

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0394

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 115057). The employer filed a timely request for hearing. On March 24, 2017, ALJ Snyder conducted a hearing at which claimant did not appear, and on March 31, 2017 issued Hearing Decision 17-UI-80093, reversing the Department's decision. On April 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) RailServe, Inc. employed claimant as a helper and sometimes as a crew leader until January 19, 2017.

(2) The employer expected claimant to report for work as scheduled or to notify the employer if he was not going to attend work. Claimant understood the employer's expectation as a matter of common sense.

(3) On January 8, 2017, the employer's crew leader spoke with claimant and asked him if he would work on Tuesday, January 10, 2017, a day on which he was not otherwise scheduled to work, because another employee had been injured. Claimant agreed to do so. Later on the night of January 8, 2017 claimant contacted the crew leader and stated he preferred not to work on Tuesday, January 10, 2017 but would work on Tuesday, January 17, 2017. The crew leader told claimant that he needed to work on January 10 to cover the shift of the injured employee and he was scheduled to work that day.

(4) On Tuesday, January 10, 2017, claimant did not report for work and did not notify the employer that he would be absent. That day, the crew leader called claimant to learn the reason he had not reported for work. In that call, the crew leader asked claimant if he was going to report for work and claimant stated that he was occupied eating his dinner. The crew leader told claimant he was needed at work. Claimant responded that, "He's not going to come in and [the crew leader] could either write him up or fire him." Audio at ~9:30. Subsequently, claimant did not report for work that night and the crew leader covered the shift that claimant had earlier had agreed to cover.

(5) On January 13, 2017, claimant's supervisor spoke with him and told him he was suspended from work until January 16, 2017 due to his failure to attend work on January 10, 2017 or notify the employer that he was going to be absent. The supervisor cautioned claimant that he needed to report for his normally scheduled shifts or to notify of the employer of his absence. At that time, claimant's next normally scheduled shift was on January 19, 2017.

(6) On January 19, 2017, claimant did not report for work and did not call in to notify the employer of an absence. On January 19, 2017, the employer discharged claimant for not calling in and not reporting for work.

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 a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant failed to call in or report for work on January 19, 2017, his first scheduled shift after he was suspended for identical behavior that occurred on January 10, 2017. Coming so soon in time after the suspension and after the call from his supervisor, claimant could only have been aware that, absent exigent circumstances or illness, the employer expected him to report for work as scheduled or to notify the employer that he was going to be absent. There is no evidence in the record showing that exigent circumstances caused claimant's absence from work on January 19, 2017 or prevented him from calling in to notify that the employer that he was not able to report for work. Claimant's failure to attend work or to notify the employer that he was going to be absent was at least a wantonly negligent violation of the employer's standards.

Although claimant's behavior on January 19, 2017 was 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). Before it may be considered an "isolated instance of poor judgment," however, it must, among other things, have been 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, on January 10, 2017, claimant also failed to call in or report for work approximately one week before the incident at issue and, after the crew leader contacted him to determine why he was not at work, he invited the crew leader to discipline or discharge him for his behavior. Claimant's comment demonstrated both that he was aware of the employer's expectation that he call in or attend work and that he willfully intended on that day to ignore that expectation regardless of the consequences. Since claimant's behavior on January 10, 2017 was in willful violation of the employer's standards, claimant's similar behavior on January 19, 2017 was a repeated violation and formed a pattern of behavior in disregard of those standards. As such, claimant's behavior on January 19, 2017 may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor may claimant's behavior on January 19, 2017 be excused as a good faith error under OAR 471-030-0038(3)(b). On this record, and in light of claimant's comment to the crew leader on January 10, 2017 and the supervisor's clear statement to claimant on January 13, 2017 that he needed to report for his scheduled shifts, it is not plausible that claimant's failure to call in or report for work on January 19, 2017 was the result of a sincere but mistaken belief as to his work schedule or need to call in if he was going to be absent from work.

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

DECISION: Hearing Decision 17-UI-80093 is affirmed.

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

DATE of Service: April 18, 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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