

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0926

Hearing Decision 17-UI-87919 Affirmed ~ Request to Reopen Denied
Hearing Decision 17-UI-85857 Affirmed ~ Disqualification

PROCEDURAL HISTORY: On May 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151352). The employer filed a timely request for hearing. On May 31, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 15, 2017. On June 15, 2017, ALJ Janzen conducted a hearing, at which claimant failed to appear, and on June 16, 2017 issued Hearing Decision 17-UI-85857, reversing decision # 151352 and concluding that claimant's discharge was for misconduct. On July 6, 2017, claimant filed a timely request to reopen the June 15th hearing that included a written statement explaining why claimant failed to appear at the hearing. On July 13, 2017, ALJ Kangas reviewed claimant's request and issued Hearing Decision 17-UI-87919, denying claimant's request to reopen. On August 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB) that was construed as a timely application for review of Hearing Decisions 17-UI-85857 and 17-UI-87919.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-85857 and 17-UI-87919. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0926 and 2017-EAB 0936).

FINDINGS OF FACT: (1) Open Arms Adult Care employed claimant as a substitute caregiver from June 10, 2016 to February 22, 2017.

(2) The employer required claimant to report to work on time and be respectful to others. The employer notified claimant of the expectations upon hire and issued a warning to her for tardiness in August 2016. The employer also required claimant to track the dates and times she distributed medications to residents, and trained her on the policy upon hire and again in January 2017.

(3) On January 9, 2017, claimant reported to work 15 minutes late. On January 19, 2017, claimant reported to work 15 minutes late. On January 30, 2017, claimant reported to work 10 minutes late. On February 4, 2017, claimant failed to track the date and times she distributed medication to some residents. On February 4, 2017, the employer warned claimant for that conduct.

(4) On February 18, 2017, claimant reported to work 35 minutes late. The employer warned claimant again.

(5) The employer had a variety of concerns about claimant's work performance and behavior. On February 22, 2017, the employer's owner conducted a performance review call with claimant, during which claimant loudly yelled at the owner and said the owner did not "give a damn" about the residents and had "no fucking idea what the job" was. Audio recording at ~ 13:50. Later that day, the owner discharged claimant because of her disrespectful behavior toward the owner in that meeting.

(6) Claimant apparently received notice of the June 15th hearing. She did not participate in the hearing because her witness was not available on the day and time set for the hearing, and she considered it "very important" that he be present for the hearing. *See* Claimant's request to reopen. Claimant filed a request to reopen on July 6, 2017 because she was "now prepared to pursue my case." *Id.*

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's request to reopen should be denied, and that claimant should be disqualified from receiving unemployment insurance benefits because her discharge was for misconduct.

Request to Reopen. ORS 657.270(5) provides that any party who failed to appear at the hearing may request to reopen the hearing, and that the ALJ may reopen the hearing if the party shows good cause for failing to appear. "Good cause" means an excusable mistake or factors beyond an applicant's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

It appears in this case that claimant knew when the hearing was scheduled to occur and chose not to appear at it because her witness was not available at that time. It was within claimant's reasonable control not to miss the hearing, however, such as by calling OAH ahead of time to request that the hearing be postponed to a date or time her witness was available, appearing at the hearing to provide her own evidence about the work separation and asking the ALJ to continue the hearing to another time when her witness might be available, or asking her witness to prepare a written statement claimant could submit into evidence, among other options. Given the existence of such options, claimant's witness's unavailability was not a factor that made claimant's appearance at a hearing beyond claimant's reasonable control. Likewise, although it was likely a mistake for claimant to choose not to appear at the hearing, the mistake was not "excusable" for purposes of reopening the hearing because it was not the result of inadequate notice, reasonable reliance on another person, or the inability to follow directions despite substantial efforts to comply. *See accord* Employment Appeals Board Decision 2017-EAB-0838 (August 8, 2017); Employment Appeals Board Decision 2016-EAB-1435 (December 28, 2016). Claimant's request to reopen is, therefore, denied.

Discharge. 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. Good faith errors and isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer had a variety of concerns about claimant's work performance and behavior in the workplace, but did not decide to discharge claimant until after she yelled at the owner and used foul language toward her during a performance review call. The employer had the right to expect claimant to be respectful at work, and claimant knew or should have known that expectation because the employer had a policy to that effect and notified claimant of it, and also should have known not to yell at or use foul language toward the owner as a matter of common sense. Under the circumstances the owner described, claimant's decision to yell at and use foul language toward the owner was, more likely than not, conscious, and demonstrated her indifference to the employer's expectation that she be respectful at work. Her conduct was, therefore, wantonly negligent.

Claimant's conduct cannot be excused as a good faith error. The record does not suggest that claimant sincerely believed, or had a factual basis for believing, that the employer would not consider yelling at and using foul language toward the owner a violation of its policy requiring her to treat others with respect, or that the employer would condone her decision to violate that policy.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. An isolated instance of poor judgment is a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). In addition to the final incident of wantonly negligent disrespectful behavior, claimant had previously been warned for repeated instances of tardiness, including an incident where she reported to work 35 minutes late only two weeks after having been warned against further instances of tardiness. Given claimant's pattern of tardy arrivals and a history of repeated oral or written warnings, it is more likely than not that her February 18th tardiness was the result of her conscious indifference to the expectation that she report to work on time. Because the record suggests that claimant engaged in repeated acts of wantonly negligent conduct at work, her conduct in the final incident cannot be considered isolated or excused as an isolated instance of poor judgment.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation until she requalifies for benefits by earning four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decisions 17-UI-85857 and 17-UI-87919 are affirmed.

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

DATE of Service: August 24, 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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