

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1280

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 130014). The employer filed a timely request for hearing. On October 25, 2016, ALJ Micheletti conducted a hearing, and on November 3, 2016 issued Hearing Decision 16-UI-70506, reversing the Department's decision. On November 8, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB two monthly addiction treatment reports from Lincoln County Mental Health Court. EAB construes this submission as a request to have EAB consider this new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented during the hearing if is relevant and material to the issues before EAB and the party offering it shows that factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. Claimant was discharged for absences from work on August 6 and 7, 2016 and even if his absences on those days were the result of alcohol use, the treatment reports would not be relevant since they were from July 31, 2015 and August 21, 2015, approximately a year before the absences at issue. *See* ORS 657.176(2)(g). For this reason, EAB did not consider the treatment reports that claimant submitted when reaching this decision.

FINDINGS OF FACT: (1) Nordic Oceanfront Inn employed claimant as a housekeeper and a maintenance person from January 16, 2014 until August 7, 2016.

(2) The employer expected claimant to report for work when scheduled and if he was not able to do so, to notify it reasonably promptly. Claimant understood the employer's expectations.

(3) On May 10, 11, 29 and 30, 2016 and July 15, 2016, claimant did not report for work or notify the employer that he was going to be absent. Around the time of these absences, claimant told the employer's general manager that he had an alcohol addiction. The employer did not discharge claimant

for these absences, because he was dealing with addiction issues and it wanted to “get him on the right track.” Audio at ~10:00.

(4) On July 30, 2016, claimant failed to report for work or to notify the employer of his absence. On July 31, 2016, the employer’s general manager met with claimant, told him he had been absent without notice several times and the next time he was absent without notice he would be discharged.

(5) On August 6, 2016, claimant failed to report for work and called the employer after the scheduled end his shift that day. On August 7, 2016, claimant did not report for work and did not notify the employer. On that day, the general manager removed claimant from the schedule. On August 13, 2016, claimant spoke with the general manager and learned he was discharged.

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.

While the employer testified with certainty about the days claimant was absent from work without notice, claimant did not recall when he was so absent. Audio at ~13:44, ~15:45. Ultimately, he testified that he did not call the employer to report his absence on August 6, 2016 before the end of his scheduled shift and he thought on August 7, 2016 that he called in and spoke to the assistant manager before his shift began to report his absence and she told him he was discharged. Audio at ~14:57, ~15:10. However, the assistant manager stated with certainty that she did not speak to claimant on August 7, 2016 and she and the general manager agreed that they both spoke to him and informed him of his discharge on August 13, 2016. Audio at ~7:25, ~11:17, ~20:46, ~20:57. The testimony of the general manager and the assistant manager is the more reliable as to the date they spoke to claimant, and it therefore appears claimant did not notify the employer of his absence on August 7, 2016. Claimant’s failure to notify the employer reasonably promptly that he was going to be absent on August 6 and August 7, 2016 was at least a wantonly negligent violation of the employer’s standards.

Claimant’s wanton negligence on August 6 and 7, 2016 may not be excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An “isolated instance of poor judgment” is a single or infrequent occurrence in violation of the employer’s standards rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Here, claimant was absent without notice on both August 6 and 7, 2016, as well as on several other days in May and July 2016. There is insufficient evidence in this record to show claimant’s absences without notice were the result of exigent circumstances or factors over which he had no control. As such, it appears likely they resulted from claimant’s wantonly negligent behavior. Since claimant’s behavior on August 6 and 7, 2016, was not single or infrequent, it may not be excused as an isolated instance of poor judgment. Nor was claimant’s wantonly negligent behavior on those days excused from constituting misconduct as a good faith error. Claimant did not assert or contend that his failure to report for work or to notify the employer was caused by a misunderstanding of the employer’s standards, or a belief that the employer would condone his behavior.

In addition, ORS 657.176(2)(g) presents a second ground to disqualify claimant from benefits. It requires a disqualification from benefits if an individual was discharged for absences from work that resulted from the use of alcohol on a second or subsequent occasion during a twelve month period unless the person was participating in a recognized alcohol rehabilitation program at the time of the absences or within ten days of the discharge. While claimant stated that alcohol “may have been the reason” for his absences on August 6 or 7, 2016, it appeared from the tenor of claimant’s testimony that alcohol had been a major contributing factor to his absences in May and July 2016 and it can be reliably inferred that alcohol use was likely a factor in his August 2016 absences. Although claimant mentioned that he was participating as an outpatient in an addiction treatment program at some point during his 2016 absences, there was no specific evidence that he was participating in treatment on August 6 or August 7, 2016 or within ten days after he was discharged for his absences on those days. Audio at ~17:15. There is insufficient evidence to conclude that claimant’s absences resulting from alcohol use were excused due to his participation in a recognized alcohol rehabilitation program.

The employer discharged claimant for unexcused misconduct under ORS 657.176(2)(a). Alternatively, the employer discharged claimant for alcohol-related absences under ORS 657.176(2)(g) that were not excused as a result of his participation in a recognized alcohol rehabilitation program. On either ground, claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-70506 is affirmed.

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

DATE of Service: December 8, 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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