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

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0012

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with good cause (decision # 141630). The employer filed a timely request for hearing. On December 8, 2016, ALJ Frank conducted a hearing, and on December 16, 2016, issued Hearing Decision 16-UI-73133, concluding that claimant was discharged for misconduct. On January 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From March 3, 1998 until August 31, 2016, Santiam Canyon School District (District) employed claimant, last as grounds keeping and transportation supervisor.

(2) The employer expected that claimant and the employees with whom he worked would take two 10 minute rest breaks and one 30 minute meal break during each eight hour shift. The employer also expected that claimant and other employees who came across confidential personnel documents in the course of their work would not read these documents. Claimant knew about and understood these expectations.

(3) For several years, claimant and his coworkers obtained free lunches and cereal from school cafeterias. Sometime prior to August 2016, the District superintendent notified claimant and his coworkers that they could no longer receive free food from school cafeterias. As a result of this directive, claimant began paying for his lunches.

(4) Sometime prior to August 26, 2016, the District superintendent received reports that claimant and his coworkers were taking rest breaks of more than 10 minutes. The superintendent viewed security camera footage from approximately August 22 through 26, 2016, and discovered that claimant took a number of

rest breaks that lasted 30, 40 and 50 minutes. The superintendent also saw claimant take and eat cereal from a school cafeteria.

(5) On August 26, 2016, claimant was cleaning the District superintendent's office, a duty he performed every morning. He saw a pad on the superintendent's desk with claimant's name on it. Claimant began to look through the materials on the superintendent's desk; he found and read materials indicating that the superintendent had viewed video camera footage which showed that over the past week, claimant took a number of breaks that lasted longer than 10 minutes and had eaten two bowls of cereal taken from a school cafeteria. Audio recording at 10:54. Claimant subsequently told his coworkers that he and they could no longer eat cereal from a school cafeteria.

(6) The superintendent discovered that the materials on his desk concerning his investigation into claimant's conduct had been rearranged, subsequently observed that claimant and his coworkers stopped taking long breaks and eating cereal, and concluded that claimant had looked through and read these materials. On August 30, 2016, the superintendent met with claimant and his union representative to discuss claimant's conduct. During this meeting, claimant admitted that he had taken and eaten cereal from the school kitchens, took rest breaks that lasted more than 10 minutes, and looked through materials on the superintendent's desk.

(7) By letter dated August 31, 2016, the superintendent notified claimant that he was discharging claimant, effective immediately. In the letter, the superintendent told claimant that he was terminating claimant's employment for violating District directives by consuming food from a school cafeteria, taking excessively long breaks, reading confidential material on the superintendent's desk on August 26, and communicating information contained in this material to other employees. Audio recording at 23:18.

(8) On or about September 14, 2016, claimant and the District signed an agreement in which they agreed that claimant's work separation would be considered a resignation. Audio recording at 34:31.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged him for misconduct.

Work separation: The first issue is the nature of claimant's work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

By letter dated August 31, 2016, the District notified claimant that his employment was terminated. Although the parties subsequently agreed to call the work separation a resignation, we are not bound by the terms the parties use to characterize their actions. Because the District was unwilling to allow claimant to continue working after August 31, his work separation was a discharge.[1]

[1] Although the superintendent testified that claimant's work separation would have had to "go to the [District school] board" (Audio recording at 20:18), if the parties had not agreed to consider the separation a resignation, there is no evidence in the

Discharge: 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. 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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

The District discharged claimant because its investigation revealed that from August 22 through 26, 2016, he violated its policies and expectations by eating cereal from a school cafeteria, taking excessively long rest breaks, and reading confidential personnel materials found on the superintendent's desk. Claimant knew about and understood the employer's expectation that he would limit rest breaks during an 8 hour shift to two 10 minute breaks, not take food from the cafeteria, and not read confidential personnel materials he might come across during his work. Claimant's conscious refusal to comply with the employer's directives regarding these matters shows an indifference to the standards of behavior the employer expected of him and was at least wantonly negligent.

Claimant asserted, however, that he believed his conduct did not violate the employer's expectations. In regard to his consumption of cereal, claimant asserted that he knew the employer had recently prohibited him from accepting free lunches from the school cafeteria, but did not understand that he could no longer eat cereal from the cafeteria. We find claimant's assertion implausible. Based on the employer's directive that he must begin to pay for his lunches, claimant could not have reasonably believed that he could continue to take free food, such as cereal, from the District's cafeterias. In regard to the long rest breaks he took, claimant testified although he sometimes took rest breaks of more than 10 minutes, he felt justified in doing so because he often performed additional work on the weekends to make up for time taken off during his normal work week. Audio recording at 40:02. Claimant's testimony about how he made up time taken off for lengthy breaks was vague and imprecise. Although he claimed he was careful about determining how much time he needed to work on the weekend to make up for long breaks taken during the work week, he provided no specific details about how he made these calculations. In addition, it seems unlikely that the employer allowed claimant to maintain very flexible work hours that permitted him to take as much time off during the work week as he wanted, with no prior notice to or approval of his supervisor.

Concerning the employer's charge that claimant violated its confidentiality policy by reading materials on the superintendent's desk, claimant asserted that his discovery of these materials was inadvertent, and not deliberate. It is improbable, however, that claimant could have discovered as much information as he did about the superintendent's investigation merely by accidentally glancing at the documents on the superintendent's desk. In addition, claimant presented no legitimate reason, such as the need to dust or

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record to suggest that school board approval was needed before the termination of claimant's employment became final. To the contrary, the subject line of the August 31 letter is "Notice of Termination" (Audio at 21:40), indicating that the letter was sufficient to complete the process of discharging claimant.

clean the superintendent's desk, why he was looking at anything on the superintendent's desk. Because claimant's explanation of his conduct was implausible, we reject it as not credible. We find it more likely than not that claimant understood the employer's expectations, and consciously violated them by eating cereal from the school cafeteria, taking rest breaks that were longer than 10 minutes, and reading confidential documents on the superintendent's desk.

Claimant's actions cannot be excused as an isolated instance of poor judgment under the provisions of OAR 471-030-0038(3)(b). To be isolated, the exercise of poor judgment must be 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). Here, claimant willfully, or with wanton negligence, engaged in at least three violations of the employer's policies when he consumed school cafeteria cereal, took excessively long breaks, and read confidential materials. His exercise of poor judgment was therefore a repeated act and pattern of willful or wantonly negligent behavior, and not a single or infrequent occurrence.

Nor can claimant's actions be excused as the result of good faith errors. For the reasons discussed above, claimant understood the employer's expectations regarding cafeteria food, rest breaks and confidential documents and could not have reasonably believed the employer would excuse his failure to comply with these expectations.

The employer discharged claimant for misconduct. He is disqualified from the receipt of unemployment benefits on the basis of this work separation

DECISION: Hearing Decision 16-UI-73133 is affirmed.

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

DATE of Service: <u>January 23, 2017</u>

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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