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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-0445

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82223). Claimant filed a timely request for hearing. On March 30, 2017, ALJ Monroe conducted a hearing, and on April 7, 2017 issued Hearing Decision 17-UI-80603, affirming the Department's decision. On April 14, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Shari's Management, Inc. employed claimant as a hostess from February 4, 2016 to May 20, 2016.

(2) The employer expected employees to report to work for their scheduled shifts or notify the employer in advance if they were unable to report to work. Claimant understood the employer's expectations.

(3) The employer generally posted the work schedule two weeks in advance by placing the schedule on the office door. Employees were supposed to check the door and note their scheduled shifts. The employer also provided employees with copies of the schedule upon request, and employees were allowed to orally notify other employees of their schedules if they called to ask for their schedule. The employer posted contact numbers, including the general manager's cell phone number, on a bulletin board. Claimant knew where the schedule was located, and understood it was her responsibility to know her own schedule.

(4) Sometime prior to April 22, 2016, claimant went to the workplace to work but had to leave to retrieve her work shirt. Before leaving, she told the general manager that she would return to work, but did not have transportation back to work. She did not notify the general manager that she was not going to return to work until after the general manager called her to find out why she had not returned to work. The general manager told claimant that she either needed to work as scheduled or notify the general manager if she could not so the general manager could cover her shift.

(5) Claimant last worked on April 22, 2016. That day, claimant told the general manager that she was having trouble securing a babysitter and transportation to work, and that she was looking for a job closer to her home.

(6) The employer scheduled claimant to work on April 19, 2016, May 4, 2016 and May 13, 2016. Claimant did not report to work for any of those shifts or notify the employer that she was going to be absent from work.

(7) On May 20, 2016, the general manager concluded that claimant had abandoned her job, and discharged her from employment.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

On this record, there is some suggestion that claimant might have left work voluntarily, based on inferences drawn from her failure to report to work for scheduled shifts or notify the employer of her absences after April 22, 2016, during a period of time in which continuing work was available to claimant as indicated by the fact that the employer scheduled her to work on April 29th, May 4th and May 13th. However, the first unambiguous indication that the employment relationship had ended did not occur until May 20, 2016, the date upon which the employer determined that claimant had abandoned her job and was not longer willing to allow claimant to continue working an additional time. Because the evidence of a discharge is stronger than inferences suggesting that claimant might have quit, we conclude that the preponderance of the evidence supports a finding the employer discharged claimant, and that the discharge occurred on May 20, 2016.

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) 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to report to work as scheduled, or notify the employer if she was going to be absent from work. Claimant understood the employer’s expectations and knew she was responsible for knowing her own work schedule, but violated those expectations three times by failing to report to work or notify the employer she was going to be absent from work on April 29th, May 4th and May 13th.

Although claimant testified that she "made every effort" given her circumstances to find out when she was scheduled to work during the relevant time period, her testimony on the whole suggests that her efforts were minimal. *See* Transcript at 15, 16, 19, 20, 25, 29. As a preliminary matter, claimant did not provide the dates or times of her alleged calls to find out her schedule or the identity of those she spoke with, nor did she explain when she went to the business to try to look at the schedule posted on the office door. There were also some contradictions within her testimony, for example, although she stated she "made every effort" to find out her work schedule, when the ALJ asked claimant if she checked the work schedule on April 22nd before she left work for the day, claimant initially replied,

> Sometimes I did not have an opportunity to check the schedule, not just like - you know - if I'm - if I'm on the clock . . . revisions to it to where it's not posted and - you know - I don't wanna be like . . . interrupting like some things that are going on, but sometimes they have the office door closed . . . because they have an important meeting or something . . . and so then I'll - just leave and try to check back or I'll try to call.

Transcript at 21. She later testified, however, "I don't even know if they're supposed to technically – you know – tell me when I work on the phone" if she called, suggesting that when she left without knowing her work schedule she did so not knowing whether she would be able to find out about it by phone. Transcript at 23, 26. She said she "was calling for about two weeks," but then said she was trying to "stay out of their way" and felt like "a nuisance basically" and admitted that her efforts to learn her work schedule were perhaps "scarce." Transcript at 25-26, 29.[1]

There is no dispute in this record that claimant was experiencing difficulties that affected her ability to work, check the work schedule in person, or call the employer. However, the employer set the work schedule two weeks in advance, and would therefore have scheduled claimant to work the April 29th shift since sometime during the week of April 10th, well before the final shift she worked on April 22nd. The employer would have scheduled claimant's May 4th and May 13th shifts sometime during the weeks of April 17th and April 24th, respectively, giving claimant ample time to find out what her work schedule was before she missed any shifts. Claimant's description of her efforts suggests that she made minimal efforts to learn her schedule, demonstrating indifference to the consequences of conduct that predictably resulted in her violation of the employer's expectation that she either work or notify the employer if unable to work. Claimant's conduct was, therefore, wantonly negligent.

Claimant's conduct may not be excused from being considered misconduct as a good faith error. Claimant knew she did not know her work schedule, made minimal efforts to learn what her work schedule was, and did not have reason to believe in good faith that she was simply not scheduled to work between April 22, 2016 and May 13, 2016. Nor did she sincerely believe not knowing when she was scheduled to work then not reporting to work for her scheduled shifts would be something the employer condoned.

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[1] Claimant suggested that her efforts to learn her work schedule were stymied by others, alleging the employer's manager discriminated against her, ignored her calls, she "beg[ged]" another manager to let her see the schedule and was refused, the employer "purposely" scheduled her to work at inconvenient times, promised and denied her a promotion, cut her hours, and that other employees refused to help her. *See e.g.* Transcript at 17, 18, 25, 27-28, 30, 31, 33, 46. Weighing the parties' testimony, and considering the inconsistencies in claimant's, we find the allegations implausible.

Nor may claimant's conduct be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent exercise of willful or wantonly negligent poor judgment that does not exceed mere poor judgment by making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(A)-(D). It appears more likely than not that in addition to missing three shifts of work scheduled for three separate weeks and failing to notify the employer she would be absent, claimant also did not check her work schedule between the time the April 29th schedule would have been posted during the week of April 10th and the date of her final missed shift on May 13, 2016, a several week period, which would likely involve repeated wantonly negligent failures to perform an act – checking her schedule – that logically resulted in her failure to report to work or notify the employer of her absences. Claimant's wantonly negligent conduct was, therefore, not isolated. Even if claimant's absences had involved only one wantonly negligent act or failure to act, as a matter of common sense, employers have to be able to rely on employees to report to work when scheduled in order to meet the employer's business needs. Claimant's ongoing failures to check her schedule so she could either report to work or notify the employer of her absences over a protracted three-week period would cause any reasonable employer to conclude that claimant was not reliable enough to continue scheduling her for shifts, and that a continuing employment relationship was impossible. Therefore, even if claimant's conduct was considered isolated, it exceeds mere poor judgment, and conduct that exceeds mere poor judgment may not be excused.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-80603 is affirmed.

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

DATE of Service: <u>May 5, 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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