

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0509

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 151339). The employer filed a timely request for hearing. On May 3, 2018, ALJ Snyder conducted a hearing, and on May 11, 2018 issued Order No. 18-UI-109198, concluding that claimant's discharge was for misconduct. On May 15, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant asked that the hearing be reopened to allow him the opportunity to be heard. Claimant's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant argued that he has a learning disability that prevents him from reading and comprehending notices, he did not think he received notice of the May 3rd hearing, and he was not expecting to receive mail about his hearing anyway. Because we have found in claimant's favor on other grounds, however, we need not and do not need to determine whether claimant's reasons for missing the hearing constituted a circumstance beyond his reasonable control that would allow EAB to consider new information.

FINDINGS OF FACT: (1) Fred Meyer Stores, Inc. employed claimant from January 27, 2006 to January 31, 2018.

(2) In December 2014, claimant failed to report to work or notify the employer he would be absent. Claimant was sleeping and did not feel well and decided not to report to work, but did not notify the employer of his absence until after his shift began. The employer suspended claimant for three days. Again in approximately 2015, claimant did not report to work or notify the employer he was going to be absent. Claimant was in the hospital during that instance, and the employer did not discipline him.

(3) On January 26, 2018, claimant did not report to work or notify the employer he was going to be absent from work. At 11:35 a.m., three hours and thirty-five minutes after his shift began, claimant reported to work. He told the employer that he had been late because he was sleeping. The employer suspended claimant pending investigation, and on January 31, 2018, the employer discharged claimant.

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.

The ALJ wrote that because claimant knew or should have known that "sleeping through the first three hours of a scheduled shift would result in a violation of the Employer's expectations," claimant's conduct "was wantonly negligent, and amounts to misconduct." Order No. 18-UI-109198 at 2-3. Assuming for the sake of argument that sleeping past the start of a work shift can be considered a conscious and wantonly negligent act, the ALJ did not address whether or not claimant's conduct should be excusable as an isolated instance of poor judgment.

OAR 471-030-0038(3)(b) defines exceptions to "misconduct," including isolated instances of poor judgment. OAR 471-030-0038(1)(d)(A)-(D) defines an isolated instance of poor judgment as "a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior" that involves poor judgment, and does not exceed mere poor judgment by making a continued employment relationship impossible.

In this case, claimant's failure to notify the employer of his absence was an exercise of poor judgment, as there is nothing in this record suggesting that claimant could not have set an alarm or taken other steps to ensure that he could report to work as scheduled rather than sleeping through the majority of his shift, nor is there anything suggesting that claimant could not have called to notify the employer about his tardiness immediately upon realizing he was late to work instead of waiting to report to work several hours after his shift began. However, while claimant had previously missed work without notifying the employer of his absences in advance, the prior instances occurred in 2014 and 2015, making the 2018 instance an "infrequent" occurrence that may be considered isolated. The record fails to show that it is more likely than not that claimant's absence without advance notice due to sleeping, and reporting to work when he awoke, was the type of behavior that any reasonable employer would conclude had created an irreparable breach of trust or made a continued employment relationship impossible.

On this record, the employer discharged claimant for an isolated instance of poor judgment that did not exceed mere poor judgment. His conduct was therefore excusable as an isolated instance of poor

judgment. Because OAR 471-030-0038(3)(b) states that isolated instances of poor judgment are not misconduct, claimant's discharge was not for misconduct, and he is not subject to disqualification from receiving benefits because of his work separation.

DECISION: Order No. 18-UI-109198 is set aside, as outlined above.¹

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

DATE of Service: May 25, 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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¹ This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.