

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1409

Reversed
Disqualification

PROCEDURAL HISTORY: On November 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133812). Claimant filed a timely request for hearing. On December 9, 2016, ALJ Holmes-Swanson conducted a hearing, and on December 13, 2016 issued Hearing Decision 16-UI-72827, concluding claimant's discharge was not for misconduct. On December 17, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Celilo Restaurant and Bar employed claimant as a cook until September 18, 2016.

(2) The employer expected claimant to report to work as scheduled, or notify the employer if he was not going to be able to report to work. Claimant understood the expectation.

(3) On September 18, 2016, claimant had an altercation with his live-in girlfriend. He was arrested by police, charged with assault in the fourth degree and incarcerated. Although claimant knew he was scheduled to work on September 18th, he did not report to work or notify the employer that he was going to be absent. Because of claimant's failure to report to work or notify the employer of his absence, the employer was unwilling to continue employing claimant.

(4) Between September 20th and October 2nd, the employer scheduled claimant to work three additional shifts. Claimant ultimately pled guilty to the crime of assault in the fourth degree based on the September 18th altercation, and was convicted of assault. He remained incarcerated for approximately 20 days, until approximately October 8th.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant's discharge was 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. When an individual is discharged for violating the employer's attendance policy as the result of incarceration, the relevant inquiry is whether claimant willfully created the situation that resulted in his incarceration and inability to report to work. *Accord Weyerhaeuser Company v. Employment Div.*, 107 Or App 505, 812 P2d 44 (1991).

We agree with the ALJ that claimant's failure to report to work on September 18th was the result of his willfully or wantonly creating the circumstances, his commission of the crime of assault and resultant incarceration, that led to his inability to report to work. Hearing Decision 16-UI-72827 at 3. The ALJ also concluded, however, that claimant's conduct was excusable as an "isolated instance of poor judgment" because it was a single incident and did not exceed poor judgment. *Id.* at 4. Although we agree with the ALJ that claimant's conduct was isolated, we disagree with the ALJ that the conduct did not exceed mere poor judgment.

Claimant's exercise of poor judgment may exceed excusable "mere poor judgment" if it was unlawful or tantamount to unlawful conduct. OAR 471-030-0038(1)(d)(D). The judgment claimant exercised in this case was not a decision to miss a shift at work, the judgment involved was that which led to his commission of the crime of assault in the fourth degree. Because claimant's exercise of poor judgment involved commission of an unlawful act, it exceeded mere poor judgment. In the alternative, claimant's exercise of poor judgment may also exceed excusable "mere poor judgment" if it made a continued employment relationship impossible. *Id.* As a result of claimant's exercise of poor judgment on September 18th, he caused himself to be in a position where he was unable to report to work for an indefinite duration and unable to consistently or timely communicate his absences or his availability for work to the employer. Objectively considered, any reasonable employer would consider conduct that results in an inability to communicate with or schedule an employee to work to have made a continued employment relationship impossible. We therefore conclude that claimant's conduct exceeded mere poor judgment. We also note that claimant's conduct cannot be excused as a good faith error or any other reason under OAR 471-030-0038(3)(b) because he could not have believed, and had no rational basis for believing, the employer would condone criminal conduct that resulted in his inability to report to work or communicate his absences to the employer.

The employer discharged claimant for misconduct. Claimant is, therefore, disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-72827 is set aside, as outlined above.

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

DATE of Service: January 12, 2017

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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