

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0385

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130928). Claimant filed a timely request for hearing. On March 1 and 20, 2018, ALJ Wyatt conducted a hearing, and on March 28, 2018 issued Order No. 18-UI-106160, affirming the Department's decision. On April 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she offered new information that she did not present during the hearing. However, claimant did not explain why she did not present this information at the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that she was prevented from doing so by factors or circumstances beyond her reasonable control. For this reason, EAB did not consider the new information that claimant offered.

Claimant's argument also contended that, although the employer had mailed to her the documents comprising Exhibit 1 on March 13, 2018, a week in advance of the continued hearing on March 20, 2018, she had not received them as of that date, and she objected to the admission of Exhibit 1 into evidence on the ground that she would have "disputed" the accuracy of the documents in it had she received it before the hearing. However, the documents constituting Exhibit 1 were described in detail at the hearing and claimant had an opportunity to and did dispute their implications in her testimony at hearing. Transcript of March 20, 2018 Hearing (Transcript 2) at 15-18. Claimant did not file with the ALJ a post-hearing objection to the admission of Exhibit 1, as the ALJ instructed her to do if she had one. Audio of March 20, 2018 Hearing at ~7:33. Claimant also did not state in her argument to EAB any grounds for her objection to Exhibit 1 other than that she allegedly had not received it before the hearing, and did not suggest that the documents in Exhibit 1 were inauthentic or that, having reviewed Exhibit 1, there were grounds in addition to those she raised at hearing to dispute the accuracy of those documents. Because claimant failed to present a colorable claim that she sustained legal prejudice by the ALJ's admission of Exhibit 1 into evidence, her objection is not sustained.

FINDINGS OF FACT: (1) Cascade Enforcement Agency employed claimant as an office manager and a human resources generalist from February 9, 2016 until December 15, 2017.

(2) The employer expected claimant to clock in using the employer's Ultra 32 time keeping system when she started a shift and to clock out of that system when her shift was over. If claimant's shift started or ended off the employer's premises, the employer expected claimant to use her personal or work cell phone to access the Ultra 32 time keeping system for purposes of clocking in and clocking out. Claimant understood the employer's expectations.

(3) During her employment, claimant held training orientations for new employees and instructed them about clocking in and clocking out of the Ultra 32 time keeping system and using cell phones to do so when working off-site. Claimant was responsible for ensuring that all employees complied with the employer's clock in and out procedures.

(4) On November 17, 2017, the employer's president met with claimant to discuss deficiencies in her work performance. As of that day, claimant had used the Ultra 32 system both to clock in and out on only three work days in November 2017, November 1, 6 and 13. Exhibit 1 at 3-5. The president showed claimant a report of her clocks ins and outs generated by the Ultra system for November 2017 as of November 17, 2017. Among other things, the president told claimant she was required to clock in and out using the Ultra 32 system every day that she worked. The president also told claimant it was unacceptable for her, as a manager and the human resources generalist, not to consistently use the Ultra 32 system to clock in and out since she was responsible for overseeing that subordinate employees used that system. The president also told claimant that her performance over the next 30 days would be reviewed to determine if she had corrected her performance deficiencies, including her failure to consistently clock in and out using the Ultra 32 system.

(5) On November 17 and November 20, 2017, claimant both clocked in and clocked out using the Ultra 32 time keeping system. Exhibit 1 at 5. On November 21, 22, 24, 27, 28 and 30, 2017 and December 1, 4, 5, 6, 7, 8, 11, 12, 13 and 14, 2017 claimant either did not clock in, clock out, or both using the Ultra 32 time keeping system. Exhibit 1 at 6-10.

(6) On December 14, 2017, the employer's president and vice-president reviewed claimant's progress in correcting the deficiencies in her work performance since November 17, 2017. On that day, the president generated a report from the Ultra 32 system to gauge claimant's consistency since November 17, 2017 in clocking in and clocking out using the Ultra 32 time keeping system. The president discovered that claimant had complied with the employer's requirement that she both clock in and out using the Ultra 32 system on only two work days on or after November 17, 2017, and had not complied on 17 work days after November 17, 2018.

(7) On December 15, 2017, the employer discharged claimant for, among other things, not consistently clocking in and clocking out using the Ultra 32 time keeping system since her meeting with the president on November 17, 2017.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(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).

Claimant did not dispute that the employer's president told her on November 17, 2017 that, going forward, she was required both to clock in and out each work day using the Ultra 32 time keeping system. Exhibit 1, the report the employer generated from the Ultra 32 time keeping system, indicated that claimant failed to comply with the employer's expectation that she both clock in and out using that system on 17 of 19 work days after the November 17th meeting through December 14th. Claimant initially contended that the report must be flawed since she used her cell phone to clock in and out of the Ultra 32 system "every single day," and using that phone must somehow overridden what the report showed as to claimant's clocks ins and outs. However, claimant did not dispute the employer's contention that the report would have listed the number of any cell phone from which she clocked in or clocked out, even if that phone was not registered with the Ultra 32 system. Transcript of March 1, 2018 Hearing (Transcript 1) at 27; Transcript 2 at 15-18.

Claimant ultimately contended that the reports generated by the Ultra 32 system possibly did not show her clocks ins and outs because her cell phone might not have been charged when she attempted to clock in and out on the 17 work days at issue after November 17, 2017 meeting, or that there some unexplained "errors" in the Ultra time keeping system prevented the Ultra 32 report from showing that she had actually clocked in and out on those work days. Transcript 2 at 18. However, claimant's explanation is implausible since, after the November 17th meeting, she likely would have ensured that her cell phone was consistently charged for purposes of clocking in or out, likely would have been aware if it was not charged when she tried to clock in or out, and likely would have notified the employer if she was unable to clock in or out, which she did not. Further, it would have been expected that if the reports generated by the Ultra 32 system were erroneously failing to show claimant's clock ins or outs, such errors would have been present in the report of her November 2017 clock ins and outs, and she would have raised any errors with the Ultra 32 reports at that time if such errors had actually existed, which she apparently did not. Claimant's contention that the Ultra 32 report shown in Exhibit 1 was not an accurate depiction of her clocking in and out activities between November 1st and December 14th is not persuasive. On this record, the employer met its burden to show that claimant repeatedly failed to consistently comply with the employer's clock in and out expectations after November 17, 2017 with at least wanton negligence.

While claimant might have with wanton negligence violated the employer's standards of clocking in and clocking out after November 17th, claimant's behavior may excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be an "isolated instance of poor judgment," the behavior at issue must have been, among other things, a single or infrequent occurrence on claimant's part rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(a). Here, that claimant, with wanton negligence, failed to both clock in and out using the Ultra 32 system on 17 separate days after November 17, 2017 establishes that

her wantonly negligent actions in violation of the employer's standards were neither single nor infrequent. As such, the wantonly negligent behavior for which the employer discharged claimant falls outside that which may be excused as an isolated instance of poor judgment.

Nor can the wantonly negligent behavior for which the employer discharged claimant excused as an good faith error on claimant's part under OAR 471-030-0038(3)(d). Claimant neither asserted nor showed that she did not clock in and out using the Ultra 32 timekeeping system due to misunderstanding the employer's standards, or because she thought the employer would condone her failure to do so. The record is insufficient to support that claimant's behavior at issue was arose from a good faith error.

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

DECISION: Order No. 18-UI-106160 is affirmed.

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

DATE of Service: May 24, 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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