EO: 200
BYE: 201838

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1467

Affirmed ~ No Disqualification
Afirmada ~ No Descalificación

PROCEDURAL HISTORY: On October 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 85323). The employer filed a timely request for hearing. On December 11, 2017, ALJ Griffin conducted a hearing, and on December 12, 2017 issued Hearing Decision 17-UI-98819, affirming the Department's decision. On December 19, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dinsdale Farms So. LLC employed claimant from 2013 until September 27, 2017 as an equipment operator and pruner.

(2) The employer expected employees to request leave from work by filling out a form 30 days before the employee intended to take time off work for vacation or appointments, and to report to work and remain at work until the end of the employee's shift unless the employer approved the leave. Employees did not have to request time off 30 days in advance if the time off was due to illness, but the employer expected them to contact the manager.

(3) On September 25, 2017, during his lunch break, claimant asked his supervisor for two days off work to care for his infant daughter, who had been born prematurely in August 2017, and to take her to the emergency room for medical treatment. The supervisor told claimant he could take the two days off work.

(4) Later on September 25, 2017, the employer's manager went out to the orchards where the workers were harvesting fruit. The manager brought a secretary with him who spoke Spanish to help him communicate with the workers, who also spoke Spanish. Claimant was operating machinery to haul bins of fruit out of the orchard. The manager met with six of the workers and began asking them, and yelling at them, about why they had not fully filled some of the bins with fruit they had picked. Claimant completed putting empty bins in the field and joined the meeting between the other workers and the manager. Shortly after he joined the meeting, claimant stated that he had to leave, would be

gone for two days, and "if you want me at the end of two days I'll come back and work." Transcript at 7. Claimant had an appointment that day and knew he was leaving before the manager completed the meeting. Claimant did not tell the manager why he was leaving before the end of the meeting.

(5) Claimant did not report to work on September 26 and 27, 2017. The evening of September 27, claimant spoke with the supervisor who told him that the employer had put another employee in claimant's position at work. Claimant asked the supervisor if he had a job to return to the next morning. The manager told the supervisor that claimant could not return to work.

(6) On September 27, 2017, the employer discharged claimant because he left work during a meeting on September 25 and did not report to work on September 26 and 27, 2017.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude that the employer discharged claimant not for misconduct.

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

Claimant left work before the end of the employer's meeting with the employees on September 25, 2017. However, it was clear by claimant's statement when he left work and on September 25 that he was willing to continue working on September 28, after his two days off work. Because the employer did not permit claimant to work for an additional period of time after he left the meeting on September 25, the work separation was a discharge.

Discharge. 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant in part because he failed to report to work on September 26 and 27, 2017, and had not requested that time off using the employer's request form or by notifying the manager. However, we are persuaded by claimant's testimony that his understanding of the employer's policy for requesting time off was that if he was requesting time off for longer periods of time, such as pre-planned vacation and traveling abroad, he needed obtain permission from the manager, but that permission for shorter absences, such as for illness or other appointments, could be granted by his supervisor. *See* Transcript at 11, 32. The record does not show that claimant knew or should have

known from experience, prior warnings or otherwise that the employer expected him to use the employer's preplanned absence form or to contact the manager rather than the supervisor regarding his need to take time off to care of his daughter on September 26 and 27. Moreover, although the supervisor apparently did not tell the manager claimant had requested two days off work, the supervisor did not testify to controvert claimant's testimony that he had requested the time off, and absent a reason to disbelieve claimant, we conclude that claimant's firsthand testimony that the supervisor gave him permission to take two days off outweighs the inference that claimant did not request that time off merely because the supervisor did not tell the manager about the request. Therefore, because claimant asked his supervisor for two days off work and the supervisor gave claimant verbal permission to take the days off, claimant reasonably believed that that the employer had approved his time off work on September 26 and 27. Claimant's absences on September 26 and 27 thus resulted from his good faith belief that he was permitted to request absences for short periods of time from the supervisor and that the employer had approved his time off work. Claimant's violation of the employer's attendance policy on September 26 and 27 therefore resulted from a good faith error in his understanding of what the employer expected of him. Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer also discharged claimant in part because he left work on September 25 during the middle of a meeting, and before he was released from work that day. As matter of common sense, claimant reasonably should have known that the employer would not allow him to leave the workplace as he did in the middle of a meeting without having the employer's permission, or at least notifying the supervisor or manager why he was leaving. Claimant's behavior that day was at least a wantonly negligent violation of the employer's expectation.

Although claimant's behavior on September 25 was wantonly negligent, it may be excused from constituting disqualifying misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). An "isolated instance of poor judgment" is behavior that is 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). To be excused, the behavior at issue also must not have exceeded "mere poor judgment" by causing, among other things, an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Here, the employer asserted that claimant had another unexcused absence from work approximately two years earlier. Transcript at 7. Claimant denied the assertion. Transcript at 11. Regardless of whether the prior incident was misconduct, it was too remote in time to show claimant's conduct on September 25 was a repeated act or part of a pattern of other willful or wantonly negligent behavior. In addition, we have concluded that claimant's behavior on September 26 and 27 was not willful or wantonly negligent. Claimant's behavior on September 25 therefore meets the first prong of the test for an isolated instance of poor judgment since it was a single occurrence. As well, claimant's behavior in leaving the meeting on February 25 did not exceed mere poor judgment. Under these circumstances, claimant's behavior likely was attributable more to his urgency to address his daughter's health needs than a disregard for the employer's interests. An employer would not objectively conclude from claimant's behavior on September 25 that it could not trust claimant to conform to its expectations in the future. Because it meets both prongs of the standard, claimant's behavior on September 25, while it was wantonly negligent, is excused from being disqualifying misconduct as an isolated instance of poor judgment.

We thus conclude that the employer discharged claimant not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-98819 is affirmed. *Decisión de la Audiencia 17-UI-98819 queda confirmada.*

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

DATE of Service: January 25, 2018

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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***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en **courts.oregon.gov**. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atencion al cliente. *Para llenar este formulario, puede visitar* https://www.surveymonkey.com/s/5WQXNJH. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*