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

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0366

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 120418). The employer filed a timely request for hearing. On March 28, 2018, ALJ Griffin conducted a hearing, at which claimant failed to appear, and on March 29, 2018 issued Order No. 18-UI-106193, concluding claimant's discharge was for misconduct. On April 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Amazon employed claimant as a customer service representative from May 18, 2017 to December 18, 2017.

(2) The employer's attendance policy allowed employees to take time off if they had accrued paid time off or vacation leave, or to volunteer to take time off in times of low workloads by taking voluntary time off. Absences covered by paid time off, vacation leave, voluntary time off and other protected leave were considered excused; absences not covered were considered unexcused and could result in employee discipline.

(3) The employer had two systems, a scheduling system through which it accepted and approved leave requests, and a payroll system that tracked employees' leave balances. The two systems were not linked, which allowed an employee without sufficient leave balances to request and be approved to take time off without realizing that the employee's leave balances were inadequate to cover the request. The employer expected employees to keep track of their leave balances before requesting time off; it could take a couple of weeks before errors resulting in unexcused absences were discovered.

(4) On November 3, 2017, claimant requested and was approved for voluntary time off for an entire shift. Claimant thought at the time that she had sufficient leave balances to cover the entire shift. Most

of claimant's shift was covered by her leave balances, but 1.5 hours was not, and was unexcused.[1] The employer issued claimant a warning.

(5) On November 24, 2017, claimant requested and was approved for 3.42 hours of time off. Claimant thought she had enough leave balances to cover the absence, and was not aware at the time that she did not. The portion of her absence not covered by leave balances was unexcused. On November 25, 2017, the employer issued claimant a final written warning.

(6) On December 14, 2017, claimant wanted time off work to attend her child's school performance. She felt frustrated that she did not have enough accrued leave balances to cover the absence, and took the time off anyway. 30 minutes of claimant's shift was not covered by accrued leave balances or voluntary time off, and was therefore unexcused.

(7) On December 18, 2017, the employer discharged claimant for her unexcused absences.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant's discharge was not 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 are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant "was, at a minimum, wantonly negligent when she did not ensure that she had the full amount of PTO available to cover her absence[]" on December 14, 2017.[2] We agree. The unrefuted evidence in the record is that claimant knew she did not have the time off accrued, felt frustrated because she wanted to attend her child's school performance, and took the time off anyway. Claimant's decision to take time off work despite not having sufficient accrued leave balances demonstrated her indifference to the standards of behavior the employer had the right to expect of her.

However, the ALJ also concluded that claimant's conduct on December 14th was not excusable as an isolated instance of poor judgment. The ALJ reasoned that the "final attendance event was the culmination of two other similar incidents where claimant had misread the amount of PTO or vacation

[1] The employer's computer system reported that 2 hours of the absence was unexcused, but the employer's witness testified only 1.5 hours was unexcused, suggesting that the employer's systems of tracking leave balances might not be accurate.

[2] Order No. 18-UI-106193 at 3.

she had available to cover a particular absence" and her "conduct was not isolated within the meaning of the rule."[3] We disagree.

An act is not excluded from being considered "isolated" merely because other similar incidents occurred. Rather, OAR 471-030-0038(1)(d)(A) defines an "isolated" act as one that is "a single or infrequent occurrence rather than a repeated act or pattern of *other willful or wantonly negligent behavior*." Therefore, in order to exclude claimant's December 14th unexcused absence from being considered "isolated," the "other similar incidents" to which the ALJ referred must also have been the result of willful or wantonly negligent behavior on claimant's part. In this case they were not.

Claimant's November 3rd and November 24th unexcused absences occurred because although claimant thought she had sufficient accrued leave balances to cover the entire period for which she was absent those days, she did not. Unlike the final incident, it appears in both of the prior incidents that claimant had made some effort to ascertain her leave balances prior to taking the time off, and inadvertently failed to do so accurately. Complicating claimant's effort, the employer required claimant to request leave through one system, but tracked it through another system that was not linked to the first, creating a system in which an individual's request for time off could easily be approved even though the individual did not have adequate leave balances, and the individual might not find out about her error until a couple of weeks after having taken the unexcused time off work. Further complicating things, it appears that there were discrepancies within the employer's systems that could result in reports that an employee took 2 hours of unexcused leave when in fact she had taken only 1.5 hours of unexcused leave, suggesting claimant might not have had access to accurate information about her leave balances or usage at the time of the prior events.

It is apparent that claimant did not manage her leave balances and leave requests carefully enough in November 2017, but it is also more likely than not on this record that claimant's failure to keep careful track of her leave balances was an unconscious error. An unconscious error is, at most, evidence of negligence or the failure to exercise due care, and while mere negligence in the work-related matters, even when the negligence is repeated, may be a valid basis for discharge, it is not sufficient to establish misconduct. The record in this case shows that while claimant made repeated, likely unconscious, errors in managing her leave balances, her conduct was not intentional and did not demonstrate indifference to the employer's expectations or the consequences of taking unexcused leave. Claimant's behavior in the November 3rd and November 24th instances were, therefore, not willful or wantonly negligent, making her behavior on December 14th an isolated exercise of poor judgment on claimant's part.

Some conduct, even though isolated, exceeds mere poor judgment and cannot be excused, including unlawful acts, acts tantamount to unlawful, and conduct that causes an irreparable breach of trust in the employment relationship or otherwise makes a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). Claimant's December 14th absence was not unlawful or tantamount to unlawful conduct, and, on this record, we cannot say given the totality of the circumstances that any reasonable employer would consider claimant's 30-minute unexcused absence to see her child's school performance to have irreparably broken the employer's trust or made it impossible to continue

[3] *Id.*

employing her. Claimant's conduct therefore did not exceed mere poor judgment, and is excusable as an isolated instance of poor judgment.

For the foregoing reasons, we conclude that claimant's discharge was not for misconduct. Claimant is therefore not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-106193 is set aside, as outlined above.[4]

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

DATE of Service: May 11, 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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[4] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.