

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0913

Reversed
Disqualification

PROCEDURAL HISTORY: On May 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 111613). The employer filed a timely request for hearing. On July 18, 2017, ALJ Sgroi conducted a hearing at which claimant failed to appear, and on July 20, 2017, issued Hearing Decision 17-UI-88529, affirming decision # 111613. On July 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Salem Group Conference employed claimant as a part time banquet server from August 31, 2017 until March 20, 2017.

(2) Sometime prior to February 24, 2017, claimant contacted his supervisor and said that he had broken his arm, but that he would be able to perform the duties of his position as a server.

(3) On February 24, 2017, claimant reported for a scheduled shift but was unable to perform his job duties. Claimant's supervisor told claimant that he needed to see a doctor and could not return to work until a doctor had released him.

(4) Sometime after February 24, claimant contacted his supervisor and told him that he had a doctor's appointment on March 10, 2017. The supervisor asked that claimant contact him after his doctor's appointment to let the supervisor know if the doctor had released claimant to work. The supervisor did not schedule claimant for any shifts after February 24 because he was awaiting notification from claimant that he had been released to work.

(5) On March 11, 2017, claimant's supervisor called claimant because claimant had not contacted him. Claimant's supervisor left a voice mail message for claimant, asking that he contact the supervisor regarding his availability for and ability to work. Claimant did not contact his supervisor as requested.

(6) On March 20, 2017, claimant's supervisor again called claimant and left a voice mail message, asking that he contact the supervisor. Claimant did not contact his supervisor as requested.

(7) On March 20, 2017, the employer terminated claimant's employment for job abandonment.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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 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).

On February 24, 2017, claimant's supervisor realized that claimant's broken arm prevented him from performing his job duties as a banquet server. The supervisor asked claimant to obtain a doctor's release indicating that he was able to perform his job. After claimant told the supervisor he had a March 10 doctor's appointment, the supervisor asked that claimant contact him after the appointment to let the employer know if he was available for and able to work. Claimant never contacted his supervisor after March 10, and the employer discharged him for abandoning his job on March 20. In Hearing Decision 17-UI-88529, the ALJ summarily concluded that claimant's failure to contact the employer to be placed on the schedule was not misconduct."¹ However, claimant was made aware that his supervisor expected contact from not only during the conversation about his doctor's appointment, but also by the voice mail messages the supervisor left for claimant on March 11 and March 20. Claimant's conscious failure to comply with the employer's reasonable expectation – that he tell the employer if and when he was able to and available for work – was a violation of the standards of behavior the employer expected of him and was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. 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). Here, claimant repeatedly failed to inform the employer if and when he was able to and available for work. His exercise of poor judgment therefore was a repeated act, and not a single or infrequent occurrence. In addition, acts that make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D). Claimant's repeated failures to inform the employer if and when he was able to and available for work for nearly one month objectively made a continued employment relationship

¹ Hearing Decision 17-UI-88529 at 2.

impossible. Claimant's conduct therefore exceeded mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3).

Claimant's conduct also cannot be excused as a good faith error. The record fails to show claimant sincerely believed, and had a rational basis for believing, that repeatedly failing to inform the employer if and when he was able to and available for work for nearly one month complied with the employer's expectations.

We therefore disagree with the ALJ and conclude the employer discharged claimant for misconduct. Claimant is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-88529 is set aside, as outlined above.

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

DATE of Service: August 16, 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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