

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1238

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 5, 2014 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 165200). The employer filed a timely request for hearing. On July 8, 2014, ALJ Lohr conducted a hearing, and on July 10, 2014 issued Hearing Decision 14-UI-21221, affirming the Department's decision. On July 18, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) C & K Market, Inc. employed claimant as a cashier from September 14, 2013 until April 29, 2014.

(2) The employer expected claimant to report for work as scheduled and to notify the manager on duty by telephone at least two hours before the start of her shift if she was going to be absent. Claimant was aware of the employer's expectations but thought she was permitted to communicate by text message with one particular store manager about her absences and her work schedule.

(3) From the time she was hired, claimant regularly contacted a particular store manager by text message to notify the manager of her absences and also to inquire about when she was scheduled to work. The store manager never told claimant that she was not permitted to communicate with that store manager about these matters through text messages or otherwise.

(4) On April 26, 2014, when the store manager was off duty and out of town, claimant sent a text message to the manager telling the manager that she was ill and could not report for her scheduled shift on April 27, 2014. The store manager was very irritated that claimant contacted her about a scheduling matter when she was off duty. The store manager thought that claimant was "taking advantage of [her]"

as no other employee does" by requesting scheduling changes on short notice because claimant was romantically involved with the store manager's son. Audio at ~23:23. The store manager sent a reply text message to claimant telling claimant that she was not able to arrange for another employee to cover claimant's shift because she was out of town. Claimant sent a text message in response emphasizing to the manager that she was too sick to work on April 27, 2014. After she received the text message, the store manager arranged for another employee to cover claimant's shift. Audio at ~9:55. The store manager replied, by text message, telling claimant, "Never mind," which claimant interpreted as meaning she did not need to report for work on April 27, 2014. Audio at ~9:55. In that text message, the store manager also stated to claimant, "We're done. I need someone who can be here." Audio at ~20:24; *see also* Audio at 17:13, 23:23. Claimant was uncertain whether the store manager had discharged her. Claimant did not report for work on April 27, 2014.

(5) On April 28, 2014, claimant was still uncertain about her employment status. Claimant sent a text message to the store manager, who was on duty and at the store at the time, and asked if she was scheduled to work at either of the employer's stores on April 29, 2014. The store manager was irritated that claimant had not checked the store's written schedule that was posted in the workplace to determine if she was expected to work on April 29, 2014. Audio ~10:16, ~11:28. The store manager sent claimant a text message reply stating, "No." Audio at ~11:17, ~18:34. In fact, the employer's written schedule showed that claimant was expected to work on April 29, 2014, beginning at 6:00 a.m. Although claimant sent other text messages to the store manager on April 28, 2014, the manager did not respond to them. Audio at ~10:16.

(6) On April 29, 2014, claimant did not report for work. The store manager's son told claimant later that day that the store manager had discharged her for failing to report for scheduled work on April 29, 2014.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Both parties agreed that the employer discharged claimant, although they disagreed about the reasons for the discharge and its date. Audio at ~6:32, ~7:47, ~13:20, ~17:53, ~22:00. Regardless of this disagreement, claimant's work separation is properly analyzed as a discharge. *See* OAR 471-030-0038(2) (August 3, 2011).

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) 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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The store manager testified that she discharged claimant for failing to report for work or to call in to report an absence on April 29, April 30 and May 1, 2014. Audio at ~6:52. Claimant contended that she did not report for work on April 29, 2014 because the store manager told her in the April 28, 2014 text message that she was not scheduled for work on April 29, 2014. Audio at ~18:22, ~20:44. Claimant also testified she did not report for work on any days after April 29, 2014 because she was uncertain about whether she was still employed after the store manager's April 26, 2014 message stating that

"we're done," and that, combined with the statement to her from the store manager's son on April 29, 2014 that the store manager had discharged her for missing work on April 29, 2014, she concluded that the store manager had indeed discharged her. Audio at ~18:35, ~18:45. The store manager did not dispute that she responded "no" to claimant's inquiry about whether she was working at either of the employer's stores on April 29, 2014, and did not dispute that she told claimant on April 26, 2014 that "we're done." Audio at ~10:06, ~11:17, ~23:23. Despite these concessions, the store manager's apparent position was that if claimant had checked the employer's posted workplace schedule she would have known when she was scheduled to work, and that claimant's failure to report for work on those days was therefore at least wantonly negligent. Audio at ~10:56.

Although the store manager may have expected claimant to check her own schedule, the manager did not dispute that it was claimant's practice to ask the store manager by text message if she was scheduled to work on particular days. The store manager also did not dispute both that she had responded to claimant's inquiries in the past about her work schedule and that she did not tell claimant that the employer disapproved of or prohibited such inquiries. On these facts, given the store manager's acquiescence to claimant's method of determining her work schedule, it was not a wantonly negligent violation of the employer's expectations, as claimant reasonably understood them, for claimant to have inquired of the store manager, by text message, whether she was working on April 29, 2014. Because the store manager's response to claimant's inquiry was reasonably understood as stating that claimant was not scheduled to work on April 29, 2014, claimant's failure to report for work that day was not a willful or a wantonly negligent violation of the employer's expectations.

Claimant's belief that the store manager had discharged her on April 29, 2014 was also reasonable under the circumstances. The store manager's April 26, 2014 text message to claimant reasonably left claimant uncertain about whether the store manager had discharged her, particularly since it included expressions of displeasure and impatience from the store manager. While the store manager testified that she intended her statement of "we're done" to refer to the personal relationship between herself and claimant, and not the work relationship, that limitation was not obvious from the language of the message. Audio at ~23:23. Claimant's conclusion that she had been discharged was reasonably confirmed when the store manager's son told her the manager had discharged her on April 29, 2014 for failing to report for work. Audio at ~18:40. Although the store manager denied that she ever told her son that she had discharged claimant, that she had done so is most consistent with her level of irritation at claimant for not checking her own work schedule and the manager's misleading reply to claimant on April 28, 2014, causing claimant to believe that she was not scheduled to work on April 29, 2014. Audio at ~22:57. On these facts, more likely than not, the employer discharged claimant on April 29, 2014 after misleading claimant into failing to report for work on that day. Claimant's failure to report for work after April 29, 2014 was because she reasonably believed that she had been discharged on April 29, 2014. Claimant's failure to report for work on any workdays after April 29, 2014 was not a wantonly negligent violation of the employer's expectations.

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

DECISION: Hearing Decision 14-UI-21221 is affirmed.

Susan Rossiter and Tony Corcoran;

J. S. Cromwell, not participating

DATE of Service: August 19, 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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