

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0942

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 143832). Claimant filed a timely request for hearing. On May 24, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 8, 2017, at which time claimant failed to appear. On June 8, 2017, ALJ Wyatt issued Hearing Decision 17-UI-85216, dismissing claimant's request for hearing based on his failure to appear. On June 12, 2017, claimant filed a request to reopen the June 8, 2017 hearing. On June 27, 2017, OAH mailed notice of a hearing scheduled for July 20, 2017. On July 20, 2017, ALJ Wyatt conducted a hearing, and on July 27, 2017 issued Hearing Decision 17-UI-89089, allowing claimant's request to reopen and concluding that claimant was discharged, but not for misconduct. On August 4, 2017, the employer filed an application for review of Hearing Decision 17-UI-89089 with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant received the May 24, 2017 notice of hearing scheduled for June 8, 2017 hearing a few days after it was mailed and planned to attend the 9:30 a.m. hearing. However, claimant became nauseously ill shortly before the scheduled start of the hearing and could not participate at that time. Approximately 45 minutes later, claimant attempted to call in for the hearing, but had missed it.

(2) JB Medical Transport LLC employed claimant as a medical transport driver, last from September 2016 to February 4, 2017.

(3) On January 23, 2017, claimant sustained a painful on-the-job injury to his hand for which he was prescribed pain medications and sedatives for sleep. He agreed to work as much as he could because he had no other source of income. However, on January 31, 2017 he collapsed on the job, following which he remained off work from February 1 through February 3, 2017. On February 3, 2017, at the owner's request, claimant agreed to perform a medical transport at approximately 4:30 a.m. on February 4.

(4) On February 4, 2017, claimant failed to awaken in time for his scheduled transport due to the effects of his painkillers and sedatives. When he did awake, he contacted the owner and told him he was unable

to work due to his physical condition. The owner then told claimant he would be required to sign a warning letter for the “no call no show” that day. Transcript at 22. An argument ensued when claimant stated that he would refuse to sign such a warning unless it included an explanation of the circumstances surrounding his no call no show. The owner refused to include such an explanation. The argument ended when the owner instructed claimant to return the employer vehicle. When claimant did so, the owner gave him his final check.

CONCLUSIONS AND REASONS: We agree with the ALJ. Claimant established good cause for his failure to appear at the June 8, 2017 hearing and his request to reopen the hearing was appropriately allowed. The employer discharged claimant, but not for misconduct.

Request to Reopen. ORS 657.270(5) provides that a party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and the party shows good cause for failing to appear. “Good cause” exists when the requesting party’s failure to appear at the hearing arose from an excusable mistake or factors or circumstances beyond the party’s reasonable control. OAR 471-040-0040(2) (February 10, 2012).

At hearing, there was no dispute that claimant filed his request to reopen the hearing within 20 days of the date Hearing Decision 17-UI-85216, dismissing his hearing request for failing to appear on June 8, was issued. Nor was there any dispute that claimant was unable to participate in the hearing at the scheduled start time on June 8 due to the sudden onset of his debilitating illness. On this record, we conclude that claimant’s sudden illness was a circumstance beyond claimant’s reasonable control that prevented him from participating in the scheduled hearing. And, even if we had concluded that it was within claimant’s control to call in and request a postponement, and inferred that his request with virtually no notice would have been granted, we also would have concluded that his failure to do so under the circumstances was an excusable mistake.

Claimant established good cause for failing to appear at the June 8, 2017 hearing and his request to reopen the hearing was appropriately allowed.

Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

The parties disagreed on the nature and timing of the work separation with the employer asserting that claimant quit and claimant asserting that he was discharged. *Cf.* Transcript at 34-35; 32-34. However, it was undisputed that the argument ended when the owner instructed claimant to return the employer vehicle and that the owner gave claimant his final check when he did so. More likely than not, the employer did not expect claimant to perform any additional work after that time. Under the above cited rules, the work separation was a discharge on February 4, 2017.

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) 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.

The employer had the right to expect claimant to at least acknowledge that he was a no call no show on February 4, 2017 and read the owner's warning before refusing to sign it. However, assuming *arguendo*, that claimant's refusal to sign the employer's no call, no show warning was willful or wantonly negligent, and assuming claimant knew or should have known that his refusal would probably violate a reasonable employer expectation, we agree with the ALJ that claimant's conduct was no more than an isolated instance of poor judgment, which is not misconduct under OAR 471-030-0038(3)(b). Hearing Decision 17-UI-89089 at 4. OAR 471-030-0038(1)(d) defines "isolated instance of poor judgment":

(A) The act must 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.

(B) The act must involve judgment. A judgment is an evaluation resulting from discernment and comparison. Every conscious decision to take an action (to act or not to act) in the context of an employment relationship is a judgment for purposes of OAR 471-030-0038(3).

(C) The act must involve poor judgment. A decision to willfully violate an employer's reasonable standard of behavior is poor judgment. A conscious decision to take action that results in a wantonly negligent violation of an employer's reasonable standard of behavior is poor judgment. A conscious decision not to comply with an unreasonable employer policy is not misconduct.

(D) Acts that violate the law, acts that are tantamount to unlawful conduct, acts that 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(3).

Claimant's refusal to sign the warning was, at most, a single exercise of poor judgment. Although claimant did not report for work as scheduled or notify the employer he would be absent on February 4, 2017, there was no dispute that claimant was unable to do either because he failed to wake up due to the effects of the medications he was taking for his injury. Accordingly, his violations of the employer's expectations in those respects were not conscious, *i.e.* neither willful nor wantonly negligent. Moreover, absence due to illness is not misconduct. OAR 471-030-0038(3)(b). Claimant's exercise of poor judgment in failing to sign the employer's warning on February 4 was, at most, an isolated instance of poor judgment.

Claimant's conduct did not exceed mere poor judgment. His refusal to sign the warning was not unlawful or tantamount to unlawful conduct. Claimant's refusal was not outright but conditioned on the

employer's inclusion of a description of the circumstances of claimant's no call, no show that day. Given those circumstances, claimant's refusal to sign the document, when viewed objectively, did not amount to a breach of trust in the employment relationship sufficient to make a continuing relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-89089 is affirmed.

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

DATE of Service: August 29, 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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