EO: 200
BYE: 201801

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0331

Reversed
Disqualification

PROCEDURAL HISTORY: On February 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143004). Claimant filed a timely request for hearing. On March 8, 2017, ALJ S. Lee conducted a hearing, and on March 10, 2017 issued Hearing Decision 17-UI-78706, reversing the Department's decision. On March 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained information not offered into evidence during the hearing. However, the employer did not show that factors or circumstances beyond its reasonable control prevented it from presenting that information at the hearing 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 written argument.

FINDINGS OF FACT: (1) Century Benefits, LLC employed claimant as an insurance producer from January 5, 2017 until January 9, 2017.

(2) The employer expected claimant to limit his lunch breaks to one hour unless he had permission to take a longer break. Claimant understood the employer's expectations.

(3) Before December 9, 2016, the employer observed that claimant sometimes took lunch breaks of longer than one hour without permission. Also before December 9, 2016, claimant's floor manager told claimant more than once that he should limit his lunch breaks to one hour. On December 9, 2016, the employer's phone records showed that claimant was logged out for one hour and fifteen minutes to take his lunch. On December 12, 2016, the employer issued a warning to claimant for several alleged infractions, including taking lunch breaks that were longer than one hour. When claimant was given this warning, the employer told claimant he was not allowed to take lunch breaks of longer than one hour.

(4) On December 28, 2016, the employer's phone records showed that claimant was logged out for one hour and thirty-three minutes for his lunch. On December 29, 2016, claimant was logged out for one hour and twenty eight minutes for his lunch break. On December 31, 2016, claimant was logged out for one hour and nine minutes for his lunch break. On January 6, 2017, claimant was logged out for one hour and twenty five minutes on his lunch break. The employer did not take immediate disciplinary action against claimant for these excessively long lunch breaks because of holiday season distractions and interruptions.

(5) On January 9, 2017, claimant was logged out of the employer's phone system for one hour and four minutes to take his lunch. After claimant returned from lunch, the employer's owner told claimant he wanted to talk to him. The owner and claimant discussed whether claimant was satisfied working for the employer. At the conclusion of the conversation, the owner told claimant he was discharging claimant for taking excessively long lunches. Transcript at 31.

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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-78706, the ALJ concluded that the employer did not demonstrate that claimant engaged in willful or wantonly negligent behavior in violation of the employer's standards or that the employer discharged claimant for misconduct. The ALJ reasoned that since claimant disputed he took lunches of longer than one hour on December 28, 29, 31, 2016 and January 6 and 9, 2017, and also contended that on many occasions he was back from lunch within one hour and performing work but had failed to log in, the employer did not meet its burden to show claimant had engaged in misconduct. The ALJ further reasoned that claimant's testimony that his supervisor had once told him he was "lenient on longer lunch hours," established that claimant had a good faith basis for believing the employer would condone his taking lunches that were longer than one hour and claimant's behavior, even if it violated the employer's standards, was presumably excused as a good faith error. Hearing Decision 17-UI-78076 at 4. We disagree.

The weight of the evidence does not support the ALJ's conclusion that claimant effectively rebutted the contention that he took lunches of longer that one hour on six work days after December 12, 2016. Although claimant's testimony was not completely clear, claimant appeared to testify that he did not believe he took extended lunches on any of those days and thought he "probably" had returned from

lunch within one hour but either failed to log back into the phone system before beginning to work or entered the phone system in "after call" status. This explanation for the extended periods he was logged out of the system was not plausible, however, because it is unlikely that, having just received a final written warning on December 12, 2016 for taking excessively long lunches, claimant would repeatedly overlook the need to log back into the phone system after he returned to work. Transcript at 26-27. In addition, the employer's witnesses testified that, in connection with the allegedly excessive lunches, the employer's phone logs showed that claimant was logged out for lunch in a break mode and there was no indication that claimant's "after call" status was even an issue for at the hearing. Transcript at 11. The phone logs upon which the employer's witnesses based their testimony at the hearing are more reliable that claimant's speculations about what he did or did not do on the days at issue. As well, in claimant's testimony about the lengthy lunches, he took the varying and inconsistent positions that he was not away from work for longer than an hour on lunch breaks, that he thought he was allowed to take lunches longer than one hour since it was the open enrollment period, and that other employees also took lengthy lunches. Claimant's many positions seriously undercut the strength of his attempted rebuttals to the employer's contentions.

On this record, the preponderance of the evidence shows that claimant took lunch breaks of over an hour on December 9, 28, 29, 31, 2016 and January 6 and 9, 2017. It is difficult to infer that claimant would have inadvertently lost track of the length of time he was at lunch on so many days and claimant presented no evidence that he did not know the length time he was gone on any of those days. Since claimant was aware that his lunch break was limited to one hour, the only reasonable conclusion is that claimant willfully or with wanton negligence violated the employer's standards on the days at issue. We reject the ALJ's conclusion that, if such a violation were established it was excused as good faith error on claimant's part based on the supposed statement by his supervisor that the supervisor was "lenient" about the length of lunch breaks. Transcript at 22, 25. As claimant testified, however, the supervisor supposedly made this statement when the employer extended the work hours of its producers to take account of the open enrollment period and the "tons" of days and hours employees were working. Transcript at 22, 25. However, the open enrollment period began on November 1, 2016 and, if the supervisor made such a statement, we infer it was made early in the open enrollment period. Transcript at 23. In addition, claimant testified that that his supervisor and the owner orally told him not to take longer than one hour lunches and he was issued a warning to that effect on December 12, 2016. Transcript at 26. Given that the oral instructions and the written warning about the permissible length of lunches appear to have been issued sometime after the supervisor's statement about being "lenient," it is simply not plausible that claimant failed to understand that those latter instructions and warning superseded the supervisor's supposed leniency about the length of lunches. That claimant would have relied on the supervisor's statement and believed that the employer would condone the lengthy lunch breaks he took on December 9, 28, 31, 2016 and January 6 and 9, 2017 is not credible. That claimant took excessively long lunches on those days could not the result of a good faith misunderstanding of the employer's expectations. Claimant's behavior in doing so was therefore a willful or wantonly negligent violation of the employer's standards.

Although claimant's violation of the employer's standards may have been willful or wantonly negligent, it may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Behavior is excusable as an isolated instance of poor judgment if, among other things, it was a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A).

Here, claimant took excessively long lunches on five days after claimant received the December 12, 2016 written warning – on December 28, 29 and 31, 2016 and January 6 and 9, 2017. Rather than having been an isolated occurrence, claimant's violations of the employer's standards were numerous, repeated and exemplified a pervasive pattern of indifference to the employer's standards. As such, claimant's behavior on the days at issue may not be excused from constituting misconduct as an isolated incident of poor judgment.

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

DECISION: Hearing Decision 17-UI-78706 is set aside, as outlined above.

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

DATE of Service: <u>April 11, 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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