

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1748

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On September 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 91048). Claimant filed a timely request for hearing. On November 4, 2014, ALJ Shoemake conducted a hearing, and on November 7, 2014, issued Hearing Decision 14-UI-28351, concluding claimant was discharged, but not for misconduct. On November 10, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Chamberlain House Inc., a 24-hour residential care facility, employed claimant as a member of its support staff from January 15, 2013 to June 17, 2014.

(2) The employer expected claimant to report for work as scheduled. The employer's expectation was contained in its handbook, a copy of which claimant received on January 15, 2013. On May 9 and 18, 2014, claimant reported for work late. On May 19, 2014, the employer warned claimant in writing that reporting for work late one more time would result in termination of her employment. Exhibit 1 at 4. Claimant was aware of the employer's expectation.

(3) On June 14, 2014, claimant was scheduled to work at 10:00 a.m. On her way to work, claimant unexpectedly soiled herself and returned home to shower and change. Claimant arrived at work at approximately 11:05 a.m. She worked until 8:45 although her shift was scheduled to end at 6:00 p.m. On June 17, 2014, the employer notified claimant that it would not pay her for work time after 6:00 p.m. and that she was being discharged for "chronic tardiness and altering your own schedule." Exhibit 1 at 2.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. Under OAR 471-030-0038(3)(b), absences due to unavoidable accidents, illness or other physical disabilities are not misconduct.

As a preliminary matter, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, the evidence shows the employer *discharged* claimant for "chronic tardiness and altering [her] own schedule." Exhibit 1 at 2; Audio Record ~ 7:10 to 7:30, 15:00 to 15:15. The last incident of claimant's tardiness preceding her discharge was her late arrival to work on June 14, 2014. Therefore, that incident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.¹

The employer had the right to expect claimant to report for work as scheduled. Claimant understood the employer's expectation, and on June 14, 2014, violated it when she reported for work approximately one hour after her scheduled start time. However, to disqualify an individual from receiving benefits, an employer has the burden to establish by a preponderance of the evidence that a violation of a reasonable employer expectation for which the claimant was discharged was due to misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant explained at hearing that she was late to work on June 14, 2014 because she unexpectedly "had personal issues with sickness" on her way to work and had to return home to shower and change clothes before proceeding to work. Audio Record ~ 20:00 to 25:00. Claimant's assertion at hearing that she did not report those circumstances to the employer that day because she was hurrying to get to work and was embarrassed about them was plausible and credible. *Id.* On this record, claimant's tardiness was caused by an unavoidable personal accident, illness or physical infirmity and absences from work for any of those reasons is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-28351 is affirmed.

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

DATE of Service: December 17, 2014

¹ The employer failed to establish by a preponderance of the evidence that it *discharged* claimant for failing to notify the employer she would be late to work on June 14. To the extent claimant was discharged for altering her own schedule on June 14, the employer also failed to establish misconduct. The employer failed to allege or show that claimant had the authority to alter her own schedule and the employer's evidence shows she was not paid for staying late on June 14. Exhibit 1 at 2. Accordingly, the employer failed to establish that claimant altered her own schedule that day.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.