

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0518

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164024). Claimant filed a timely request for hearing. On May 1, 2017, ALJ Snyder conducted a hearing and issued Hearing Decision 17-UI-82201, affirming the Department's decision. On May 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument and the hearing record in reaching this decision.

FINDINGS OF FACT: (1) Target employed claimant from February 9, 2015 to March 19, 2017 as a team member.

(2) The employer expected team members to report to work as scheduled, or notify the leader on duty not later than two hours after his scheduled start time if unable to report to work. If a team member failed to report to work or call the employer for three consecutive scheduled shifts, the employer considered the employee to have abandoned his job and discharged the employee. Claimant understood the employer's expectations.

(3) Claimant's work schedule varied each week. The employer posted the work schedule in advance of each work week. On approximately March 14, 2017, claimant checked the work schedule, but misread it to read that he was not scheduled to work on March 17, 18 and 19, 2017.

(4) On March 17, 18, and 19, 2017, claimant failed to report to work for his scheduled shift or notify the employer he would miss work because he did not know he was scheduled to work that day. Two hours after claimant's shift began on March 18, the leader on duty left claimant a telephone voicemail message stating that he had a no call, no show and risked job abandonment, and asking that he call her back at the store. Claimant did not receive the voicemail message until after business hours on March 18, 2017.

(5) On March 19, 2017, claimant learned from coworkers that his direct supervisor was on vacation until March 20. Claimant planned to talk to him in person on March 20 about the voicemail message he received from the leader on duty on March 18. Claimant tried to check his schedule online, but was unable to do so on March 19 because his password was expired. Claimant did not contact the leader on duty who left him the voicemail or otherwise contact the employer on March 19.

(6) On March 20, 2017, claimant went the worksite, spoke with his direct supervisor, and learned that the employer had discharged him for job abandonment after he failed to report to work or contact the employer for three consecutive scheduled shifts.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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 establish 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-82201, the ALJ concluded that claimant's choice to wait until March 20, 2017 to contact his employer was a wantonly negligent violation of the employer's reasonable expectations.¹ While we do not disagree, the ALJ failed to assess if claimant's conduct in failing to contact the employer sooner was an isolated instance of poor judgment. We conclude that it was.

It is not disputed that claimant failed to report to work or contact the employer to report he was unable to work for three consecutive scheduled shifts. It is also not disputed that claimant did not intend to miss his scheduled shifts, having mistakenly read the work schedule to indicate that he was off work on March 17, 18 and 19. The record therefore does not show that claimant's behavior was willful within the meaning of OAR 471-030-0038(3)(a). Thus, to establish misconduct, the employer must show that claimant's conduct was wantonly negligent behavior.

We first address claimant's failure to report to work on March 17, 18 and 19, 2017. The mere fact that claimant missed those scheduled shifts does not show he engaged in wantonly negligent behavior. A claimant's mistakes and oversights, without more, do not show the consciously aware mental state necessary to establish wanton negligence.² Claimant attempted to comply with the employer's standards

¹ Hearing Decision 17-UI-82201 at 3.

² See e.g. *Guadalupe Villasenor* (Employment Appeals Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent).

by checking the work schedule before March 17. The only evidence in the record about claimant's mental state when he checked the work schedule was that he inadvertently misread it. Absent additional evidence showing that claimant made more than an unintentional error, the employer did not meet its burden to show that claimant had the requisite mental state needed to demonstrate that his behavior in incorrectly reading the schedule was willful or wantonly negligent.

However, on March 18, the leader on duty left claimant a voicemail message stating that claimant should call her back, and mentioned the issue of job abandonment. Claimant contended that the leader on duty would have been finished with her shift by the time he received the message, and that he thought he should speak with his direct supervisor, who he learned from coworkers was on vacation until March 20. Audio Record at 16:00 to 16:53. Claimant's explanation does not show why he would disregard the leader on duty's express request that he call the employer about a no call, no show at work, especially when he was unable to check his work schedule online. By failing to communicate with the employer sooner after he received the voicemail message, claimant violated the employer's standards as stated in the voicemail message with at least wanton negligence.

Claimant's wantonly negligent failure to communicate with the employer sooner after receiving the voicemail message may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior may be excused as an isolated instance of poor judgment if it was single of infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). To be excused, the behavior at issue must also not have been of a type that exceeded "mere poor judgment" by, among other things, causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). The record contains no evidence that claimant engaged in other willful or wantonly negligent behavior before March 19. As a result, claimant's behavior meets the first part of the test to be excused as an isolated instance of poor judgment.

Nor did claimant's conduct exceed mere poor judgment or cause an irreparable breach of trust in the employment relationship. Claimant contacted his direct supervisor on March 20, so was not insubordinate in his failure to contact the employer. He merely used poor judgment in waiting until March 20 to contact the employer even though the leader on duty had mentioned job abandonment in her voicemail. On these facts, a reasonable employer would not have concluded that claimant's failure to reply to the voicemail message sooner was behavior that caused an irreparable breach of trust in the employment relationship, or signified that it could not trust claimant to conform his behavior to the employer's standards in the future. Because claimant's behavior meets both parts of the test necessary to be excused as an isolated instance of poor judgment, it was not misconduct.

The employer discharged claimant, but not for misconduct. He is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-82201 is set aside, as outlined above.³

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits.

DATE of Service: May 24, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.