

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0910

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 131716). The employer filed a timely request for hearing. On May 13, 2014, ALJ Frank conducted a hearing, and on May 22, 2014 issued Hearing Decision 14-UI-15877, affirming the Department's decision. On May 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jackson County School District #91 employed claimant as a substitute custodian in a school from sometime in August 2013 until January 8, 2014.

(2) The employer expected claimant to report for work as scheduled and to notify the employer if she was going to be absent. Claimant was aware of the employer's expectations.

(3) The employer never gave claimant a schedule that specified the days she was expected to work, and did not post an attendance schedule in the workplace.

(4) In early December 2013, the maintenance supervisor commented to claimant that some custodial work was available during Christmas break. Claimant understood that this work was available to her if she wanted some hours during the break and that her work attendance during the school break period was optional. Audio at ~23:55, ~24:34. Claimant did not understand that the employer expected her to report for work during the break. The employer never specifically notified claimant that she was scheduled to work on any days during the Christmas break.

(5) On December 26, 2013 through December 31, 2013, the school was on Christmas break. Claimant did not report for work during these days because she was not aware that the employer expected her to work. On January 2, 2014, after school was back in session, claimant reported for work. The

maintenance supervisor told claimant that she had been expected to work during the period of December 26, 2013 through December 31, 2013. Claimant told the supervisor she was not aware that she had been scheduled to work, and had been helping a friend who was moving.

(6) On January 8, 2014, the employer discharged claimant for not reporting to work on December 26, 2013 through December 31, 2013 and not notifying the employer of her absences on those days.

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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record was sparse on how the employer notified claimant of the days it expected her to work or that it had scheduled her to work on December 26, 2013 through December 31, 2013. Although the employer's witness, the maintenance supervisor, generally contended that claimant was aware of the days that she was expected to work, he did not present any evidence as to how she was aware of the days that she was expected to work. The maintenance supervisor did not dispute claimant's testimony that she never received a work schedule and that the employer did not post a schedule in the workplace. Audio ~27:34. The supervisor did not rebut claimant's testimony that the only time he discussed work during the Christmas break with her was in early December 2013, and from that conversation claimant had understood that work attendance during the break was optional. Audio at ~23:55. ~24:34. The maintenance supervisor did not provide any specific evidence to show that claimant should have been aware that she was expected to work when school was not in session during the Christmas break, and he testified that claimant should reasonably have known this because she had reported for work during the Thanksgiving break. Audio at ~31:32. Because claimant thought that work attendance during the fall and winter holiday breaks was optional, however, that she worked during one holiday period does not necessarily demonstrate a reasonable awareness that work attendance during holiday breaks was mandatory. Although the maintenance supervisor contended that he called claimant when she was not at work from December 26, 2013 through December 31, 2013, which might have sufficed to notify claimant that the employer expected her to report for work on those days, claimant disputed that she had received any such calls or any voice mail or text messages. Audio at ~27:46. Since there is no reason in the record, to believe or disbelieve the testimony of either party, the uncertainty on this issue must be resolved against the employer, because it is the party who has the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, the supervisor did not call claimant to tell her she was missing scheduled work on December 26, 2013 through December 31, 2013.

Absent evidence that claimant was reasonably aware that she was scheduled to work during the Christmas break or that claimant's understanding of the early December 2013 conversation with the maintenance supervisor about holiday work was unreasonable, the employer cannot demonstrate that claimant's failure to report for work or call to report her absences from December 26, 2013 through

December 31, 2013 was a willful or wantonly negligence violation of the employer's standards. The employer did not present such evidence. Accordingly, the employer failed to establish that claimant's behavior in not reporting for work and not notifying the employer that she was going to be absent from work on December 26, 2013 through December 31, 2013 was misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-18141 is affirmed.

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

DATE of Service: July 8, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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