

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0032

Reversed
Disqualification

PROCEDURAL HISTORY: On November 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142602). Claimant filed a timely request for hearing. On December 20, 2016, ALJ Seideman conducted a hearing, and on December 22, 2016 issued Hearing Decision 16-UI-73537, concluding the employer discharged claimant, but not for misconduct. On January 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not presented into evidence during the hearing. The employer did not explain why it was unable to present this information at the hearing and did not otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present by way of its argument. EAB considered only information received into evidence during the hearing when reaching his decision.

FINDINGS OF FACT: (1) Bank of America employed claimant from August 5, 2016 until the Bank of the Cascades acquired the branch at which claimant was employed in January 6, 2016. Bank of the Cascades then continued claimant's employment until September 9, 2016, last as a branch manager.

(2) The employer expected claimant to notify her immediate supervisor, the district manager, if she was not going to report for work on a day she was scheduled, or if she left the workplace for non-business related reasons. The employer expected this notice to be given, if feasible, prior to the scheduled start of claimant's shift or claimant's absence from the workplace. The employer also expected claimant not to ask subordinate staff to provide false information about her work activities or her absences in response to the employer's questions. Claimant understood the employer's expectations.

(3) On June 21, 2016, claimant was scheduled to work at her usual bank branch in Reedsport, Oregon. Claimant did not work a full day, but instead travelled to Eugene, Oregon early in the day to complete the purchase of a new car for personal purposes. Eugene is located approximately 88 miles from

Reedsport.¹ Claimant did not notify the district manager, who was her supervisor, before she missed work to travel to Eugene. While claimant was absent from the workplace on this trip, the district manager called claimant's branch and was told claimant was not there. The employee who spoke to the district manager said she did not know why claimant was absent or where claimant was. When claimant finally reported for work near the end of her scheduled work day, she was informed that the district manager had tried to reach her. Claimant then contacted the district manager and told her she had been away from the branch on a personal errand in Eugene.

(4) On August 5, 2016, the district manager issued a final written warning to claimant that described several violations of the employer's policies she had allegedly engaged in. Among other things, claimant was warned that if she did not report for work or if she left the branch on a scheduled work day for any reason she needed to notify the district manager before her shift began or before she left the branch.

(5) On August 29, 2016, claimant was ill but reported for work sometime before 10:00 a.m. Claimant left the branch at approximately 10:00 a.m. Claimant did not inform the district manager that she was leaving. At approximately 2:00 p.m., claimant sent an email to the person covering for the district manager, who was out that day, explaining that she had missed a conference call scheduled for earlier that day because she was ill. Transcript at 17. Claimant also wrote that she was at a physician's office at that time and did not think she would return to the branch that day. The person covering for the district manager replied that she had not known before that time that claimant was not at the branch, and asked claimant "Who gave you permission [for the absence]?" Transcript at 25. Claimant responded that she had been very ill, had been laying on a couch in the back break room when she was at the branch and offered to bring in a physician's note excusing her absence that day. Transcript at 25. Despite her statement that she was not going to complete the work day, claimant returned to the branch at approximately 3:00 p.m. At that time, an employee who was subordinate to claimant was having a telephone conversation with the person who was covering for the district manager. That manager asked the subordinate about claimant's presence in the branch that day. Claimant overheard the subordinate and realized that the subordinate was speaking to a manager about her. Claimant went up to the subordinate's desk and whispered to the subordinate to tell the manager that she had been at the branch earlier that day laying down in the back break room before she left. Transcript at 47, 49. Although the subordinate had not seen claimant in the back break room at any time that day, the subordinate told the manager that claimant was at the branch and spent some time lying in the back break room.

(6) Sometime after August 29, 2016, the subordinate contacted the person covering for the district manager and stated that claimant had left the branch at around 10:00 a.m. on August 29, 2016 and she did not know if claimant had been lying in the back break room before that time. The subordinate told the manager that claimant had coached her responses to the manager's questions. Later the employer reviewed surveillance videos for the branch on August 29, 2016 and did not observe claimant in the back break room.

¹ See https://www.google.com/?gws_rd=ssl#q=reedsport+to+eugene=oregon+distance. EAB takes notice of this generally cognizable fact which is from a source commonly accepted as reliable. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

(7) On September 9, 2016, the employer discharged claimant for not informing the district manager or her stand-in before leaving the branch on August 29, 2016 and for asking subordinate to tell the manager that claimant had been in laying down in the break room before leaving the branch on August 29, 2016, when the subordinate had observed claimant doing so.

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. The employer carries the burden to show claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 16-UI-73537, the ALJ concluded the employer did not show it discharged claimant for misconduct. The ALJ reasoned that "the main reason for the discharge was claimant's absence [on August 29, 2016] because of her illness and because there was no showing that claimant's willful or wantonly negligent behavior led to her illness, the employer did not establish claimant engaged in misconduct. Hearing Decision 16-UI-73537 at 3. We disagree.

At hearing, although claimant testified a great deal about the employer's failure to train her in its policies after it acquired Bank of America, and that her subordinate staff generally knew when she was not going to be on the bank premises, she did not dispute that she knew she was expected to notify her supervisor, the district manager, before she left the branch for non-trivial periods of time for non-business-related reasons. Transcript at 19-23. As a matter of common sense, if not based on her prior work experience, claimant knew or should have known that the employer expected her to notify her immediate supervisor on August 29, 2016 before she left the branch for a lengthy period of time, even if her departure was due to illness. Claimant did not contend as a result of her illness, she was confused about the notification requirements if she left the branch, was so distracted that she forgot about them or, for some other exigent reason, she was unable to comply with those requirements. By not notifying or attempting to notify her supervisor before she left the branch on August 29, 2016, claimant violated the employer's standards with at least wanton negligence.

The ALJ's contention that the employer discharged claimant as a result of her absence due to illness on August 29, 2016, and the basis for his conclusion that claimant was not disqualified from receiving benefits, is not correct. The testimony of the employer's witness at hearing was that the employer discharged claimant, not because she left the branch due to illness, but because she failed to notify her supervisor before leaving. Transcript at 8, 17, 30, 39. Claimant did not suggest that the fact that she was ill on August 29, 2016 somehow absolved her from compliance with the employer's notification standards. There is no evidence in this record showing that the reason the employer discharged claimant was because she was absent for some period of time on August 29, 2016 due to illness, as distinct from her failure to notify her supervisor that she was leaving the branch due to illness. The ALJ erred in his finding about the proximate cause of the discharge.

Although claimant violated the employer's standards with wanton negligence on August 29, 2016 when she left the branch without notifying her supervisor, that behavior may be excused from constituting misconduct if it was an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b). Behavior is considered an "isolated instance of poor judgment" if, among other things, it is 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). In this case, in addition to failing to notify her supervisor before she left the branch on August 29, 2016, claimant later induced a subordinate employee to provide false information to her supervisor about her presence in the branch earlier that day. The information claimant persuaded the subordinate to supply to the manager was false since claimant admitted at hearing she did not lay down in the back break room of the branch that day. Transcript at 41-43. Claimant initially testified that the subordinate had on her own initiative falsely told the manager that claimant had been laying down in the back break room because the subordinate was concerned about claimant and "didn't want to get me in trouble." Transcript at 38. Upon hearing the testimony of her subordinate about claimant coaching her in what she was supposed to say to the manager, claimant then admitted she told the subordinate to tell the manager that she was in the back room laying down, when she was not, because the manager "was calling to check up on me." Transcript at 49.

Regardless of whether claimant had told the subordinate to misrepresent that she had been in the branch back room for some period of time earlier that day, or whether she had told the subordinate to misrepresent that she was in the back room at the time the call with the manager was taking place, in either case claimant was suborning a misrepresentation to the manager. As well, claimant's testimony as to what she told the subordinate to say to the manager did not make sense in that the manager should have been under the impression from her last communication with claimant that claimant was not going to report to the branch after leaving the physician's office and likely would only have inquired of the subordinate about claimant's activities at the branch earlier that day, not her activities at the branch during the time of the call. It also is unlikely the subordinate would have called to correct the statement she gave to the manager unless claimant had instructed her to falsely state she was in the branch, laying down in the back room, earlier that day. Given these facts, it is most likely that claimant told the subordinate to tell the manager that claimant was at the branch in the back room sometime after 10:00 a.m. that day to diminish the length of time claimant would appear to have been away from the branch without informing her supervisor. We infer that claimant knew as a matter of common sense that the employer prohibited her from inducing a subordinate to misrepresent facts about her activities to her supervisor who was investigating them. Claimant's willful violation of the employer's standards was separate from her wantonly negligent failure to notify her supervisor that she was leaving the branch on August 29, 2016.

In addition to claimant's second violation of the employer's standards on August 29, 2016, claimant also violated the employer's standards with at least wanton negligent on June 21, 2016, when she left the branch for most of the work day, without notifying her supervisor that she was doing so, to complete the purchase of a car in Eugene. At hearing, while claimant contended she told staff at the branch she would not be in on June 21, 2016, she did not dispute that she was expected to inform her supervisor in advance of such an absence from the branch and not just to inform the subordinate staff. Transcript at 23-24. Claimant knew or should have known as matter of common sense that the employer expected her to inform her supervisor if she was going to be absent for most of a scheduled work day on personal business. By failing to notify her supervisor in advance of her absence on June 21, 2016, claimant also violated the employer's standards with at least wanton negligence. Because claimant's failure to comply

with the employer's expectations on June 21, 2016 was wantonly negligent, and her instruction to her subordinate to lie in response to the manager's inquiries about her behavior on August 29, 2016 was a willful violation of the employer's expectations, her wantonly negligent failure to comply with the employer's notification expectations on August 29, 2016 was not an isolated act in violation of the employer's standards. As such, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor was claimant's behavior on August 29, 2016 excused as a good faith error under OAR 471-030-0038(3)(b). Claimant did not argue or contend that her failure to notify her supervisor that she had left the bank on August 29, 2016 resulted either from her failure to understand the employer's standards or a mistaken belief that the employer would allow her to leave the bank without notifying her supervisor. There is insufficient evidence in the record to excuse claimant's wantonly negligent behavior on August 29, 2016 as a good faith error.

On this record, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-73537 is set aside, as outlined above.

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

DATE of Service: February 13, 2017

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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