

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0813

Affirmed
Disqualification

PROCEDURAL HISTORY: On July 3, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94115). Claimant filed a timely request for hearing. On August 3, 2018, ALJ Schmidt conducted a hearing, and on August 7, 2018, issued Order No. 18-UI-114476, affirming the Department's decision. On August 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted a written argument. However, claimant's argument contained some new information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument, to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) Creekside Valley Farms, LLC employed claimant as an equipment operator from August 8, 2016, to June 7, 2018. Claimant's typical work shift began at 7:00 a.m. and ended whenever his assigned work was finished.

(2) The employer expected its employees to report for work as scheduled or notify the employer no later than the start of its daily 7:00 a.m. shift that the employee would be absent. Claimant had followed the employer's expectations regarding attendance in the past by texting the owner when he would be absent, and was aware of and understood the employer's expectations in that regard.

(3) During the weeks prior to May 28, 2018, claimant's relationship with the employer's owner became strained, in part, because claimant had worked excessive hours and when he had asked the owner for time off, the owner talked him out of taking time off and would not allow him to miss work. Also, the owner mistakenly blamed claimant for reporting to a work site late even though the owner had not given him the correct address and damaging a piece of equipment that another employee had used just prior to

claimant. Claimant felt stressed by the strained relationship and excessive hours and felt he needed a break from work.

(4) The employer expected claimant to report for work as usual on Monday, May 28, 2018 at 7:00 a.m. because claimant had agreed to do so, and on May 29 through May 31, 2018 as usual because they were regular workdays. Claimant decided that he needed to take a break from work “to clear his head” and chose to not report for work or notify the owner he would be absent on May 28, 29, 30 or 31, 2018 because he believed the owner would try to talk him out of staying away from work. Audio Record ~ 26:30 to 27:00.

(5) Late on May 31, 2018, claimant texted the owner about returning to work the next day and the owner responded by telling him to report for work because he had an assignment for him. Claimant worked for the employer on June 1 and June 2, 2018. However, on June 3 and June 4 the owner notified claimant to not come in because the machinery he had been operating was not operational. On June 5, 2018, claimant did not report to work because the owner had not called him back.

(6) On June 6, 2018, the owner asked claimant to report the next day “to talk.” Audio Record ~ 10:40 to 12:40. When he did, on June 7, 2018, the owner discharged claimant for failing to report for work or notify the owner that he would be absent on May 28, 29, 30 and 31, 2018.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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. 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 report for work as scheduled on May 28 through May 31, 2018 without notifying the owner that he would be absent. The employer had the right to expect claimant to do both because claimant admitted that he understood the employer’s policy and that he had followed it in the past. Audio Record ~ 14:00 to 18:00. Moreover, claimant did not return to work on June 1, after his absences without notification, until the owner gave him permission to do so on May 31, 2018, from which we infer he knew he had violated the employer’s attendance and notification policy. More likely than not, claimant understood that he was expected to report for work as scheduled or notify the owner whenever he would be absent. By failing to do so on May 28, 29, 30 and 31, 2018, claimant violated those expectations willfully or with wanton negligence.

Claimant's failures to notify the owner that he would be absent under the circumstances described was not the result of a good faith belief that he did not need to call or report for work as scheduled. A "good faith error" usually involves a mistaken but honest belief that one is in compliance with the employer's policy or expectation, and some factual basis for believing that to be the case without reason to further investigate what the expectation was. *Accord Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006). Viewed objectively, claimant's assertions that he believed his absences without notification would be allowed by the owner because his relationship with the owner was "strained" and that he needed a break "to clear [his] head" were neither persuasive nor reasonable given his prior practice of texting the owner whenever he would be absent. Audio Record ~ 19:00 to 21:00. Similarly, claimant's further explanation to the ALJ that he thought his actions would be allowed because he was allowed to return to work for two days after missing work for four days was neither persuasive nor reasonable because it could not have influenced his failures to call or report for work on the days in question. Audio Record ~ 22:00 to 23:30. Accordingly, claimant's failures to do so on May 28, 29, 30 and 31, 2018, more likely than not, were not the result of a good faith error.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent exercise of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Here, claimant's repeated failures to call or report for work were not isolated, and given his explanation that he did not contact the employer until he decided that he had cleared his head, involved at least two conscious exercises of poor judgment on each of the days in question. First, on each of the days, claimant chose not to report for work knowing that he was needed and expected, and second, claimant chose not to notify the owner to allow him the opportunity to compensate for claimant's absence from work. On this record, each of those separate decisions demonstrated claimant's indifference to the consequences of his actions for the employer and were wantonly negligent.

For the foregoing reasons, the employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation until he has earned at least four times his weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-114476 is affirmed.

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

DATE of Service: September 24, 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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