

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0792

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 8, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 104800). The employer filed a timely request for hearing. On June 22, 2017, ALJ Murdock conducted a hearing, and on June 23, 2017 issued Hearing Decision 17-UI-86490, which concluded claimant's discharge was for misconduct. On July 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On July 20, 2017, ALJ Murdock issued Amended Hearing Decision 17-UI-88473, again concluding claimant's discharge was for misconduct.¹ Because Hearing Decision 17-UI-88473 did not cancel or resolve the issue presented by Hearing Decision 17-UI-86490, claimant was not required to file an application for review of the amended hearing decision.²

FINDINGS OF FACT: (1) Northwest Restaurant Oregon, Inc. employed claimant as a shift supervisor from October 21, 2013 to April 7, 2017.

(2) On March 23, 2017, claimant asked the employer's human resources director for time off work to obtain an emergency insulin "pen" for her son. The human resources director approved claimant to take time off work until March 29, 2017. The human resources director instructed claimant to contact the area manager about her work schedule before that date. Claimant understood she was expected to contact the area manager. The human resources director notified the area manager that she had given

¹ Although Hearing Decision 17-UI-86490 stated that claimant was disqualified from benefits because of a discharge for misconduct, the decision contained a clerical error in the "Order" section stating that decision # 104800 was "affirmed" rather than "set aside." Hearing Decision 17-UI-88473 was issued for the sole purpose of correcting the clerical error in the "Order" section but was otherwise identical to Hearing Decision 17-UI-86490.

² Because Hearing Decision 17-UI-86490 was final and claimant had already filed an application for review of that decision when the Office of Administrative Hearings (OAH) issued the amended hearing decision, OAH lacked jurisdiction to issue the amended hearing decision. See ORS 657.270(6) (an ALJ's decision is final unless a party files an application for review); ORS 657.275(1) (establishing EAB's jurisdiction once an application for review is filed); ORS 657.290 (only the Department and EAB have continuous jurisdiction to reconsider decisions; ALJs do not).

claimant time off work and that claimant would return to work on March 29th. The area manager scheduled claimant to work on March 29, March 30, March 31, April 3 and April 4.

(3) Claimant did not contact the area manager. On March 30, March 31 and April 3, 2017, the area manager tried to call claimant; she did not answer, and the area manager did not have the option to leave a voicemail message. The area manager sent claimant a text message; claimant did not respond.

(4) On April 4, 2017, the human resources director called claimant and left a voicemail stating that the employer had not heard from claimant in a while and said she would like to hear from claimant. Claimant received the voicemail message but chose not to return the director's call. On April 7, 2017, the employer concluded that claimant had abandoned her job, and discharged her. Sometime after April 9, 2017, Oregon Employment Department staff told claimant that the employer had discharged her.³

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant for misconduct, and that she must be disqualified from receiving unemployment insurance benefits.

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, where the individual is conscious of her conduct and knew or should have known that it would probably result in a violation of the standards of behavior which an employer has the right to expect of her.

The employer discharged claimant after claimant did not contact the employer about returning to work or respond to the employer's attempt to contact her. The employer had the right to expect claimant to maintain contact and respond to the employer's reasonable requests for contact. Although the parties disagreed about some of the particulars, claimant testified during the hearing that she understood the human resources director had instructed her to contact the area manager about her schedule and did not do so. Audio recording at ~ 28:05. She also testified that she received the director's voicemail asking her to call and chose not to do so. Audio recording at ~ 19:15, ~ 19:45. It is therefore more likely than not that claimant understood that she was expected to contact the employer.

³ Claimant testified during the hearing that she learned of her discharge from Department staff when she filed her claim for benefits, but did not know the date that occurred. Audio recording at ~ 14:50. The BYE (benefit year ending) date on claimant's claim is week 15-18; a claim with a BYE date of week 15-18 had to have been filed during the week of April 9, 2017 to April 15, 2017. Therefore, the earliest claimant might have learned of her discharge would be April 9th; given our understanding of the Department's processes, including that the Department was closed on Sunday April 9th and would not have had time to notify the employer of claimant's claim or receive a separation statement from the employer for several days after beginning to process her initial claim, claimant likely learned of her discharge at least a week after April 9th, if not longer. We take notice of the BYE date, which is contained in Employment Department records, and our specialized knowledge of the Department's processes. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

Claimant's explanations for failing to maintain contact with the employer were inconsistent and illogical.⁴ Claimant suggested that she did not make contact with the area manager because she believed she was on family medical leave, which is illogical because she acknowledged at the hearing that she had never received family medical leave paperwork and never followed up with the human resources director about family medical leave. Audio recording at ~ 12:30 *et seq.* Moreover, at one point during the hearing claimant referred to her March 23rd conversation with the human resources director as having been about the "pen," which contradicted her testimony that that conversation was about her need for family leave but was consistent with the director's testimony claimant had only asked for a small amount of time off until she could secure an emergency insulin pen for her son and did not discuss or request family medical leave. *Compare* Audio recording at ~ 25:15, ~ 28:05. It is therefore more likely than not that claimant did not ask for family leave during the March 23rd conversation with the human resources director and did not have reason to believe that she was on family leave at the time she failed to make contact with the area manager.

With respect to claimant's failure to return the human resources director's April 4th call, claimant testified that she thought she did not need to return the human resources director's April 4th call because the director knew her "whole situation." Audio recording at ~ 21:00. She later contradicted that testimony, however, by stating that she did not tell the director that part of the reason she took time off work was that her son was out of school until his school had a plan in place to deal with any problems related to his health, that she lacked childcare for him during that time, and that she did not provide the employer with a doctor's note about her own health, all of which suggests that she knew the director did not know her "whole situation." *Compare* Audio recording at ~ 23:00, ~ 23:55. Claimant also testified that she did not return the director's April 4th call because she was waiting for her son's school's emergency plan to be put in place, and found out from the Employment Department that the employer had discharged her before she had a chance to call. Audio recording at ~ 14:50. That is not plausible, however, because claimant testified that her son's plan was in place on April 4th, the same day as the director's call, and she could not have found out about her discharge from the Department until at least five days later and probably later than that. Audio recording at ~ 13:35. Accordingly, neither a belief that the human resources director knew claimant's situation, nor receipt of the news the employer discharged her, could have been the reason claimant decided not to return the director's April 4th call.

In sum, the record shows that it was more likely than not that claimant understood the employer wanted her to call the area manager in late March about her work schedule, and understood the human resources director wanted her to call around April 4th, but chose not to do so. Claimant's failures to call the employer under the circumstances described was not the result of a good faith belief that she did not need to call, or that she was on an approved leave of absence, for reasons already explained. Rather, her failures to call appear to have been conscious deviations from the employer's expectations, and the circumstances suggest it was more likely than not that she was indifferent to the consequences of her conduct. Her failures to maintain contact with the employer were, therefore, wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly

⁴ Accordingly, where the parties disagreed we found facts in accordance with the employer's evidence.

negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant's failures to call, and general failure to maintain contact, involved at least two conscious exercises of poor judgment; first, her choice not to call the area manager about her work schedule as instructed, and second, her failure to return the director's April 4th call when asked. Her conduct was, therefore, not isolated. Additionally, conduct, even if isolated, may not be excused if it exceeded mere poor judgment by causing an irreparable breach of trust or making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, claimant was approved to take less than a week of time off but consciously chose not to contact the employer for approximately two weeks, even after receiving at least one call from the employer asking her to return the call; as a result of her failure to contact the employer, she missed five scheduled shifts during that time.⁵ Claimant's failure to maintain contact with the employer about her need for time off work and availability to work scheduled shifts made it impossible for the employer to continue to schedule her to work, and created an irreparable breach of trust such that any reasonable employer would conclude under the circumstances that it could not continue to employ claimant. Claimant's conduct therefore cannot be excused because it exceeded mere poor judgment.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-88473 is affirmed.

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

DATE of Service: July 27, 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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⁵ The area manager called claimant three times and sent her one text message between March 30th and April 3rd, but claimant did not reply. The ALJ did not ask what the text message said. Although the manager testified that he did not leave voicemail messages, the ALJ did not ask claimant whether she received "missed call" notifications or whether she received the text message, nor, if she did, did the ALJ ask why claimant did not reply. Without evidence that claimant was aware she was failing to return the manager's calls or respond to his text message we cannot conclude that her conduct with respect to the calls and text message was conscious.