EO: 200
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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-1004

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83141). Claimant filed a timely request for hearing. On August 22, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for September 5, 2018 at 8:15 a.m. On September 5, 2018, claimant failed to appear at the hearing, and ALJ Wyatt issued Order No. 18-UI-116035, dismissing claimant's requests for hearings due to his failure to appear. Claimant filed timely request to reopen the hearing. On October 10, 2018, ALJ Murdock conducted a hearing, and on October 12, 2018 issued Order No. 18-UI-118122 granting claimant's request to reopen the hearing, cancelling Order No. 18-UI-116035, and affirming the Department's decision. On October 17, 2018, claimant filed an application for review of Order No. 18-UI-118122 with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and he failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, and considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Coca Cola Bottling Company, employed claimant as a maintenance mechanic, from April 29, 2017 until July 12, 2018.

(2) The employer had a written code of conduct and ethics policy, which provided in part that failing to observe working schedules, including rest and lunch periods could result in corrective action or dismissal. Claimant was aware of the employer's policies and understood that he had two 15-minute rest periods per day and a 30-minute lunch period.

(3) On September 21, 2017, claimant received a written warning for taking extra time for rest periods on August 26, 2017. The employer found record of claimant leaving the building he worked in for three rest periods in addition to his lunch break. Claimant's total rest periods on August 26, 2017 totaled one hour and forty minutes. Claimant acknowledged that on August 26, 2017, he had taken long rest periods.

(4) On July 7, 2018, the employer's production manager noticed claimant and his co-worker in the breakroom when he walked by it at about 8:35 a.m. He walked by the break room about 30 minutes later and noticed claimant and his co-worker were still in the breakroom. The production manager reported it to claimant's supervisor. The supervisor stated that when he interviewed claimant's co-worker, who was seen in the breakroom with him that morning, the co-worker reported that he and claimant had taken a break that morning for over one hour and then again that afternoon, for nearly an hour, watching the World Cup. Claimant admitted that he had taken an extended rest period that morning, by five to ten minutes, but denied taking an extended rest period in the afternoon. Claimant stated that he took the extended morning rest period because he had not had an opportunity to eat his breakfast before his shift started, because he had been asked to clock in fifteen minutes early. Claimant also stated that the employer had a practice which allowed employees to take an extra rest period if they needed it, as long as they told someone. The employer denied such a practice, and instead explained that if an employee missed a rest period, they would take it later.

(5) On July 7, 2018, the production manager asked claimant to stay for an extended period of time at the end of his shift, because he was not comfortable running the line without a maintenance mechanic present. The supervisor stated that claimant had violated the employer's work policy by remaining in the shop while on the clock but not performing his responsibilities. Claimant denied the allegation and asserted that he had stayed in the shop cleaning up his mess, while he waited for the operators to finish running the line.

(6) On July 12, 2018, the employer discharged claimant for extending his break periods beyond 15 minute on July 7, 2018.

CONCLUSIONS AND REASONS: We agree with the ALJ and the Department and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for willfully extending his morning rest period on July 7, 2018. The employer had policies which provided that failing to observe working schedules, including rest and lunch periods, could result in corrective action or dismissal. Claimant was aware of the employer's policies and understood its expectations.

Claimant acknowledged that on September 21, 2017, he received a written warning from the employer for extending his rest periods on August 26, 2017. Exhibit 4. When the ALJ asked claimant about the extended rest period on August 26, 2017, claimant responded, "Um, I believe I did." Transcript at 23. Claimant also acknowledged that he understood that his rest periods were limited to 15 minutes twice per day, and his lunch break was limited to 30 minutes. Transcript at 23. It is uncontradicted that claimant took more than a 15-minute rest period during the morning on July 7, 2018. Claimant stated during the hearing, "I admitted to taking an extra 5 or 10 minutes in the first break ..." Transcript at 24, 32. Claimant willfully chose to extend his morning rest period, violating the standards of behavior, which the employer had the right to expect of an employee. Claimant's conduct cannot be excused as an isolated instance of poor judgment, because as stated above, claimant had previously willfully taken extended rest periods. *See* OAR 471-030-0038(1)(d)(A).

Claimant's behavior of July 7, 2018 also cannot be excused as a good faith error under OAR 471-030-0038(3)(b). Claimant stated, "I didn't have time to eat my breakfast when I first got there" "[b]ecause I was called in early." Transcript at 28, 45. When asked by the ALJ why he had needed more than 15 minutes to eat his breakfast at the first rest period, claimant stated, "That and then – that and put my stuff away and change because it was just sitting on the floor." Transcript at 29. However, claimant normally accomplished those tasks in 15 minutes, before he started work. Transcript at 24. Although claimant was previously written up for taking extended rest periods, he tried to justify his action of July 7, 2018 by stating that the employer had a practice allowing employees to take extra time if they needed "an extra minute to sit down let somebody know and that's fine." Transcript at 45, 46. The employer's denial of such a practice is supported by the fact it had previously given claimant a written warning for extending his rest periods. The record fails to show claimant sincerely believed, and had a rational basis for believing, the employer would condone him extending his morning rest period because he had not been able to eat his breakfast when he first got to work because he was asked to start his shift 15 minutes early.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits.

DECISION: Order No. 18-UI-118122 is affirmed.

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

DATE of Service: <u>November 20, 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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