

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0537

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision #142435). The employer filed a timely request for hearing. On March 13, 2014, ALJ Sime conducted a hearing, and on March 18, 2014 issued Hearing Decision 14-UI-12706, affirming the Department's decision. On April 4, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bruce Chevrolet, Inc. employed claimant from July 30, 2013 to November 21, 2013 as a lube technician.

(2) Claimant worked for the employer from 8:00 a.m. to 5:00 p.m. on weekdays. The employer expected employees to report for work as scheduled, or to contact the employer before their scheduled shifts if they needed to miss work due to illness. The employer expected employees to refrain from missing work due to illness if they were not ill.

(3) On November 19 and 20, 2013, claimant left work halfway through his shift due to illness.

(4) On November 21, 2013, claimant sent his supervisor a text message stating he was sick and needed to go to the doctor, and that he would report to work at 2:00 p.m. that day. The supervisor asked claimant why he needed to miss work until 2:00 p.m. to visit his doctor. Claimant responded that he would report to work at noon. The supervisor told claimant to take the rest of the week off from work so his health would improve. Claimant told the supervisor he did not want to miss work for the rest of the week.

(5) Later on November 21, 2013, the supervisor called claimant and discharged him due to poor attendance.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ and conclude the employer discharged claimant, not for 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) (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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant due to poor attendance. Claimant reported to the employer that he was sick on November 19, 20, and 21, 2013. The employer testified that it believed claimant was untruthful when he reported he was sick on November 21, 2013, because he left early the two previous days, and because he appeared to easily change the time he was able to report to work from 2:00 p.m. to noon on November 21. Audio Record ~ 10:58 to 11:55. The employer also distrusted claimant because claimant admitted to the employer on November 6, 2013 that he had been untruthful to the employer about the reason he missed work on November 5, 2013. Audio Record ~ 18:13 to 19:02. Thus, the employer believed the claimant missed work on November 21, 2013 for a reason other than illness. A person testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. *See* ORS 44.370. Claimant offered first-hand testimony that he was unable to work on November 19, 20 and 21 due to illness and the need to see a doctor. His testimony was consistent and plausible. His behavior was consistent with that of a person who was willing to work, but was unable to work due to illness. Moreover, the ALJ did not find claimant lacked credibility at hearing. Absent a reason to disbelieve claimant's sworn testimony at hearing, the employer failed to meet its burden to show by a preponderance of the evidence that claimant's absence from work was due to a reason other than illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

Thus, the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-12706 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: April 29, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.