

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0775

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121658). Claimant filed a timely request for hearing. On April 25, 2014, ALJ Wyatt conducted a hearing, and on May 2, 2014 issued Hearing Decision 14-UI-16776, concluding the employer discharged claimant, but not for misconduct. On May 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. In its argument, the employer asserted that the ALJ erred in allowing claimant to testify regarding the contents of documents the ALJ did not admit into evidence because the employer had not received copies of the documents. However, OAR 471-040-0025(5) (August 1, 2004) states only that irrelevant, immaterial or unduly repetitious evidence may be excluded, that all other evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs shall be admissible, and that erroneous rulings on evidence shall not preclude the ALJ from entering a decision unless shown to have substantially prejudiced the rights of a party. Sworn testimony under oath is evidence of a type commonly relied upon by reasonably prudent persons in conduct of serious affairs, and claimant's testimony was not irrelevant, immaterial or unduly repetitious. The ALJ allowed the employer to cross-examine claimant, and the employer's witness an opportunity to rebut claimant's testimony. The employer has not shown that allowing claimant to testify regarding the content of the excluded documents substantially prejudiced the rights of the employer.

FINDINGS OF FACT: (1) On February 8, 2014, claimant sent the employer's owner and manager (owner) an email stating that she had arranged for another employee to cover part of her shift on February 11, 2014, and asking the owner to cover parts of her shifts on March 18 and 19, 2014. The employer discharged claimant for arranging for another employee to cover part of her shift, and asking the owner to covers parts of two of her shifts.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer failed to establish claimant's discharge was 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. 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).

The employer discharged claimant for arranging for another employee to cover part of her shift on February 11, 2014, and asking the employer's owner to covers parts of her shifts on March 18 and 19, 2014. At hearing, the employer's owner testified that he had repeatedly informed claimant that she was no longer allowed to arrange for other employees to cover for her, or even ask the owner to cover for her. Audio Record at 9:30-21:30. However, claimant testified that the owner never had informed her she was no longer allowed to do so. Audio Record at 22:00-30:00. We find that evidence on that issue, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant knew or should have known that arranging for another employee cover part of her shift, and asking the owner to cover parts of two of her shifts, probably violated the employer's expectations. Absent such a showing, the employer failed to establish that claimant violated its expectations willfully or with wanton negligence.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-16776 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 10, 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.