

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0948

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 160357). Claimant filed a timely request for hearing. On May 12, 2014, ALJ Micheletti conducted a hearing, and on May 13, 2014 issued Hearing Decision 14-UI-17446, concluding the employer discharged claimant, not for misconduct. On June 2, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. We considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) JP Morgan Chase Bank employed claimant from January 17, 2006 to March 24, 2014 as an assistant branch manager.

(2) The employer expected claimant to create and submit a monthly teller schedule to his branch manager by the 20th day of the month preceding the schedule. The employer expected claimant to schedule himself to work as a teller during all periods when there was a lack of coverage of one hour or more in the teller schedule and to avoid scheduling himself and other staff to work overtime. Claimant understood the employer's expectations.

(3) Before claimant created the March 2014 teller schedule, his district manager told him the employer would provide claimant's branch with additional staff for March 2014 because one of the branch's bankers was on a leave of absence during that month. The banker's absence during March affected how claimant scheduled the tellers and himself, because claimant had to be available to cover the banker's position if no other person qualified to act as banker was available. The branch manager provided the additional staff's availability on a weekly basis. Claimant did not know when the additional staff would be available to work before he was expected to submit the March 2014 schedule to his branch manager for review and approval. Claimant's branch manager told him to create the best schedule he could with the information he had at that time.

(4) On February 20, 2014, claimant gave his branch manager the March 2014 teller schedule. After the branch manager reviewed the schedule with claimant and sent it to the district manager, the district manager determined that claimant did not schedule himself to cover all the days additional teller coverage was required.

(5) On March 24, 2014, the employer discharged claimant for failing to schedule himself to work as a teller during all gaps of one hour or more in the March 2014 teller schedule.

CONCLUSIONS AND REASONS: We agree with 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. 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 bears the burden to prove misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had a right to expect claimant to prepare a schedule each month that met the employer's staffing needs. Claimant understood the employer's expectations. On February 20, 2014, claimant submitted a teller schedule that did not meet those expectations. However, to be misconduct, claimant's violation had to be willful or wantonly negligent. Here, claimant did not know when the substitute staff promised by the district manager would be available to work. He told his branch manager he could not complete the schedule without that information, and the branch manager told him to "do the best he could" to schedule the staff according to the staff availability information he had when he was required to submit the schedule. Audio Record ~ 12:47 to 13:01. Before sending the schedule to the district manager, claimant and his branch manager worked together to fill all the time slots where additional teller coverage was needed. Audio Record ~ 14:59 to 15:18. The record fails to show that claimant consciously failed to follow the employer's scheduling instructions, or that he consciously engaged in other conduct that he knew or should have known would probably result in his failure to prepare a satisfactory teller schedule. Absent such a showing, the employer failed to show claimant's conduct was willful or wantonly negligent under OAR 471-030-0038(1)(c).

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-17446 is affirmed.

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

DATE of Service: July 9, 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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