

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0197

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 91119). The employer filed a timely request for hearing. On February 12, 2018, ALJ Murdock conducted a hearing, and on February 13, 2018 issued Hearing Decision 18-UI-103185, affirming the Department's decision. On February 21, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Advanced Commercial Cleaning LLC employed claimant from March 25, 2017 through January 2, 2018 as a cleaner.

(2) Prior to January 2, 2018, claimant had missed multiple days of work due to illness. Claimant had never failed to call or report to work ("no-call, no-show").

(3) On January 2, 2018, claimant had a meeting with the employer's human resources representative regarding claimant's attendance and work schedule. The representative was the owner's mother. During the meeting, claimant complained to the representative that the owner allegedly did not pay claimant for all her work time and spoke negatively about claimant and other employees to claimant's coworker, sometimes calling the employees derogatory names. Claimant was scheduled to report to a work site to begin cleaning at 7:00 p.m. The meeting ended at 7:05 p.m., and claimant told the representative she was going to the work site to work.

(4) The human resources representative called the owner when the meeting ended and told her what claimant had stated. The owner expected claimant to arrive at the work site shortly after she left the meeting. The owner drove to the work site to speak with claimant. When the owner arrived at the work site at 7:30 p.m., claimant had not arrived and some employees told the owner that claimant had said, in previous weeks, that she was going to quit work.

(5) After the meeting with the human resources representative, claimant stopped and got fuel for her vehicle. While at the gas station, claimant received a telephone call from a coworker and a text message

from another coworker stating that the owner was at the work site, was angry with claimant, and planned to discharge her. Claimant did not go to the work site because she believed the owner would confront her. The owner called claimant, and claimant did not answer her telephone. The owner did not leave a message. At 8:07 p.m., the owner sent claimant a text message stating, "I guess you're a no-call, no-show. Go ahead and bring me your stuff. You need to stop saying these things about me or I will sue you for slander." Audio Record at 23:53 to 23:59.

(6) On January 5, 2018, claimant asked the employer for her final paycheck. The owner told claimant to return the employer's equipment in claimant's possession. The owner and claimant did not discuss what occurred on January 2, 2018.

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

Nature of the Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. 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).

The employer asserted at hearing that claimant quit work because claimant did not arrive for her shift on January 2, 2018, other employees told her that claimant had quit, and claimant did not answer her telephone when she called her that day. Audio Record at 3:48 to 4:15. The record shows claimant did not report to work for her shift on January 2 because she wanted to avoid a confrontation with the owner, but not because she was unwilling to continue working for the employer. Her reluctance to have a confrontation with the owner did not itself show intent on claimant's part to sever her employment relationship with the employer, and before her coworkers told her about the owner's angry statements at the work site, claimant had told the human resources representative that she was going to work. Had claimant planned to quit that day, it is logical that she would have told the human resources representative that when they met before claimant's cleaning assignment began. Because claimant was a no-show, no-call for her shift, the owner would not allow her to continue working and requested her badge from her. Because the employer would not allow claimant to continue working after January 2, 2018, 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 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 and good faith errors are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233(1976).

The employer had a reasonable right to expect that, absent exigent circumstances, claimant would report for work as scheduled. Claimant should have understood that expectation as a matter of common sense. Thus, on January 2, it was reasonable for the employer to expect claimant to report to work, even though claimant did not want to discuss her complaints directly with the owner. We therefore conclude that claimant's failure to report to work on January 2 within a reasonable time after her meeting was a wantonly negligent violation of the employer's attendance expectations.

We conclude, however, that claimant's failure to report to her cleaning assignment on January 2 was an isolated instance of poor judgment. A claimant's behavior is an "isolated instance of poor judgment" if it is, among other things, 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 constitute an isolated act of poor judgment, in addition to being isolated, claimant's behavior also must not have "exceed[ed] mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D).

Claimant's prior unscheduled absences were due to illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). Her conduct on January 2 was, therefore, isolated. Nor was claimant's failure to report to work due to a fear of confrontation with the owner the type of wantonly negligent behavior that exceeded mere poor judgment. A reasonable employer would not have concluded from the final incident that it could no longer trust claimant or that a continued employment relationship with claimant was impossible. Because claimant's behavior on January 2 was isolated and did not cause an irreparable breach of trust in the employment relationship or otherwise make a continued employment relationship impossible, claimant's behavior was excused from constituting misconduct as an isolated instance of poor judgment within the meaning of OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 18-UI-103185 is affirmed.

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

DATE of Service: March 22, 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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