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

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0614

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84738). Claimant filed a timely request for hearing. On May 10, 2017, ALJ Sgroi conducted a hearing, and on May 12, 2017 issued Hearing Decision 17-UI-83313, concluding the employer discharged claimant, but not for misconduct. On May 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Deception Brewing Company employed claimant as a bartender in its tap room from August 14, 2014 to January 16, 2017.

(2) In November and December 2016, the employer received several customer complaints about claimant. The employer also was aware that claimant had violated the employer's policy against vape smoking in the tap room. The employer also was aware that claimant had consumed a small bag of potato chips for sale to customers without paying for it. The employer's owners planned to schedule a meeting with claimant in early 2017 to discuss those issues.

(3) The employer scheduled claimant to work from 4:00 p.m. to 11:00 p.m. on January 7, 2017, and from 12:00 p.m. to 9:00 p.m. on January 8, 2017. The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer. Claimant understood the employer's expectations and was aware of his work schedule.

(4) On January 7, the employer's owners decided to close its tap room at 3:00 p.m. due to inclement weather. One of the owners called claimant and told him not to report for work that day. The owner also told claimant that he would call claimant's cell phone at 10:30 a.m. on January 8 and let him know whether the employer was going to open at noon, and whether claimant should report for work as scheduled.

(5) After speaking to the owner, claimant received a call from a friend who asked claimant to help him remove some fallen trees from his property. Claimant agreed, drove to his friend's property, helped him

remove the trees, and stayed overnight at his lodge. Although claimant was aware that cell phone reception at the lodge was unreliable, his friend had a landline. It did not occur to claimant to contact the owner and arrange for him call the landline the following morning.

(6) Before going to bed, claimant set his cell phone alarm for the following morning. However, he forgot to plug his cell phone into an electrical outlet, and the battery drained and died overnight due to the phone searching for a signal due to poor reception.

(7) At 10:30 a.m. on January 8, the owner telephoned claimant's cell phone, which was dead, and left a voice message stating that the employer was opening at noon, and that claimant therefore needed to report for work as scheduled or notify the owner if he was unable to do so. The owner then sent a text message to that effect to claimant's cell phone. The owner telephoned claimant twice more, but did not leave another voice message.

(8) On January 8, 2017, claimant woke up at approximately 12:44 p.m., at which time he realized that his cell phone had died overnight and that he had overslept, and twice called the owner from his friend's landline. The owner did not recognize the landline number, and therefore did not answer the calls. Claimant therefore left the owner a voice message apologizing if he missed the owner's call that morning, explaining that he was at the lodge and that his cell phone died overnight searching for a signal. Claimant further stated that, based on weather conditions at the lodge, he assumed the tap room would remain closed, and told the owner to call him back on the landline if he needed to contact claimant.

(9) The owner listened to claimant's voice message a little after 1:00 p.m. but did not return claimant's call. After waiting a short period of time for the owner to return his call, claimant drove to the tap room, which took longer than usual due to icy road conditions. Claimant arrived a little after 2:00 p.m., apologized to the owner, and offered to work the remainder of his shift. The he owner did not allow claimant to do so.

(10) Based on claimant's failure to report for work as scheduled or notify the employer that he would be absent on January 8, 2017, the owners scheduled a meeting with claimant on January 16, 2017 and discharged him at that time.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

If an 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) (August 3, 2011). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id*.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b). For an instance of poor judgment to be isolated, the 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)(A). Acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(1)(d)(D).

The first issue in this case, is the reason, or reasons, for claimant's discharge. It is undisputed that the employer discharged claimant, at least in part, for failing to report for work as scheduled or notify the employer that he would absent from work on January 8, 2017. One of the employer's owners testified that claimant also was discharged, in part, for other reasons, including several customer complaints about claimant, claimant's violation of the employer's policy against vape smoking in the tap room, and his consumption of a small bag of potato chips for sale to customers without paying for it. Audio Record at 21:00-26:00. However, the owner testified that although those other matters were taken into consideration, it was claimant's attendance violation on January 8 that led the employer to discharge him when it did. Audio Record at 14:15-14:30, 21:00-23:00, 26:00-26:10. More specifically, the owner testified that although the owners planned to schedule a meeting with claimant in early 2017 to discuss those other matters, and may have discharged claimant at that meeting, it was claimant's attendance violation on January 8 that led them to schedule the meeting with claimant on January 16 and discharge claimant on that date. Audio Record at 23:00-24:00.

The owner's testimony shows that it was claimant's failure to report for work as scheduled or notify the employer that he would absent from work on January 8 that led the employer to sever the employment relationship, and therefore discharge claimant, on January 16. We therefore focus on that incident as the proximate cause of claimant's discharge, and first determine whether he violated the employer's attendance expectations willfully or with wanton negligence. We address prior incidents only if necessary to determine whether claimant's conduct on January 8 may be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d)(A) and OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to report for work as scheduled or notify the employer if he was unable to do so. Claimant violated that expectation on January 8, 2017. Claimant arguably should have known to arrange for the owner to call his friend's landline to confirm whether he was expected to report for work that day. He also arguably should have known to charge his cell phone overnight to ensure that he woke up in time to confirm whether he was expected to report for work, and to do so on time. However, the record fails to show claimant consciously neglected to arrange for the owner to call his friend's landline, or that he consciously neglected to charge his cell phone. Nor does the record show that claimant acted with indifference to the consequences of his actions, as supported by the fact

that he immediately contacted the employer after waking up on January 8, and then drove to the tap room and offered to work the remainder of his shift. Claimant was careless, arguably negligent, but his conduct was not willful, and did not rise to the level of *wanton* negligence as defined OAR 471-030-0038(1)(c). It therefore is unnecessary to determine whether claimant's conduct can be excused as an isolated instance of poor judgment under OAR 471-030-0038(1)(d)(A) and OAR 471-030-0038(3)(b).

Claimant's discharge was not for misconduct. He is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-83313 is affirmed.

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

DATE of Service: <u>June 12, 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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