

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0531

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90720). Claimant filed a timely request for hearing. On April 27, 2017, ALJ Janzen conducted a hearing, and on April 28, 2017, issued Hearing Decision 17-UI-82146, affirming the Department's decision on the merits but modifying the decision by concluding the denial was effective February 26, 2017 instead of February 19, 2017. On May 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not offered into evidence during the hearing, did not explain why it was unable to present the information at that time or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. The employer also failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Accordingly, under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090, EAB only considered the hearing record when reaching this decision. Pursuant to ORS 657.275(2), EAB performed a *de novo* review of the entire record.

FINDINGS OF FACT: (1) Experience Oregon, Inc. employed claimant as a shop technician from approximately February 1, 2016 to February 27, 2017. Claimant's usual work hours were Monday through Friday, 6:30 a.m. to 3:00 p.m.

(2) The employer expected its employees to report for work as scheduled or notify the employer the employee would be absent as soon as possible prior to the start of a scheduled shift. Claimant was aware of the employer's expectations.

(3) On January 16, 2017, claimant failed to report for work as scheduled or notify the employer he would be absent.

(4) On February 22, 23, and 24, 2017, claimant failed to report for work as scheduled or notify the employer he would be absent.

(5) On Monday, February 27, 2017, claimant reported for work. When asked why he had not reported for work or called in to notify the employer he would be absent on February 22, 23 and 24, claimant responded that he had been kicked out of his apartment and his cell phone's battery had died. That day the employer discharged claimant for failing to report for work without providing notice to the employer on February 22, 23 and 24, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to report for work as scheduled or notify it in advance that he would be absent. Claimant was aware of and understood the employer's expectations both as a matter of common sense and because he was given a handbook explaining those expectations at hire. Claimant violated both of those employer expectations on January 16 and February 22, 23 and 24 of 2017 when he failed to report for work as scheduled without notifying anyone at the employer he would be absent. His assertion that he notified both his supervisor and the employer's dispatcher that he would be absent on February 23 and February 24 was contradicted by the testimony of both of those individuals and the fact that the employer had to cancel a bus trip claimant was scheduled to drive on February 23 because it had no time to find a substitute. *Cf.* Transcript at 19 and 29, 31-32. On this record, claimant was not credible. More likely than not, claimant's violations of the employer's expectations were conscious and demonstrated a willful disregard of the employer's interests.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. To be considered isolated, an exercise of poor judgment must be 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). Claimant's exercise of poor judgment both in failing to provide prior notice he would be absent and failing to report for work on February 22, 23 and 24 without authorization was not isolated.

Claimant's conduct was not the result of a good faith error in his understanding of the employer's expectations. Claimant did not assert or show that he sincerely believed or had a factual basis for believing the employer would tolerate his absences from work without notification or authorization.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 17-UI-82146 is affirmed.

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

DATE of Service: June 7, 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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