

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0560

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113126). Claimant filed a timely request for hearing. On January 27, 2014, ALJ S. Lee conducted a hearing, and on March 26, 2014, issued Hearing Decision 14-UI-13528, affirming the Department's decision. On April 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Smith CFI/Commercial Furnishings employed claimant as a sales assistant from May 1, 2012 to November 13, 2013.

(2) The employer expected claimant to report for work by her starting time of 8:00 a.m. "ready to work." Audio Record ~ 10:20 to 10:30. On October 7, 2013, claimant arrived to work after 8:00 a.m. and her supervisor admonished claimant that the employer's expectation was that claimant "be at her desk with her computer turned on and ready to work at 8 o'clock every day." Audio Record ~ 16:00 to 16:30. Claimant's supervisor documented her discussion with claimant in an email that was placed in claimant's personnel file. Claimant was aware of the employer's expectation.

(3) On November 13, 2013, claimant arrived at work a few minutes after 8:00 a.m. due to traffic congestion along her travel route. Claimant had anticipated there would be morning traffic congestion along that route due to freeway construction and had begun taking the precaution of leaving home early to arrive at work on time. However, because traffic was "really heavy", she arrived at work a few minutes late. Audio Record ~ 9:35 to 10:15, 31:40 to 32:25.

(4) On November 13, 2013, the employer's managers called claimant into the office for a review. During the meeting, they discharged claimant for "tardiness" explaining that although she was "a really

great employee,” she had arrived at work late “a couple of times.” Audio Record ~ 9:35 to 10:15, 31:40 to 32:25.

CONCLUSIONS AND REASONS: The employer discharged claimant, but 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. 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 has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-13528, after finding the employer discharged claimant on November 13, 2013 for “for excessive tardiness and failing to properly notify the employer when she was going to be late”, the ALJ concluded that on November 13 claimant was at least wantonly negligent because, after the October 7 warning, she “failed to change her habits.” Hearing Decision 14-UI-13528 at 4. However, the employer's witness testified that on November 13, claimant was discharged for “tardiness”, rather than failing to properly notify the employer, and did not dispute claimant's testimony that she was told by the other manager at the review that she was being terminated for being “late, a couple of times.” More likely than not, claimant was discharged for arriving at work a few minutes late on November 13, 2013.

Barring illness or exigent circumstances, the employer had the right to expect claimant to report for work at her scheduled time “ready to work” because she was advised of that expectation on October 7. Claimant violated that expectation on November 13, 2013 due to “really heavy” traffic. However, contrary to the ALJ's analysis, the evidence shows that claimant took steps to “change [the] habits” that caused previous late arrivals to work. Claimant testified that because she was aware that road construction was causing delays along her travel route, to compensate for the delay, she routinely left home early. Audio Record ~ 42:00 to 43:40. That was a reasonable precaution to take to ensure her punctual arrival at work and, according to claimant, it had been successful. *Id.* However, on November 13 the traffic along her travel route was “really heavy.” On this record, it was not reasonably foreseeable by claimant that her usual precaution would not be sufficient that day. That claimant took a reasonable step to ensure her punctual arrival shows that she was not indifferent to the employer's expectation. Claimant's violation of that expectation on November 13, 2013 was neither willful nor wantonly negligent.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-13528 is set aside, as outlined above.

EAB Decision 2014-EAB-0560

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.