is evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012). Claimant offered no circumstantial evidence corroborating the implied assertion that the notice of the October 17, 2016 hearing, although mailed to claimant at her address of record in North Plains, Oregon, was not delivered to her. Claimant's bare apparent assertion of non-receipt is therefore insufficient to overcome the presumption that she received the notice of hearing. Absent supporting details, there is no basis on which to conclude that factors or circumstances beyond her reasonable control prevented her from appearing during the hearing and presenting information about her work separation. Claimant's request to have EAB consider new information under OAR 471-041-0090 is denied.

FINDINGS OF FACT: (1) St. Mary's Home for Boys, Inc. employed claimant as a sanitation technician from September 30, 2014 until July 25, 2016

(2) The employer expected claimant to call her supervisor as soon as she was aware she was going to be absent from a scheduled shift. Claimant was aware of the employer's expectations.

(3) On July 12, 2016, claimant had a meeting with her supervisor. The supervisor gave claimant a disciplinary notice for excessive absences in 2016.

(4) On Monday, July 18, 2016, claimant worked her scheduled shift. On Tuesday, July 19, 2016 through Friday, July 22, 2016, claimant did not report for work. Claimant did not call her supervisor or any other employer representative on any of those days to notify the employer that she was going to be absent.

(5) On Monday, July 25, 2016, claimant still did not report for work and did not call her supervisor or any other employer representative to notify the employer of her absence. On July 25, 2016, the employer discharged claimant for failing to report for work or to notify the employer of her absences on July 19, 2016 through July 25, 2016. Claimant did not contact the employer after July 25, 2016.

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 connected with work. 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).

Because claimant did not appear at the hearing and never contacted the employer after July 18, 2016, the record fails to show what reason, if any, claimant had for failing to notify the employer of her absences beginning on July 19, 2016. Absent evidence tending to suggest that claimant was incapable of calling on each of the six work days between July 19, 2016 and July 25, 2016, it is reasonably inferable that she was. Since it appears on this record that claimant was, or should have been, aware that the employer expected her to notify her supervisor or some other employer representative of her absences, claimant's failure to do so was at least wantonly negligent.

Claimant's behavior, although wantonly negligent, may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-30-0038(3)(b). An "isolated instance of poor judgment" means, among things, behavior that is a single or infrequent occurrence of poor judgment rather than a repeated act or patterns of willful or wantonly negligent conduct. Here, rather than being single or infrequent, claimant's wantonly negligent behavior was prolonged and occurred over six successive work days, and, therefore, was not 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). There is no evidence in this record which would support that claimant did not call in and notify the employer of her absences because she misunderstood the employer's expectation.

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

DECISION: Hearing Decision 16-UI-69716 is affirmed.

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

DATE of Service: November 16, 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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