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BYE: 201906

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
2018-EAB-0427

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 150701). The employer filed a timely request for hearing. On April 23, 2018, ALJ Snyder conducted a hearing at which claimant did not appear and issued Order No. 18-UI-107939, reversing the Department's decision. On April 27, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he offered information and documents that he did not present at the hearing, presumably because he failed to appear. Claimant explained that he did not appear because, "I did not know that the first decision had been appealed." Claimant's proffer of new information and documents is construed as a request to have EAB consider new information under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by factors or circumstances beyond its reasonable control from presenting the information at the hearing. Other than the bare assertion that claimant was unaware that that the employer had filed a request for hearing on administrative decision # 150701, claimant did not provide any details as to why he might have failed to receive the notice of hearing that was mailed to him on March 9, 2018 at his address of record and should have notified him of the hearing. Documents sent through the U.S. Postal Service are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012). Claimant's bare assertion that he was not aware of the hearing is insufficient to overcome the presumption that he received the notice of hearing. Given the absence of supporting details in claimant's request and the presumption of his receipt of the notice of hearing, there is no basis on which to conclude that claimant's alleged lack of notice of the hearing was the result of factors or circumstances beyond his reasonable control. Claimant's request to have EAB consider new information is denied.

FINDINGS OF FACT: (1) Gunderson, LLC employed claimant as a fitter-welder from August 22, 2017 until February 6, 2018.

(2) The employer had a point-based attendance policy in which an employee was discharged if he or she accumulated nine attendance points. An employee who failed to report for work and failed to call in to report that absence accumulated eight attendance points for that single incident. Claimant was aware of the employer's attendance policy.

(3) On January 29, 2018, claimant notified the employer that he was unable to report for work that day and did not report for work.

(4) On January 30 and 31, 2018, claimant did not report for work and did not call the employer on either day to notify it that he was going to be absent. If not excused, claimant would accrue eight attendance points for each absence, or 16 total attendance points for both absences, which would subject him to discharge. Sometime before February 1, 2018, the employer contacted claimant's wife, who was listed as his emergency contact, to learn why claimant had failed to report for work. The wife told the employer that she thought claimant was at work, which he was not.

(5) On February 1, 2018, claimant still did not report for work, but called the employer. Claimant told the employer that he had not reported for work on January 30 and 31, 2018 because he had been robbed by "armed assailants" before work on January 29, 2018 and he had reported that robbery to the local sheriff's office. Audio at ~13:41. At around that time, the employer suspended claimant pending investigation into the validity of the reason for his absences. The employer told claimant that he needed him to provide to it a report or other documentation from the investigating sheriff's office corroborating that he had been the victim of a robbery that prevented him from attending work on January 30 and 31, 2018. Sometime after, claimant modified his explanation and told the employer that his car had been robbed on January 29, 2018 and the perpetrators had taken his cell phone. When asked how he called the employer to notify it of his absence on January 29, 2018, claimant stated he used his landline telephone. Claimant did not explain why he had not used his landline phone to call in to report his absences on January 30 and 31, 2018.

(6) Sometime after February 1, 2018, claimant provided to the employer a copy of a document indicating that he had requested documentary information from the sheriff's office about the robbery he had reported. Sometime after, the employer contacted the sheriff's office to request the investigative reports or other documents about the alleged robbery and the employer was told that such information would be provided in four or five days. Neither claimant nor the sheriff's office provided any additional information or documents to the employer.

(7) On February 6, 2018, not having received additional documents or information excusing claimant's failure to call to the employer or to report for work on January 30 and 31, 2018, the employer discharged claimant that day for "no call/no shows" on January 30 and 31, 2018.

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. 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).

While the employer discharged claimant for having exceeded the attendance points allowed under its attendance policy, claimant is not disqualified from benefits unless the occurrences from which those excessive points arose were due to claimant's willful or wantonly negligent behavior. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge); OAR 471-030-0038(3)(a).

Although the employer was willing to excuse claimant's failure to call in or report for work on January 30 and 31, 2018 if a robbery had occurred that prevented him from doing so, neither claimant nor the sheriff's office provided information corroborating the robbery or claimant's inability to call in on either day. Indeed, claimant's statements to the employer about the robbery were inconsistent and did not make clear why he was unable to call in on his landline on either day when he had been able to do so on January 29, 2018, after the supposed robbery had occurred. Absent reliable information indicating that claimant was unable both to report for work and to call in to report his absences on January 30 and 31, 2018, it may reasonably be inferred that claimant's failure to do so was due to claimant's willful or wantonly negligent behavior. On this record, it appears, most likely, that claimant's "no calls/no shows" on January 30 and 31, 2018 constituted willful or wantonly negligent violations of the employer's standards.

Claimant's willful or wantonly negligent behavior on January 30 and 31, 2018 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(b). To be considered an "isolated instance of poor judgment," claimant's behavior on those days must have been, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). Here, claimant's willful or wantonly negligent behavior in violation of the employer's standards occurred on two separate days, was the result of two separate decisions and constituted two separate exercises of poor judgment. As such, since claimant's willful or wantonly negligent behavior was not a single act, it may not be excused from constituting misconduct as an isolated instance of poor judgment.

Nor may claimant's willful or wantonly negligent behavior be excused as a good faith error under OAR 471-030-0038(3)(b). There is no evidence in this record showing or tending to show that claimant thought he had called in or reported to work on January 30 and 31, 2018, or that he failed to call in or report for work on January 30 and 31, 2018 due to an error in understanding the employer's requirements or a mistaken belief that the employer would condone his behavior in violation of its standards. There is insufficient evidence supporting that claimant's behavior was the result of a good faith error.

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

DECISION: Order No. 18-UI-107939 is affirmed.

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

DATE of Service: May 30, 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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