EO: 200
BYE: 201906

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

205
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0471

Affirmed
Request to Reopen Allowed
Disqualification

PROCEDURAL HISTORY: On March 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 144722). Claimant filed a timely request for hearing. On March 16, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 26, 2018 at 10:45 a.m. On March 26, 2018, ALJ Jarry conducted a hearing at which the employer failed to appear, and issued Order No. 18-UI-105984, concluding that claimant's discharge was not for misconduct. On March 29, 2018, the employer filed a timely request to reopen the March 26th hearing. On April 10, 2018, OAH mailed notice of a hearing scheduled for April 24, 2018. On April 24, 2018, ALJ Frank conducted a hearing at which claimant failed to appear, and on April 27, 2018 issued Order No. 18-UI-108308, allowing the employer's request to reopen the March 26th hearing and concluding that claimant's discharge was for misconduct. On May 4, 2018, claimant filed an application for review of Order No. 18-UI-108308 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that the employer's reopen request should be allowed are **adopted.** The remainder of this decision pertains only to the work separation.

The employer did not appear at the March 26th hearing, at which claimant provided testimony about his work separation, but the employer established good cause to reopen that hearing to provide testimony and respond to claimant's testimony, and did so at a hearing on April 24th. Claimant failed to appear at the April 24th hearing, and therefore neither heard nor responded to the employer's testimony. However, claimant did not request that the April 24th hearing be reopened, request to provide additional information to EAB about the work separation in response to the employer's testimony, or establish that he should be entitled to provide additional evidence or other additional proceedings about his work separation. The record therefore consists of the March 26th hearing at which claimant testified, and the April 24th hearing at which the employer testified and responded to claimant's testimony; in reaching this decision we considered the entire record, including the recordings of both hearings and all exhibits admitted into evidence.

FINDINGS OF FACT: (1) Upon This Rock, LLC employed claimant as a granite countertop fabricator and installer from approximately January 13, 2017 to February 8, 2018.

(2) The employer generally scheduled claimant to work beginning at 7:00 a.m. Claimant and the employer later agreed that on Tuesdays and Thursdays claimant was allowed to arrive at work at 6:00 a.m. instead, and to leave work for about an hour around 8:30 a.m. or 9:00 a.m. to take his child to school before returning to work the rest of his shift. The employer directed claimant to clock out when he left to take his child to school and clock back in when he returned to work, just as he would when clocking out and in for his lunch breaks.

(3) For a two month period thereafter, claimant clocked in for work at 6:00 a.m. twice a week but did not clock out during the 35-45 minutes per day when he was absent from the workplace taking his child to school. As a result, claimant received regular pay and overtime pay for the period of time in which he was away from work on a personal errand. The employer's lead technician did not have the authority over claimant's schedule or whether he remained clocked in during his errand, and subsequently told the employer that he had not given claimant permission to remain clocked in for work while on his errand.

(4) On February 8, 2018, the employer discharged claimant for failing to clock out when he left work during his workday for a personal errand.

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

The employer discharged claimant for failing to clock out while on a personal errand twice a week for two months, which resulted in claimant receiving regular and overtime pay for 70-90 minutes a week that he was not entitled to receive. The employer had the right to expect claimant to clock out while away from work, because the employer told claimant when they initially agreed claimant could take time off work for his errand that he was required to clock out when he left and clock back in when he returned. April 24, 2018 hearing, Audio recording at ~ 23:15. The employer made the expectation "very clear." *Id.* at ~ 22:15-23:00. Claimant therefore knew or should have known that the employer required him to clock out when away for work running his personal errand twice a week. His failure to do so under those circumstances amounted to conscious conduct that he knew or should have known

would result in a violation of the standards of behavior the employer had the right to expect of him, and was therefore wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment. Conduct is excusable if it is, in pertinent part, a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In this case, claimant engaged in the same wantonly negligent exercise of poor judgment twice a week over a period of approximately two months. His conduct therefore involved repeated wantonly negligent acts of poor judgment that cannot be considered isolated.

Claimant's conduct also cannot be excused as a good faith error. Claimant did not allege that he did, in fact, clock out for his errand as the employer required, or believed in good faith that he had done something to comply with the employer's expectation that he clock out. Claimant alleged, in essence, that he acted in good faith when he failed to clock out because his foreman told him "not to worry about it" and "just to hurry back," and that "it would be no big deal." March 26, 2018 hearing, Audio recording at ~ 10:50, 11:24. The employer rebutted claimant's allegation that he thought it was permissible not to clock out. The employer told claimant to clock out when he agreed to let claimant leave work for his errand. April 24, 2018 hearing, Audio recording at ~ 23:15. The employer did not speak with the lead tech about timekeeping issues, suggesting that the employer did not countermand his own instruction about claimant to the lead tech, and that the lead tech did not have the authority to excuse claimant from complying with the employer's instruction to clock out. *Id.* at ~ 26:40. The lead tech also specifically told the employer that he had not authorized claimant to remain clocked in during his errand. *Id.* at ~ 25:00.

Claimant's allegation that the lead tech authorized him to remain clocked in during his errand is also not plausible. Claimant arrived at work – and clocked into work – an hour early twice a week for two months to compensate for time he was taking off work during the day in order to take his child to school, which would allow claimant to work the same number of hours before the employer agreed to allow him to leave work during the day; he then left work for 70 to 90 minutes every week for two months, yet remained clocked in and earning wages as though he had never left. It does not make sense for claimant to have clocked in an hour early to compensate for the hour he was taking off work for his errand, but to remain clocked in during his errand, as that would result in claimant receiving pay for both the early arrival *and* the hour he took off work. Nor does it make sense that anyone at the employer's business would have plausibly authorized claimant to remain clocked in and receiving an hourly wage for 70-90 minutes each week when he was not, in fact, at work or entitled to receive wages. Because claimant's allegation was rebutted by the employer, and was not logical or plausible, it is more likely than not that claimant did not remain clocked in during his errand because he sincerely believed in the rightness of his actions when doing so. He therefore did not act in good faith, and his conduct is not excusable as a good faith error.

For those reasons, we conclude that the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-108308 is affirmed.

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

DATE of Service: June 6, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.