

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0750

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93136). Claimant filed a timely request for hearing. On June 13, 2017, ALJ Janzen conducted a hearing, and on June 14, 2017 issued Hearing Decision 17-UI-85622, affirming the Department's decision. On June 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Key Bank National Association employed claimant as a floater teller from May 21, 2016 to December 14, 2016.

(2) The employer expected employees to report for work on time, with a 5 minute grace period. The employer also had a written policy stating that it expected employees to use its "Kronos" phone system to clock in to work when they arrived and, if they did not, to manually edit their time so it was accurately reported and they would be paid for the hours they worked. Transcript at 8. Claimant was aware of the employer's policies and understood its expectations.

(3) On July 25, 2016, claimant reported for work 15 minutes late. On August 12, 2016, the employer placed claimant on a first level performance improvement plan, in part, for that reason.

(4) On September 22, 2016, claimant reported for work 24 minutes late. On October 11, 2016, claimant reported for work 34 minutes late. On October 12, 2016, claimant reported for work 11 minutes late. On October 13, 2016, claimant reported for work 18 minutes late. On October 14, 2016, claimant reported for work 14 minutes late.

(5) On October 19, 2016, the employer placed claimant on a second level performance improvement plan due, in part, to his repeated tardiness. The plan instructed claimant to be at his work station and ready to work at his scheduled time each day, use the Kronos system to record the beginning and ending times for all compensable work activities, ensure the system accurately reflected his time worked, and

make whatever arrangements necessary to arrive at work on time, including setting his alarm earlier and making earlier travel arrangements. The plan informed claimant that his failure to comply would result in further disciplinary action, up to and including discharge. The plan included space for claimant to comment in writing, and claimant did not assert that he reported for work on time on September 22 or October 11, 12, 13 or 14, 2016.

(6) On October 31, 2016, claimant reported for work 10 minutes late. On December 2, 2016, the employer placed claimant on a final performance improve plan, in part, for that reason. The plan again instructed claimant to be at his work station and ready to work at his scheduled time each day, use the Kronos system to record the beginning and ending times for all compensable work activities, ensure the system accurately reflected his time worked, and make whatever arrangements necessary to arrive at work on time, including setting his alarm earlier and making earlier travel arrangements. The plan informed claimant that his failure to comply would result in further disciplinary action, up to and including discharge. The plan included space for claimant to comment in writing, and claimant did not assert that he reported for work on time on October 31, 2016.

(7) On December 7, 2016, claimant reported for work 11 minutes late. The employer discharged claimant for that reason. Claimant's discharge notice included space for claimant to comment in writing, and claimant did not assert that he reported for work on time on December 7, 2016. However, claimant asserted orally to his manager that he had been reporting for work on time, but forgetting to clock in until more than five minutes later. He also asserted to the employer's employee relations consultant that he had not been manually correcting his clock in times because his manager had told him in September or October 2016 that he no longer was allowed to do so.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ 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. 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). For an act 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).

The employer had a right to expect claimant to report for work on time, with a 5 minute grace period, and discharged him for allegedly reporting for work 11 minutes late on December 7, 2016. It is undisputed that claimant clocked into work 11 minutes late that day, and more than 5 minutes late on 7 prior occasions during his employment. At hearing, however, claimant testified that he was more than

five minutes late for work on only two of those occasions, September 22 and October 11, 2016, because he got lost driving to work at the employer's Estacada, Oregon branch, where he had never worked before. Transcript at 21-22. Claimant asserted that he reported for work on time on the other six occasions, July 25, October 12, 13, 14 and 31, and December 7, 2016, but forgot to clock in until more than 5 minutes later. Transcript at 15-19, 22-24. According to claimant, he did not manually correct his start times because his manager told him in September or October 2016 to stop doing so. Transcript at 19-23.

However, the employer's employee relations consultant testified that she confirmed through time-stamped video surveillance photographs of claimant reporting for work that all of his late clock in times were correct,¹ and we find it unlikely that claimant would continue forgetting to clock in and not assert in his performance improvement plans that he was reporting for work on time despite understanding that his job was "somewhat" in jeopardy. Transcript at 28. The employee relations consultant also testified that claimant's manager merely instructed him to notify her of any manual corrections to his start times,² and we find it unlikely that his manager prohibited him from correcting his start times, which would have been contrary to the employer's written policy, the instructions contained in claimant's performance improvement plans, and state and federal wage and hour laws.³ We also find it unlikely that if claimant's manager had prohibited him from correcting his start times, he would have waited until being discharged to inform the employee relations consultant.

We therefore find it likely that claimant reported for work more than five minutes late on July 25, September 22, October 11, 12, 13, 14 and 31, and December 7, 2016. With respect to July 25, October 12, 13, 14 and 31, and December 7, 2016, claimant provided no explanation for being late on those days. With respect to claimant's assertion that he was late for work on September 22, 2016 because he got lost driving to work, claimant testified that it caused "only like a 10-minute delay," which would not explain why he was 24 minutes late that day. Transcript at 21. With respect to October 11, 2016, we find it implausible that claimant was 34 minutes late because he again got lost driving to work at the same location. And even if true, claimant failed to explain why he did not take steps necessary to ensure he did not get lost again, and reported for work on time.

In sum, absent credible evidence to the contrary, claimant's failure to report for work on time on eight separate occasions in less than five months despite repeated warnings demonstrated a conscious disregard of the employer's expectation that he report for work on time, and indifference to the consequences of his actions. We therefore conclude that claimant's failure to report for work on time on December 7, 2016 was wantonly negligent, and, because it was a repeated act and part of a pattern of wantonly negligent behavior, not an isolated instance of poor judgment. Likewise, absent credible evidence that claimant sincerely believed, and had a rational basis for believing, that his conduct on December 7, 2016 complied with the employer's expectations, that conduct cannot be excused as a good faith error.

¹ Transcript at 12-13, 30-33.

² Transcript at 31.

³ Nor would claimant's testimony that his manager told him in September or October 2016 to stop manually correcting his start times explain why claimant neglected to do so on July 25, 2016.

We therefore conclude that claimant's discharge was for misconduct. Claimant is disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-85622 is affirmed.

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

DATE of Service: July 18, 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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