

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0045

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145054). Claimant filed a timely request for hearing. On October 5, 2017, the Office of Administrative Hearings (OAH) mailed a notice to the parties scheduling a hearing for October 11, 2017. On October 11, 2017, ALJ S. Lee conducted a hearing at which the employer did not appear, and on October 13, 2017 issued Hearing Decision 17-UI-94586, reversing the Department's decision. On October 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On November 30, 2017, EAB issued Appeals Board Decision 2017-EAB-1236 reversing this matter and remanding it to OAH for further development of the record after finding the employer had established good cause for failing to appear at the October 11, 2017 hearing. On December 27, 2017, ALJ S. Lee conducted a hearing at which the employer and claimant appeared, and on December 29, 2017 issued Hearing Decision 17-UI-99969, affirming decision # 145054 and concluding the employer discharged claimant for misconduct. On January 11, 2018, claimant filed an application for review with EAB.

FINDINGS OF FACT: (1) Grey Ghost Studio LLC employed claimant as a web developer from February 13, 2017 until it discharged her on August 7, 2017.

(2) The employer expected claimant to work from 8:00 a.m. to 5:00 p.m. on business days. If claimant was unable to report to work on time or was going to be absent or leaving for part of the business day, the employer expected her to notify her supervisor or the chief executive officer (CEO) ahead of time by text, email, instant message or telephone call. The employer's expectations were contained in its handbook and clarified in emails to claimant from the employer's CEO on June 22 and July 14, 2017. Exhibit 1 at 4, 5.

(3) On July 19, 2017, claimant did not report to work or notify the employer before she missed work that day. Claimant missed work so that she could be home when an internet installation occurred in the

home she recently purchased. On July 20, 2017, the CEO sent claimant an email once again reminding her that the employer expected her to notify the employer before she missed work due to scheduled appointments such as internet installation. Exhibit 1 at 6.

(4) On July 28, 2017, the employer gave claimant a performance improvement plan (PIP) stating, in part, that the employer expected claimant to refrain from reporting to work late or missing work for appointments without notifying the CEO first by email. The plan provided that the CEO would meet with claimant weekly to discuss claimant's progress regarding the PIP, and any violation of the PIP could result in immediate discharge. Exhibit 1 at 7-8. Claimant reviewed the PIP, signed it, and returned it to the employer on August 1, 2017.

(5) The evening of August 1, 2017, claimant received a telephone call from the post office stating that it had a key ready for her to pick up for her mailbox at her new home. Claimant was anxious to get her mail because she had been unable to retrieve it for two weeks. The morning of August 2, 2017, claimant sent an instant message to the other web developers stating that she had an errand to run in the morning and would report to work "after 10:00 a.m." Transcript (December 27, 2017) at 18. Claimant got the key, and went home to try the key and retrieve her mail. It was a 20-minute drive between the post office and her home. The key did not work, so claimant returned to the post office to get another key, and went back to her home. It was noon before she was able to get her mail. Claimant did not contact the employer to say she would arrive to work later than expected. Claimant stopped to eat lunch and review her mail for unpaid bills that might be due or overdue. By 2:00 p.m., claimant was still at lunch, and had not contacted her employer. At 2:00 p.m., the CEO sent claimant an email stating that she should take the rest of the day off and report to work on August 7, 2017. Claimant did not respond to the employer until 5:00 p.m.

(6) On August 7, 2017, the employer discharged claimant for violating its attendance expectations on August 2, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer had a right to expect claimant to report for work as scheduled or contact the employer to notify it if she would be late or miss work. Claimant understood that expectation because the employer

gave her multiple warnings of its expectations, including emails and a PIP. The employer discharged claimant for violating that expectation by failing to report for work as scheduled or notifying the employer of her absence on August 2, 2017. Even assuming claimant's reasons for failing to report to work immediately after she discovered her mailbox key would not work justified missing additional work that day, claimant knew or should have known based on the repeated warnings, emails and the PIP to contact the employer to report that her arrival at work was delayed. Claimant provided no reasonable explanation for why she did not contact the employer when she discovered her key would not work, had to return to the post office, returned to her home to retry the replacement key, or felt she should take a lunch break and spend two hours reviewing her mail instead of going to work. Claimant did not even notify her associate web developers that she would report to work later than expected. Claimant's failure to contact the employer when she did not report to work within a reasonable time after 10:00 a.m. was, at minimum, a wantonly negligent violation of the employer's reasonable expectation that she at least notify the employer that she was missing more work.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered isolated, it must involve only a single or infrequent exercise of poor judgment rather than involve repeated acts or a pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). In this case, claimant also violated the employer's attendance and notification expectations on July 19, 2017, under circumstances demonstrating conscious indifference to the employer's interests, having been reminded of those expectations by emails from the CEO on June 22 and July 14, 2017. Accordingly, claimant's wantonly negligent conduct on August 2 was not "isolated" and cannot be excused as an isolated instance of poor judgment.

Claimant's conduct cannot be excused as a good faith error. Claimant understood the employer's expectation that she notify the employer if she would miss work, and did not sincerely believe, or have a factual basis for believing, that she either had adequately notified the employer that she was going to miss work, or that the employer would excuse or condone her failure to do so on August 2, 2017. This was especially true after having signed a PIP regarding the employer's attendance expectations one day before claimant violated the same expectations.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits until she has requalified under ORS 657.176(2).

DECISION: Hearing Decision 17-UI-99969 is affirmed.

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

DATE of Service: February 12, 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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