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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

852
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1816

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 11, 2014, the Oregon Employment Department (the Department) served notice of two administrative decisions: one concluding that the employer suspended claimant, but not for misconduct (decision # 80609), and another concluding that the employer discharged claimant, but not for misconduct (decision # 75939). The employer and claimant filed timely requests for hearings. On October 31, 2014, ALJ Vincent conducted a consolidated hearing, and on November 7, 2014, issued Hearing Decision 14-UI-28365, concluding that the employer suspended claimant, but not for misconduct;, and Hearing Decision 14-UI-28364, concluding that the employer discharged claimant for misconduct. On November 25, 2014, claimant filed an application for review of Hearing Decision 14-UI-28374 with the Employment Appeals Board (EAB). On November 28, 2014, Hearing Decision 14-UI-28365 became final, with no application for review having been filed.[1]

At the hearing, the ALJ admitted documents submitted by the employer into the record as Exhibit 1. On this record, however, the exhibit admitted was not marked. Accordingly, we have marked Exhibit 1 based on the ALJ's description. Exhibit 1 consists of "Employee Counseling Notices" with the following dates: July 29, 2012; August 5, 2012; September 22, 2012; January 5, 2013; February 3, 2014; and July 30, 2014.

FINDINGS OF FACT: (1) Einstein Noah Restaurant Group employed claimant from July 1, 2012 through August 5, 2014, last as a shift lead.

[1] We take official notice of the following documents contained in the case files of the Office of Administrative Hearings: decision # 80609 and Hearing Decision 14-UI-28365. Any party that objects to our doing so must submit any such objection to this office in writing, explaining the basis for the objection, within 10 days of the date on which this decision is mailed. OAR 471-041-0090(3) (October 29, 2006). Unless such an objection is received, the noticed documents will remain part of the record.

(2) The employer expected that employees would be properly dressed in their uniforms, and ready to work at the time their shift was scheduled to begin. Claimant knew and understood these employer's expectations because on July 28, 2012 and September 5, 2012, she received written warnings for reporting late to work.

(2) On February 3, 2014 claimant received a written warning for arriving three hours late for a scheduled shift. The warning advised claimant that "future instances of this behavior or unacceptable performance may result in disciplinary action up to and including termination of employment." (Exhibit 1).

(3) On July 27, 2014, claimant arrived late for her scheduled shift and was not properly dressed at the time her shift was scheduled to begin. The employer's general manager suspended claimant for the period from July 30, 2014 through August 4, 2014. At the time he suspended claimant, the general manager told claimant she would return to work on August 5.

(4) On August 5, 2014, the general manager discharged claimant because he believed she failed to report for her scheduled shift and failed to notify him that she would not be reporting to work.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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 connected work. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The ALJ found that based on prior disciplinary action she had received, claimant knew she was expected to arrive at work on time. The ALJ concluded that claimant's failure to report for work on August 5, 2014 constituted wantonly negligent behavior because it "demonstrated indifference to the employer's expectation that she to report for work as scheduled." Hearing Decision 14-UI-28364 at 3.

The employer's general manager testified that claimant was well aware that she was expected to work on August 5 because when he suspended her on July 27, he was "pretty sure" that he told her that her first day back at work would be August 5. Audio Record ~ 20:22. The general manager also testified that he sent claimant a text in which he told the shift she was expected to work on August 5, although he could not remember the date on which he sent this text. Audio Record ~ 20: 09. Claimant, however, testified that the general manager sent her a text the night before she was scheduled to return to work after her suspension, telling her that he had her shift covered and she would not be working on the following day. Audio Record ~ 27:03, 27:55. Thus, the evidence that claimant knew she was expected

to work on August 5 was no more than equally balanced. Where the evidence is equally balanced, the party with the burden of production – here, the employer – did not prove that claimant behaved with wanton negligence by failing to report for work on August 5, 2014.

The employer discharged claimant, but not for misconduct, and she is not disqualified from the receipt of unemployment benefits.

DECISION: Hearing Decision 14-UI-28364 is set aside, as outlined above.

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

DATE of Service: <u>January 7, 2015</u>

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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***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en **court.oregon.gov**. En este sitio web, haga clic en "Help" para acceso a información en español.*

<u>Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atencion al cliente.</u> *Para llenar este formulario, puede visitar* https://www.surveymonkey.com/s/5WQXNJH. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*