

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0283

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91744). Claimant filed a timely request for hearing. On February 9, 2017, ALJ Lohr conducted a hearing, and on February 16, 2017 issued Hearing Decision 17-UI-77164, concluding claimant's discharge was not for misconduct. On March 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) The Salem Group Conference employed claimant as a banquet supervisor from September 27, 2011 to May 3, 2016.

(2) On April 21, 2016, the general manager and director of catering met with claimant to review some policy violations and develop "an action plan to see if he was going to reinstated." Transcript at 7. Claimant was warned during that meeting that his job was in jeopardy, and the employer imposed a warning and three-day disciplinary suspension. Claimant agreed to meet with the managers again on May 3, 2016 at 11:00 a.m. to "discuss your action plan to move forward, the position you will be in and future employment." Exhibit 1, Record of Employee Discipline, dated 4/21/16. Claimant signed the "Record of Employee Discipline" form and understood as a result of the April 21, 2016 meeting that he was required to attend the May 3, 2016 meeting, and that the meeting was important.

(3) Between April 21, 2016 and May 3, 2016, claimant traveled out of state for personal reasons. He was scheduled to fly back into Portland, Oregon on May 2, 2016 around 11:00 a.m. His planned flights were laid over and delayed, and his flight ultimately landed in Portland, Oregon sometime after 11:00 a.m. and prior to 2:00 p.m. on May 3, 2016. As a result of the flight delays, claimant missed the May 3, 2016 meeting.

(4) On May 4, 2016, the employer discharged claimant. The main reason the employer discharged him was that he missed the May 3, 2016 meeting. Transcript at 8-9, 65. The fact that claimant also failed to obtain a doctor's note excusing some previous absences, provided inadequate notice that he would be absent from a scheduled shift on May 3, 2016 and missed a scheduled shift on May 3, 2016 made the general manager feel "stronger" about the decision to discharge claimant. Transcript at 9.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not 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. 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. 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). Isolated instances of poor judgment are not misconduct. 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 other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A).

The employer's evidence included a termination form that listed several policy violations as supporting the discharge decision, including claimant missing the May 3rd meeting, failing to obtain a doctor's note and failing to provide sufficient notice that he was going to miss his May 3rd shift. See Exhibit 1. When determining whether an individual's discharge was for misconduct, however, we first examine whatever event was the proximate cause of the discharge; put another way, the event that triggered the employer to decide to discharge claimant.

In this case, the employer's general manager alleged there were a combination of reasons for claimant's discharge but first identified missing the May 3rd meeting as the reason claimant was discharged. Transcript at 8-9. When the ALJ asked whether the employer would have discharged claimant for that alone or if it took additional violations to trigger the discharge, the manager replied that "it just I guess got stronger," suggesting that the discharge was because claimant missed the meeting and the other events that occurred after that point merely supported the decision that was already made. Transcript at 9. The general manager also testified that "when he missed the meeting that he picked the day and time that we would meet to discuss his employment that was really the final straw." Transcript at 9. Claimant also testified that when he was discharged on May 4th, "[t]o my recollection it was only about the meeting that I missed." Transcript at 65. Based on the parties' testimony, it appears that the proximate cause of claimant's discharge was his failure to attend the May 3rd meeting. That event is, therefore, the initial focus of the misconduct analysis. Only if the evidence shows that claimant willfully or with wanton negligence missed the May 3rd meeting would we then expand the analysis to include the other events to determine whether claimant's failure to attend the meeting can be excused as an isolated instance of poor judgment.

Claimant missed the May 3rd meeting because his flights, which were originally scheduled to return him to Oregon at approximately 11:00 a.m. on May 2nd, were laid over and delayed. As a result of those layovers and delays, claimant did not arrive in Portland, Oregon until approximately 2:00 p.m. on May 3rd, more than 24 hours later than he had planned, and after the meeting was scheduled to occur. Layovers and delays were beyond claimant's ability to control. On this record, claimant had planned to attend the May 3rd meeting, considered it important, and attempted to schedule his flights to ensure he returned from his trip in time to attend it. Because he was unable to do so due to circumstances beyond his control that were not attributable to claimant as willful or wantonly negligent misconduct, his discharge was not for misconduct. Claimant may not be disqualified from receiving unemployment benefits because of his work separation.

DECISION: Hearing Decision 17-UI-77164 is affirmed.

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

DATE of Service: March 31, 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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