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BYE: 201805

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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0449

Reversed
Disqualification

PROCEDURAL HISTORY: On March 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 81100). The employer filed a timely request for hearing. On April 11, 2017, ALJ Amesbury conducted a hearing, and on April 14, 2017 issued Hearing Decision 17-UI-80980, affirming the Department's decision. On April 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: The ALJ failed to administer an oath or affirmation to claimant prior to taking testimony from her during the April 11, 2017 hearing. Ordinarily the ALJ's failure to do so would require remand, but for purposes of reaching this decision remand would not have a substantive effect on the outcome of this matter given that we assumed for the sake of reaching this decision that claimant's testimony was true and accurate to the best of her knowledge. As such, claimant was not prejudiced by the ALJ's failure to administer an oath or affirmation to her.

FINDINGS OF FACT: (1) St. Charles Health System, Inc. employed claimant as a scheduler from September 10, 2012 to February 3, 2017.

(2) Unless pre-authorized for overtime, the employer expected schedulers to stop working on new matters after 4:30 p.m., spend the last 30 minutes of their shifts "wrap[ping] up their day," and clock out at the exact time they were scheduled to end each shift, leaving any remaining routine business for the following day. Transcript at 7. If "there was an urgent, which would be loss of life or limb" case, schedulers were allowed to work past the end of their shifts but had to send the supervisor an email listing the account number(s) and any reason(s) why they had to work overtime. *Id.*

(3) The employer repeatedly notified claimant of its policies. The employee handbook stated that overtime needed to be pre-approved. The employer sent claimant "multiple" emails and discussed the "proper use of overtime" in the "morning huddles." Transcript at 8. On October 12, 2016, November

30, 2016 and December 12, 2016, the employer issued three warnings to claimant for attendance issues, including for working past the scheduled end of her shift without authorization.

(4) During busy periods the employer notified schedulers that overtime was pre-approved, provided the schedulers with a start and end date for the overtime period, and did not require schedulers to email about working overtime during that period. Work in the scheduling department slowed over the holidays and overtime was "not really something that [the employer] would approve." Transcript at 11.

(5) On December 16, 2016, claimant worked 6 minutes of overtime. On December 19, 2016, the supervisor emailed claimant and the other schedulers about working unapproved overtime, and instructed them to let the supervisor know why they needed the overtime, how much overtime they needed, and whether they had asked the other schedulers to help them.

(6) On December 29, 2016, claimant worked 14 minutes of overtime. On January 9, 2017, claimant worked 12 minutes of overtime. On January 11, 2017, claimant worked 18 minutes of overtime. On January 12, 2017, claimant worked 12 minutes of overtime. On January 16, 2017, claimant worked 4 minutes of overtime. On January 17, 2017, claimant worked 9 minutes of overtime. On January 18, 2017, claimant worked 25 minutes of overtime. On January 20, 2017, claimant worked 13 minutes of overtime. On January 23, 2017, claimant worked 13 minutes of overtime. On those nine occasions, claimant was not pre-authorized to work overtime, did not work on urgent or emergency cases, and did not send her supervisor an email listing the accounts, why she had needed the overtime, how much overtime she needed, or whether she had asked other schedulers to help her with the work.

(7) On January 25, 2017, claimant worked 13 minutes of overtime without advance authorization. Claimant notified the supervisor that she had spent the time working on "diabetes and nutrition accounts," which were "low priority" non-emergency cases. Transcript at 8. On February 3, 2017, the employer discharged claimant for working unauthorized overtime on non-emergency cases.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was not for misconduct, reasoning that even though claimant violated the employer's policies and expectations with regard to her use of overtime, the employer's policy was inadequate to cover the situations that resulted in claimant using overtime,

claimant was working rather than "standing around idle" while using overtime, she only used a "*de minimus*" amount of overtime on the average, and her conduct amounted to no more than an "imperfect[]" attempt "to comply with employer's requirements for performing extra work." Hearing Decision 17-UI-80980 at 3-4. We disagree.

The employer had the right to expect claimant to clock out at the time her scheduled shift ended. The employer's right to expect that of claimant was not mitigated by the fact that claimant was busy, caught up in her work, or lost track of time, especially since the employer accounted for circumstances that might interfere with a scheduler's ability to stop work right at the scheduled end of her shift by requiring schedulers to suspend work on routine matters thirty minutes prior to the end of their scheduled shifts and allowing them to work overtime when pre-authorized by the supervisor or when emergency matters dictated she work late.

Claimant suggested during parts of the hearing that she did not understand the expectation or that she would get fired for violating the expectation, but contradicted herself by admitting that she was not supposed to answer any non-emergency emails after 4:30 p.m. Transcript at 26. Despite alleging some confusion, she admitted that she understood "overtime needed to be approved and that we were supposed to email" and that her supervisor "ended up bringing up that I wasn't e-mailing her. And I told her that and she said she never said that. So I said okay. I'll start e-mailing you again. And so I started e-mailing her again." Transcript at 29-30. The preponderance of the evidence suggests that claimant knew that the employer expected her to stop work at the scheduled end of her shift unless she either had pre-authorization to work overtime, or she had to work overtime to handle an emergency situation and emailed her supervisor.

Claimant violated the employer's reasonable expectation on January 25, 2017 when she incurred 13 minutes of overtime without authorization. Although claimant sent her supervisor an email, as required, the reason claimant worked overtime was to work on a routine (i.e. non-emergency, non-urgent) case. The fact that claimant sent an email to her supervisor about working overtime suggested she was conscious of the fact she was working past her scheduled shift and aware she was violating the employer's expectation that she clock out at the scheduled end of her shift, and that she knew she was not pre-authorized to work overtime on January 25th, and that she knew she was spending the time working on a low-priority matter. Claimant's conscious decision to work overtime, under circumstances where she knew or should have known she was not authorized to do so and was not working on an emergency matter, demonstrated her indifference to the consequences of her conduct and was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error. Claimant had received three prior warnings from the employer for conduct that included clocking out after the end of her scheduled shift. She had repeatedly been advised not to incur overtime unless it was for an emergency situation or an urgent case. She did not suggest that she mistakenly believed she had clocked out on time, or mistakenly thought the low priority case she worked overtime to complete had been an emergency matter, and she did not sincerely believe, or have a reasonable basis for believing, that working 13 minutes late on a low-priority case was consistent with the standards of behavior the employer had the right to expect of her. Her violation of the employer's policy was not, therefore, the result of a good faith error.

Claimant's conduct also cannot 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 willful or wantonly negligent exercise of poor judgment rather than a repeated act or pattern or other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). On nine separate occasions after claimant received two written warnings in just two months claimant worked unauthorized overtime on non-emergency and non-urgent cases. On each of those occasions, claimant did not send her supervisor an email to request authorization for the overtime, even though claimant had just 10 days before the first of those instances been specifically instructed by her supervisor to send an email describing why she worked overtime and on what account, and on January 25th demonstrated she knew she was expected to send an email to her supervisor. The preponderance of the evidence suggests claimant was aware of the employer's expectations, both that she not work past the end of her shift and that she send the supervisor an email if she had an emergency to handle, and her conscious disregard of the expectations demonstrated her indifference to the consequences of her conduct on each of those nine occasions, making the conduct wantonly negligent. Her conduct on January 25th was not isolated, and was therefore either a repeated wantonly negligent act or part of a pattern of other wantonly negligent behavior.

For those reasons, we conclude that the employer discharged claimant for misconduct. Claimant must therefore be disqualified from receiving unemployment insurance benefits because of this work separation until she requalifies for benefits by earning four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-80980 is set aside, as outlined above.

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

DATE of Service: <u>May 9, 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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