EO: 200
BYE: 201848

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-0519

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134946). Claimant filed a timely request for hearing. On May 16, 2018, ALJ Schmidt conducted a hearing, and on May 17, 2018, issued Order No. 18-UI-109561, concluding the employer discharged claimant, but not for misconduct. On May 21, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument in reaching this decision.

FINDINGS OF FACT: (1) Freres Lumber Co. Inc. employed claimant as a dryer feeder from December 13, 2017 to February 19, 2018.

(2) The employer expected its employees to report for work as scheduled or notify the employer in advance of their shift if they would be late or absent by leaving a message on a call-in line. Claimant was aware of and understood the employer's expectations.

(3) Claimant was scheduled to work on February 15 and 16, 2018. However, claimant had car trouble and had to have her car towed on February 14th. The evening of February 14, 2018, claimant left a message on the employer's call-in line to the effect that she "had to have my car towed…would be back to work when I got my car fixed and I figured it would take a couple days." Audio Record ~ 20:30 to 21:45. Claimant's shift manager received her message the next morning.

(4) On February 15, 2018, claimant's car was not yet repaired and so, at about 3:00 p.m., she telephoned the employer's human resources manager to notify him that she would again miss work the following day due to car trouble just to make sure that was acceptable. However, when the manager did not answer her call, claimant did not leave a message on his line or on the call-in line because she believed her message to the call-in line on the 14th was adequate for both days.

(5) On February 17, 2018, claimant's shift manager made the decision to terminate claimant's employment for her no-call, no-show, on February 16, 2018.

(6) On February 19, 2018, claimant reported for work but after working a short time her shift manager notified her that the employer was discharging her for her "no show, no call." Audio Record ~ 19:30 to 20:10.

(7) Prior to February 16, 2018, claimant had not been warned or disciplined for violating any employer policy.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to report for work as scheduled or notify the employer in advance of her shift that she would be absent or late by leaving a message on the call-in number designated for that purpose. Claimant satisfied that expectation on February 14th but violated that expectation on February 15, 2016 when she called the human resources manager to speak to him personally, and when he did not answer, failed to take the additional step of leaving another message on the call-in line verifying her absence on February 16th. Claimant was conscious of her conduct but mistakenly believed that her message on the 14th would suffice. Claimant's failure to leave a message on the line designated for that purpose demonstrated indifference to the employer's interest in maintaining an adequate workforce on her scheduled work day and was at least a wantonly negligent violation of the employer's expectation. However, in Order No. 18-UI-109561, the ALJ concluded that claimant's conduct was excusable as an isolated instance of poor judgment. Order No. 18-UI-109561 at 3. We agree.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. The record fails to show that the employer disciplined claimant previously for any willful or wantonly negligent behavior. Accordingly, her wantonly negligent failure to adequately notify the employer concerning her February 16th absence was a single or infrequent occurrence.

Under OAR 471-030-0038(1)(d)(D), some conduct, even if isolated, such as acts that violate the law, are tantamount to unlawful conduct, create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible, exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). On this record, claimant's failure to notify the employer that she would be absent on February 16 was not unlawful or tantamount to unlawful conduct, and, objectively considered, was not so egregious that the employment relationship could not have been rehabilitated and claimant trusted after receiving a warning concerning such conduct in the future. While claimant's failure to leave a message on the call-in line that she would be absent on February 16 showed poor judgment, it did not exceed mere poor judgment. Her conduct, therefore, was no more than an isolated instance of poor judgment under OAR 471-030-0038(3)(b), and not misconduct.

The employer discharged claimant for an isolated instance of poor judgment, and not misconduct. Claimant is not disqualified from receiving benefits on the basis of this work separation.

DECISION: Order No. 18-UI-109561 is affirmed.

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

DATE of Service: <u>June 18, 2018</u>

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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