

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1090

Reversed
Disqualification

PROCEDURAL HISTORY: On July 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 114106). The employer filed a timely request for hearing. On August 22, 2017, ALJ Wyatt conducted a hearing, at which claimant failed to appear, and on August 25, 2017 issued Hearing Decision 17-UI-91175, affirming the Department's decision. On September 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wal Mart Associates, Inc. employed claimant as an associate from approximately June 2016 to May 11, 2017.

(2) The employer had a rest break policy that prohibited employees from exceeding their required 15-minute long rest break periods. As part of a dress code policy, the employer prohibited employees from using cell phones on company time unless in an emergency. Claimant acknowledged at hire that he reviewed the employer's policies, including the policies about rest breaks and cell phone use.

(3) On multiple occasions, one of the employer's assistant managers orally warned claimant for returning late from his rest breaks. On August 23, 2016, several people complained about claimant's hygiene at work. The employer issued claimant a coaching for the issue and reviewed its dress code policy with claimant at that time. On March 27, 2017, the employer issued claimant a coaching for poor customer service after he became distracted and failed to follow up with a customer he had been helping. The March 27, 2017 coaching stated that claimant would be terminated if future instances occurred.

(4) On May 10, 2017, claimant began a rest break at 4:01 p.m. His break was scheduled to end at 4:16 p.m., but he did not return to work until 4:27 p.m. One of the employer's assistant managers saw claimant take the excessive break period and reviewed video surveillance of his break with another assistant manager to confirm the times he began and ended his break. While viewing the video surveillance footage, management also observed claimant using his cell phone while on company time.

(5) On May 11, 2017, the assistant managers confronted claimant about his tardy return from his rest break and cell phone use the day before. The managers showed claimant a photo taken from surveillance video showing his tardy return from his break. Claimant did not deny returning late from the break, did not disagree with the managers about the timing of his break, and did not offer the managers any explanation for his tardy return from break or his use of the cell phone while on company time. On May 11, 2017, the employer discharged claimant.

CONCLUSIONS 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.

The ALJ concluded that claimant's discharge was not for misconduct because despite the uncontested evidence that claimant violated the employer's policies by returning late from a rest break and using his cell phone on company time, claimant's "reason for doing so is unknown" and "[a]bsent persuasive evidence" about why claimant committed the violations claimant is not disqualified from receiving unemployment benefits. Hearing Decision 17-UI-91175 at 3. We disagree. The fact that claimant did not appear at the hearing and did not explain to the employer why he violated the employer's policies on May 10th is not dispositive of whether or not he should be disqualified from benefits.

The record, as developed at the hearing, establishes that claimant repeatedly violated the employer's rest break policy and had been spoken to about that conduct. Therefore, on May 10th, claimant knew that returning to work late from his rest break would probably violate the employer's expectations. There is nothing in the record to suggest that an illness or other exigent circumstances prevented him from returning to work on time, and the circumstances, including claimant's history of previous violations of the same policy, strongly suggest that claimant acted consciously and in disregard of the employer's policies, making his late return from his rest break on May 10th a wantonly negligent act.

The record developed at the hearing also establishes that claimant violated the employer's dress code policy by using his cell phone on company time despite having acknowledged that policy upon hire and having been coached about that policy in the past. Claimant's use of his cell phone on company time, despite his apparent familiarity with the policy prohibiting him from doing so, and in the absence of evidence suggesting that he used it due to an emergency or other exigent circumstance, strongly suggests that claimant was, again, conscious of his conduct and indifferent to the employer's policies at the time of the incident.

Although under certain circumstances an individual's conduct may be excused as a good faith error or an isolated instance of poor judgment, as provided by OAR 471-030-0038(3)(b), neither excuse applies in this case. The record fails to show that claimant thought he had not exceeded his permitted break period, thought he was not using his cell phone on company time, or thought he was permitted to use his cell phone on company time. Nor does the record suggest claimant was mistaken about the circumstances of either policy violation, so his conduct was not the result of good faith errors on his part.

An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). Claimant exercised judgment on May 10th when he exceeded his rest break period, and exercised judgment again on May 10th when he consciously used his cell phone while on company time. His exercise of both of those judgments was poor, given that they expressly violated the employer's policies, under circumstances where he knew or should have known those policies. His exercises of poor judgment were not single or infrequent because they involved more than one wantonly negligent act that were the result of separate instances of poor judgment occurring within a short period of time. Therefore, claimant's conduct on May 10th was not excusable as an isolated instance of poor judgment.

For the reasons explained, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-91175 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 10, 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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