

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1120

Reversed
Disqualification

PROCEDURAL HISTORY: On August 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135111). Claimant filed a timely request for hearing. On September 12, 2017, ALJ Wyatt conducted a hearing, and on September 14, 2017 issued Hearing Decision 17-UI-92544, reversing the Department's decision. On September 18, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted an argument that contained information that was not part of the hearing record. The employer did not explain why it did not present this information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument, and considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Lotus Media Group LLC, formerly known as The News Review, employed claimant from January 16, 2017 until July 7, 2017.

(2) The employer expected claimant to report on time for work, and if she was going to be late to notify her manager in advance of the scheduled start of her shift. The employer expected claimant to limit herself to two ten or fifteen minute rest breaks per day, one in the morning and one in the afternoon. Claimant was aware of the employer's expectations. Claimant decided to take ten minute rest breaks rather than fifteen minute breaks.

(3) Throughout her employment, claimant was tardy in arriving for work on many occasions and failed to contact her manager to notify the manager that she was going to be late to work. Several times, the employer discussed with claimant the importance of reporting for work on time. Claimant told the employer that she found it difficult to arrive at work early enough to start on time a shift scheduled to begin at 9:00 a.m. Claimant never told the employer that her tardiness was caused by providing

assistance to her disabled husband. The employer subsequently changed the start time of claimant's shifts to 9:30 a.m. to take her habitually late arrivals into account. However, claimant often reported for work after 9:30 a.m. and her tardiness continued despite the change to her work schedule. Throughout her employment, claimant often took more than two breaks per day, leaving her work area to go outside and smoke cigarettes. Several times, the employer told claimant she was limited to taking only two breaks per day.

(4) In approximately mid-April 2017, the employer gave claimant a 90 day evaluation. In the written evaluation that the employer provided to claimant, the employer stated, "Punctuality is imperative. The set work schedule for 9:30 a.m. arrival is what is expected. If you are not able to arrive on time this needs to be communicated [to her manager] ahead of time. Your schedule and needs have been accommodated and the tardiness is still an issue." Transcript at 10. After mid-April, claimant continued to arrive late for work without notifying her manager and continued to take more than two rest breaks per day. After April 2017, some of claimant's coworkers complained that the employer was providing special treatment to claimant because the coworkers thought the employer was condoning claimant's practice of taking "multiple breaks" in the morning and the afternoons when it limited the coworkers to two breaks. Transcript at 13.

(5) On July 6, 2017, the employer issued a final written warning to claimant. That warning stated it was for claimant's "continued tardiness" in arriving for work and for "abusing employee rest and break periods" by taking more than two breaks per day. Transcript at 14. The warning further stated, "To avoid further discipline, employee[] should arrive at the office and be ready to start your workday by 9:30 a.m. Monday through Friday each week." Transcript at 13.

(6) On July 7, 2017, claimant arrived between seven and twenty minutes late for the scheduled start of her shift at 9:30 a.m. Claimant had not contacted her manager to notify the manager that she was going to arrive late for work. On July 7, 2017, the employer discharged claimant for her tardy arrival to work that day and her failure to notify her manager that she was going to be late.

CONCLUSIONS AND REASONS: 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. Isolated instances of poor judgment, good faith errors and absences due to illness or physical or mental disabilities are not misconduct. OAR 471-020-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-92544, the ALJ concluded the employer did not establish that the tardiness for which it discharged claimant on July 7, 2017 was due to claimant's willful or wantonly negligent behavior. The ALJ reasoned that, because claimant's tardiness "was the result of providing care to her disabled husband," it constituted an absence due to illness or physical or mental disabilities that is specifically excluded from constituting misconduct under OAR 471-030-0038(3)(B). We disagree.

At hearing, claimant did not dispute that she was routinely late for work despite the employer having given her two written warnings about tardiness and having had several conversations with her about it. Claimant also did not dispute that she never mentioned to the employer that her tardiness was caused by a need to care for her disabled husband, even when the employer issued warnings to her, discussed her frequent tardiness with her and when it accommodated her by moving back the starting time of her shift. When initially asked by the ALJ to explain what caused her tardiness of July 7, 2017, claimant contended that it was attributable to a wide variety of reasons, the way in which the employer's time clock rounded up clock-in times; the fact that she had moved from Las Vegas a year ago and was not accustomed to driving "mountain passes"; the fact that the roads she drove on to work had asphalt surfaces as opposed to the cement surfaced roads around Las Vegas; and because of her disabled husband's need for assistance. Transcript at 15-17. If claimant's need to provide care for her disabled husband was a significant factor contributing to her frequent tardiness and to her tardiness on July 7, 2017, it is highly unlikely that claimant would not have brought it up with the employer at some point or that she would have provided a panoply of reasons, as she did, to justify her late arrival to work on July 7, 2017.

However, accepting claimant's testimony that her tardiness on July 7, 2017 was attributable to caring for her disabled husband, claimant did not assert or suggest that unforeseen exigencies arose that morning in providing care to her husband that delayed her arrival for work. Since claimant appeared to contend that she was routinely responsible for providing the same type of assistance to her husband, it should have been reasonably foreseeable to her that she would need to take into account the time that care required in determining when she needed to leave her home to arrive at work on time. Claimant's failure to take reasonable steps to ensure that she would arrive at work on time on July 7, 2017 after providing routine care to her husband was at least a wantonly negligent violation of the employer's expectations. To the extent that the mountain passes and the road surfaces may have contributed to claimant's tardy arrival to work on July 7, 2017, claimant encountered these circumstances on many of her prior commutes. Because a delay attributable to one or both was reasonably foreseeable by claimant, it also was at least wantonly negligent for claimant not to have taken reasonable steps to avoid tardiness caused by them, particularly after having received repeated warnings from the employer for the same behavior. Claimant's tardy arrival to work on July 7, 2017 was a result of claimant's wantonly negligent behavior.

Claimant's wantonly negligent violation of the employer's expectation on July 7, 2017 may be excused from constituting misconduct if it constituted an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" means, among other things, behavior that is single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). Claimant exercised poor judgment in failing to allow enough time to avoid being tardy to work on many, many occasions before July 7, 2017. For the same reasons discussed above in connection with claimant's tardiness on July 7, 2017, at least some, if not most, of claimant's prior tardy arrivals to work were at least wantonly negligent. Because claimant's wantonly negligent violation of the employer's

standard on July 7, 2017 was not isolated, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor may claimant's wantonly negligent violation of the employer's expectation on July 7, 2017 be excused as a good faith error under OAR 471-030-0038(3)(b). The record fails to show that claimant's tardiness was attributable to having misunderstood the employer's standards or due to a misguided belief that she would either arrive on time, or that the employer would allow to arrive for work after the starting time for her shift. There is insufficient evidence to conclude that claimant's tardiness on July 7, 2017 is excused as a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-92544 is set aside, as outlined above.

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

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DATE of Service: October 19, 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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