EO: 200
BYE: 201915

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-0650

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 171154). The employer filed a timely request for hearing. On May 21, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 5, 2018. On June 5, 2018, ALJ Schmidt conducted a hearing, at which claimant failed to appear, and on June 6, 2018 issued Order No. 18-UI-110792, concluding claimant's discharge was for misconduct. On June 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider claimant's argument when reaching this decision. Claimant's argument also contained information that was not part of the hearing record. To the extent claimant's argument should be construed as requesting to submit additional evidence into the hearing record after he failed to appear at the hearing, claimant's request is also denied. EAB may consider a party's additional evidence if the party submitting it shows that factors or circumstances beyond the party's reasonable control prevented them from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). In support of claimant's request, he explained that he was not aware that the hearing was taking place because he got married the week of May 18th, was out of town until May 29th, stopped his mail from delivering until May 30th, and began a new job on June 4th. Even considering that claimant was busy during the period of time immediately prior to the hearing, he ostensibly received his mail on May 30th or May 31st and therefore had approximately six days after physically receiving the notice of hearing and before the date of the hearing to attend to his important mail and either make arrangements to appear at the June 6th hearing or request that OAH postpone it. Although it might have been difficult for claimant to appear at the hearing and present evidence about his work separation under the circumstances, he has not proven that it was "beyond his reasonable control" to have done so. His request to submit additional evidence is therefore denied, and we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Anvil Media, Inc. employed claimant as an account executive from March 30, 2017 to April 5, 2018.

(2) Claimant's job duties included preparing for meetings, following up with clients, completing monthly reports, providing detailed analytics, invoicing, and timely responding to clients. Until approximately January 2018, the employer thought claimant's performance met its basic expectations, but, after January 2018, the employer began encouraging claimant to improve in several areas. Claimant agreed that he could be performing his job better but he did not follow through with recommended improvements and his performance declined.

(3) Beginning in late January, 2018, claimant spent work hours surfing the internet for personal reasons, including visiting wedding, podcasting, movie production, and entrepreneurship sites. Claimant was on the employer's social media team and was permitted to spend work hours creating and posting memes, photos, and videos to various social media platforms, but instead of posting industry-related or thought-leadership content the employer directed, claimant spent hours taking pictures and video of people and random objects around the office like mugs, editing them, and posting them to social media platforms.

(4) At various times between late January and March 2018, the employer instructed claimant to work on billable marketing activities and other tasks with deadlines. Claimant continued to spend time on non-billable employer marketing and personal matters.

(5) Between February and March 2018, the employer's vice president assigned claimant routine tasks that claimant should have known to complete on a set schedule. Claimant had not maintained a schedule for those routine tasks and failed to perform them. The vice president reminded claimant about the tasks, but claimant did not timely complete the tasks and instead took days to complete routine tasks.

(6) In March 2018, claimant and the vice president were supposed to be working together to prepare for a client meeting. Claimant did not provide the vice president with the information he needed in advance, and did not send him the client's files. Claimant failed to attend a pre-client meeting prep session he had scheduled with the vice president. Claimant arrived late to the client meeting.

(7) On March 16, 2018, the employer gave claimant a written warning based upon his declining work performance, including his failures to prepare for meetings, follow up with clients, complete monthly reports, provide detailed analytics, complete invoicing, and timely respond to clients. Thereafter, claimant's work performance continued to decline. Although most employees regularly reported to work early or stayed late, claimant did not do so. Claimant stopped talking and engaging with his coworkers, and spent more time on the internet.

(8) In late March 2018, the employer received the results of claimant's "360 evaluation."[1] The evaluation results suggested to the employer that none of claimant's peers or managers considered claimant's work performance sufficient.

[1] A "360 evaluation" is a process through which an employee, subordinates, colleagues, supervisors, and sometimes external sources who interact with the employee all anonymously provide performance feedback about the employee. We take notice of this generally cognizable information. *See* www.sampleforms.org/360-evaluation-forms.html; https://en.wikipedia.org/wiki/360-degree_feedback; https://www.thebalancecareers.com/what-is-a-360-review-191754. Any party that objects to our

(9) The employer expected claimant to prepare for meetings by sending a preliminary agenda to the rest of his team for review, then sending the agenda to the client, managing client calls in an organized manner, take notes throughout meetings and recap each meeting prior to the end of the client call, send an email recapping the meeting after the call ended, and checking in with his team after the call to make sure everything was being done in a timely manner. The employer considered that level of preparation and follow-through standard, and claimant had demonstrated competence during the first nine months of his employment. Prior to March 25, 2018, one of claimant's clients had requested that claimant improve his follow-through and the employer had encouraged claimant to do so. Claimant did not, and, on March 25, 2018, the client fired claimant from working on its jobs due to claimant's profound lack of follow-through. Prior to March 25th, the employer had never had a client fire an account executive because of the account executive's failure to perform standard job duties.

(10) On April 5, 2018, the employer discharged claimant because his performance did not meet the employer's expectations.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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) (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.

The employer discharged claimant because of his work performance, including his failure to perform basic functions of his job with respect to following through with clients, resulting in a client's decision to fire claimant, and failing to work cooperatively with his peers and supervisors to perform his job duties. The employer reasonably expected claimant to perform those basic job functions, and the record suggests it is more likely than not that claimant both knew about and had demonstrated his ability to comply with the expectations. The record also suggests that it is more likely than not that claimant violated the employer's expectations with respect to his work performance, and did so with wanton negligence. After demonstrating a protracted ability to satisfy the employer's expectations, and after conversations with the employer in which claimant agreed that he could improve his work performance, claimant's work performance instead declined and he stopped performing his job in the same manner that had previously satisfied the employer's expectations. He spent time working on non-billable

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doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

marketing rather that working on billable tasks, he did not perform routine tasks on schedule and did not complete them in a timely manner when reminded to perform them, he did not take notes during meetings, he did not follow through with his team or clients, he did not provide a vice president with the client files and materials the vice president needed to prepare for a meeting, he did not attend a preparatory meeting with the vice president, and he arrived late for a client meeting. It is more likely than not that claimant was, for example, aware of instructions to work on billable tasks, perform routine tasks, take note, and attend meetings that were scheduled for him, suggesting that his failures to perform such duties were, at a minimum, conscious conduct that demonstrated his indifference to the standards of behavior the employer had the right to expect of him, and therefore were wantonly negligent.

Claimant's wantonly negligent conduct cannot be excused under OAR 471-030-0038(3)(b) as a good faith error or isolated instance of poor judgment. Claimant did not appear at the hearing or establish that he was entitled to present additional information about his work separation on appeal to EAB; he therefore did not establish it was more likely than not that he sincerely believed he was adequately performing his job duties. The employer's evidence that claimant agreed in January 2018 that he could be performing his job duties better suggests that claimant knew or should have known his performance was not meeting expectations. Claimant's conduct was, therefore, not the result of a good faith error. An isolated instance of poor judgment is defined, in pertinent part, as a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d). Claimant's conduct was not isolated, as, for the reasons explained above, it consisted of repeated instances of wantonly negligent conduct, including his wantonly negligent failures to work with his team, follow through with the client that fired him, provide information to a vice president, attend a meeting with the vice president, attend a client meeting, and confine his social media activities at work to industry-related or thought-leadership subjects as directed by the employer. For those reasons, his conduct cannot be excused as an isolated instance of poor judgment.

The employer therefore discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-110792 is affirmed.

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

DATE of Service: <u>July 31, 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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