

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0216

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70528). Claimant filed a timely request for hearing. On January 3, 2017, ALJ Allen conducted a hearing, and on January 6, 2017 issued Hearing Decision 17-UI-74261, affirming the Department's decision. On January 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On January 31, 2017, EAB issued Appeals Board Decision 2017-EAB-0034, reversing the hearing decision and remanding the matter to the Office of Administrative Hearings (OAH) for development of the record. On February 1, 2017, OAH mailed notice of a hearing scheduled for February 13, 2017. On February 13, 2017, ALJ Allen conducted a hearing and on February 17, 2017, issued Hearing Decision 17-UI-77274, again affirming decision # 70528 and concluding the employer discharged claimant for misconduct. On February 22, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-77274.

Claimant submitted written argument to EAB, written on his EAB application for review, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Double J Trailers, Inc. employed claimant from February 27, 2015 until October 18, 2016.

(2) The employer had an attendance policy requiring employees to report to work on time as scheduled. The employer also expected employees to inform the manager via a telephone call if they were going to be absent from work. In February 2016, the manager provided claimant a copy of the attendance policy. Claimant understood the policy.

(3) Claimant knew his regular work schedule was Tuesday through Saturday, 8:30 a.m. to 5:00 p.m.

(4) On September 15, 2016, the employer gave claimant a final written warning for violating its attendance policy repeatedly since January 2016. Claimant understood that future violations of the attendance policy would result in discharge.

(5) On October 13, 2016, claimant was arrested at work during his shift. Claimant was released from jail the morning of October 14, 2016.

(6) On October 14 and 15, 2016, claimant was scheduled to work. Claimant did not call the employer or report for work either day.

(7) On October 18, 2016, claimant reported to work and the employer discharged him for violating its attendance policy on October 14 and 15.

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. 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, and absences due to illness or other physical disabilities are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

That claimant was arrested on October 13 and released from jail on October 14 is not disputed. However, the remainder of the evidence is in dispute. Claimant argued that he would not have failed to call and report to work on October 14 and 15, 2016, because he had never done that in the past and because he wanted to keep his job. Audio Record 20:41 to 21:16. However, not only was claimant's testimony repeatedly inconsistent throughout the hearings, such as regarding what occurred after he was released from jail, claimant conceded that his testimony was inconsistent because he did not remember what occurred on October 14 or 15, and that he based some of his testimony on what he believed would have happened, and not what he recalled. Audio Record at 19:32 to 24:37. Because claimant does not recall what occurred on October 14 and 15, his testimony about what occurred on those days lacks credibility. Thus, because claimant's testimony regarding the final incident lacks credibility, where the evidence is in dispute regarding October 14 and 15, EAB found facts in accordance with the employer's evidence.

Finding facts in accordance with the employer's evidence regarding October 14 and 15, it is more likely than not that claimant failed to call the employer or report to work on those days. Claimant knew the employer expected him to call or report to work. Claimant knew he was scheduled to work on October 14 and 15. There is no evidence to show that claimant did not consciously fail to call the employer or

report to work those days. Thus, claimant's failure to follow the employer's attendance policy those days was at least a wantonly negligent violation of the employer's expectations.

Claimant's conduct on October 14 and 15 cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Claimant consciously neglected to contact the employer or report to two different shifts on two days, and, as each incident was distinct in time and, possibly, causality, each of those conscious decisions necessarily required formation of a new judgment not to comply with the employer's attendance policy. His exercise of poor judgment therefore was a repeated act of wanton negligence, and not a single or infrequent occurrence.

Claimant's conduct cannot be excused as a good faith error. Claimant understood he was expected to notify the employer if he would be tardy or absent from work. The record fails to show claimant sincerely believed, or had a rational basis for believing, that he had either complied with the employer's attendance policy or that the employer would excuse or condone his failure to comply with that policy on October 14 or 15, 2016. Nor does the record show that claimant was absent due to illness or disability on either day or that his absences and failures to notify the employer of his absences were otherwise excusable under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 17-UI-77274 is affirmed.

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

DATE of Service: March 17, 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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