

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1310

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 164112). Claimant filed a timely request for hearing. On July 24, 2014, ALJ R. Davis conducted a hearing, and on August 1, 2014 issued Hearing Decision 14-UI-22711, reversing the Department's decision. On August 4, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) TMS employed claimant in its call center as a customer service agent from November 20, 2012 until May 13, 2014.

(2) The employer expected claimant to report for work as scheduled. The employer had an attendance policy which required the discharge of an employee when the employee had accrued four attendance points in a calendar month. Claimant was aware of the employer's expectations and its attendance policy.

(3) On April 12, 2014, claimant left work early and accrued an attendance point. On April 13, 2014, claimant was absent from work and accrued an attendance point. On May 4, 2014, claimant left work early and accrued an attendance point. On May 6, 2014, claimant was absent from work and accrued an attendance point.

(4) On May 10, 2014, claimant left work five hours early because she received a telephone call telling her that the police had been called to stop a dispute between claimant's mother and sister. Claimant was a registered sex offender and was told in that call that her sister had brought up her name to the police as somehow being involved in the dispute. Claimant thought it was best if she left work to assist in settling the dispute rather than having the police come to the workplace. By leaving work early, claimant accrued another attendance point.

(5) Late in the evening on May 10, 2014, claimant drove to visit her father who lived in a rural area located approximately forty-five minutes away from the workplace. Claimant stayed the night at her father's residence. On May 11, 2014, claimant intended to drive to work from her father's residence to report for a shift scheduled to begin at 11:30 a.m. That morning, the car that claimant had ridden in to travel to her father's residence would not start. Claimant's friend and her father tried to fix the car, but could not. Claimant's father lived on a limited income and did not have enough gasoline in his car to allow claimant to use his car to travel to work. Claimant tried to arrange for friends to pick her up at her father's residence to transport her to work for the start of her shift, but none were willing to do so. Before her shift on May 11, 2014, claimant called the employer to report that she was going to be absent from work that day. By this absence, claimant accrued another attendance point.

(6) On May 13, 2014, the employer discharged claimant for exceeding the absences allowed in a calendar month under its attendance policy.

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

At hearing, the employer's witness testified that the employer discharged claimant because she had exceeded the number of absences or attendance points allowed under the employer's attendance policy. Audio at ~10:13, ~13:34. Although the employer may have discharged claimant for the sum of absences she had accrued under its attendance policy, EAB customarily evaluates only the last absence to determine if claimant engaged in misconduct and is thereby disqualified from benefits. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge); *see also Jason D. Klinkebiel* (Employment Appeals Board, 2014-EAB-1155, August 6, 2014). Accordingly, claimant's absence on May 11, 2014 is the proper focus of our evaluation.

Absent exigent circumstances, the employer had a right to expect claimant to report for work as scheduled. Nothing in the record suggests that it was unreasonable for claimant to anticipate that she would be able to travel from her father's residence to the workplace on May 11, 2014 using the car she had travelled in. That the car would not start on the morning of May 11, 2014 was not within claimant's reasonable control. Nor was it within claimant's reasonable control that she could not use her father's car as an alternative means to transport her to work because her father did not have the money to purchase gasoline for that car. To try to avert an absence from work, claimant had her father and her

friend try to fix the car she had travelled in and then tried, without success, to arrange for friends to pick her up at her father's residence in time for work. Because claimant took reasonable steps under these exigent circumstances to try to report for work, claimant's absence on May 11, 2014 was not attributable to her willful or wantonly negligent behavior. On this record, the employer did not meet its burden to demonstrate that claimant engaged in misconduct when she failed to report for work on May 11, 2014.

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

DECISION: Hearing Decision 14-UI-22711 is affirmed.

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

DATE of Service: September 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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