

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1687

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On September 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 94232). Claimant filed a timely request for hearing. On October 14, 2014, ALJ Shoemake conducted a hearing, and on October 17, 2014 issued Hearing Decision 14-UI-27125, reversing the Department's decision. On October 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Western Health Resources employed claimant to perform office and scheduling work from March 1, 2011 until August 22, 2014.

(2) The employer expected claimant to provide fourteen days advance notice of an absence from work unless the employer otherwise approved the absence or it was the result of an "emergency." Audio at ~6:00. Claimant was aware of the employer's expectations.

(3) Sometime before August 19, 2014, claimant's manager approved her absence from work for an unspecified period of time on the morning of August 20, 2014. Claimant needed this time away from work to register her daughter for high school.

(4) On August 19, 2014, while at work, claimant was notified that her aunt who lived in Lincoln City, Oregon was being transported by ambulance from Lincoln City to Oregon Health & Science University Hospital (OHSU) in Portland, Oregon because the aunt was "bleeding in her brain." Audio at ~ 26:50. The aunt was the sister of claimant's mother. Claimant concluded that her aunt's condition was very serious and, possibly, life-threatening. Claimant's manager approved claimant's absence from work during the afternoon of August 19, 2014 to allow her to visit OHSU to assess her aunt's situation. On August 19, 2014, claimant left work early, picked up her mother in Canby, Oregon and proceeded to OHSU. Claimant's mother has brain cancer and is legally blind and cannot drive herself. When claimant arrived at OHSU, her aunt was in the intensive care unit, unconscious and on a ventilator. Claimant learned that her aunt was in critical condition. During the evening of August 19, 2014,

claimant arranged for another person to transport her mother to OHSU on the next day, August 20, 2014, to be with claimant's aunt. At some later point, claimant learned that person was unable to drive her mother from her home in Canby to OHSU on August 20, 2014 and claimant agreed to do so.

(5) On August 19, 2014, claimant left OHSU in Portland and drove her mother to the mother's home in Canby. Claimant arrived at her home in Gresham at approximately 10:00 p.m. After arriving, claimant sent an email to her manager at 10:08 p.m. informing him that she had a 7:45 a.m. appointment on August 20, 2014 to register her daughter for school and, after the registration was completed, she wanted to go to OHSU to see her aunt. In the email, claimant stated that her aunt was "not doing well" and that she would contact the manager sometime on August 20, 2014. Audio at ~17:36. Claimant referred the manager to his administrative assistant, who was also claimant's personal friend, if he needed additional information about her aunt's condition.

(6) On August 20, 2014, sometime before 7:45 a.m., claimant left her home to take her daughter to the high school registration appointment in Gresham. On the same day, claimant's manager arrived at work sometime around 7:00 a.m. and accessed the email that claimant sent to him on the evening of August 19, 2014. The manager replied to claimant's email and told claimant that that he was only approving her absence on August 20, 2014 to register her daughter for high school. Claimant did not receive this email before she left her home on August 20, 2014 to register her daughter for school. Claimant completed the registration process at approximately noon, got some food for her daughter, picked up her mother in Canby at around 1:45 p.m. and arrived at OHSU at approximately 3:00 p.m. Sometime before arriving at OHSU, claimant called the employer's office and told the manager's administrative assistant, who had answered the employer's phone, that she was taking her mother to OHSU and the administrative assistant told claimant that she would tell the manager. At some point while she was at OHSU with her mother, claimant's manager left a voicemail message on claimant's cell phone telling her that she needed to report for work by 4:00 p.m. Audio at ~15:00. Claimant did not receive that voicemail message, and had not had an opportunity to access her email account since she left her home for the registration appointment. Audio at ~ 29:38. Claimant left OHSU that day at around 5:00 p.m.

(7) On August 20, 2014, claimant's manager determined that claimant did not have an emergent need to be with her aunt that day, or to transport her mother to OHSU. Audio at ~6:00. On August 22, 2014, the employer discharged claimant for taking unapproved time off from work on August 20, 2014 that was not necessitated by emergency circumstances.

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).

The employer's witness, claimant's department manager, took the position at hearing that claimant knew, based on his email and voice mail communications to her on August 20, 2014, that he had not authorized her absence from work on August 20, 2014 for purposes of visiting her aunt at OHSU or taking her mother to visit the aunt and that, even if claimant did not receive those communications, her reasons were not sufficiently emergent to excuse her absence without advance approval. Audio at ~6:00, ~13:30, ~15:00. With respect to whether claimant received the manager's email and telephone communications on August 20, 2014, claimant disputed that she was aware of them or had received them. Audio at ~29:38, ~32:47, ~35:29, ~42:35. Given that the manager testified that he sent his August 20, 2014 email to claimant at 7:12 a.m., and how proximate in time that was to when claimant reasonably needed to leave her house for the 7:45 a.m. registration appointment, it is quite plausible that the manager's email did not appear in claimant's email inbox until after she had already left her home for that appointment. Audio at ~13:30. It is also plausible that, if claimant was engaged in registering her daughter for school, then went to her mother's house to pick her mother up, and then drove her mother to OHSU and stayed at OHSU until sometime around 5:00 p.m. to be with her aunt, claimant did not have reasonable access to her email account during the work day of August 20, 2014 and would not have been subsequently aware of the manager's email. In addition, the manager's testimony at hearing and claimant's testimony appeared to agree that claimant was not able to obtain cell phone service, or at least cell phone reception, from various sites on the OHSU campus. Audio at ~14:17, ~32:47. Claimant's contention that she did not receive any voicemail messages from the manager on August 20, 2014 is, therefore, also plausible. Further, the manager did not specifically dispute claimant's testimony that she called the administrative assistant in the very early afternoon on August 20, 2014 to let the manager know that she was touching base as she promised in her August 19, 2014 email and the manager did not dispute that the administrative assistant did not tell claimant during that call that the manager disapproved of her absence on the afternoon of August 20, 2014. Audio at ~14:17, ~30:30, ~31:39, ~32:02. On these facts, the employer did not show by a preponderance of the evidence that claimant knew or reasonably should have known that the employer had prohibited her from taking time off on the afternoon of August 20, 2014 to go to OHSU to visit her ill aunt.

With respect to whether claimant's need to transport her mother to OHSU to visit claimant's aunt was reasonably an emergent circumstance that would excuse claimant's absence without advance approval under the employer's policy, claimant's manager did not dispute claimant's description of the seriousness of her aunt's condition, the disabilities of her mother or that her mother wanted to see the aunt and was unable to transport herself. Although the manager testified that claimant had told a least one coworker that someone else was taking her mother to OHSU on August 20, 2014, suggesting that claimant's need to transport her mother to visit her aunt was a ruse, the manager did not challenge claimant's testimony that her initial plans had changed when she learned that person was unable to transport her mother. Audio at ~40:00. The employer did not show, more likely than not, that claimant was not absent from work on the afternoon of August 20, 2014 to transport her mother to visit the ill aunt. On the facts as presented, the employer did not show that it was unreasonable for claimant to think that her aunt's condition was acute, if not life-threatening, and that it was imperative to transport her mother to OHSU to be with her aunt. Claimant's behavior did not evidence that, under the circumstances, she was indifferent to the consequences of her absence from work on the afternoon of August 20, 2014 because she notified her manager, on the night of August 19, 2014, that she needed to take that afternoon off and

referred her manager to his administrative assistant for more information about her aunt's condition. Audio at ~12:36. Since claimant was not aware that her manager had specifically prohibited her from taking any time off on August 20, 2014 other than to register her daughter from school, claimant's failure to report for work after that registration, in order to transport her mother to visit her aunt at OHSU was not wantonly negligent.

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

DECISION: Hearing Decision 14-UI-27125 is affirmed.

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

DATE of Service: December 16, 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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