

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1821

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91252). Claimant filed a timely request for hearing. On November 4, 2014, ALJ Seideman conducted a hearing, and on November 7, 2014 issued Hearing Decision 14-UI-28370, concluding the employer discharged claimant, but not for misconduct. On November 24, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) O'Reilly Auto parts employed claimant from May 31, 2002 to September 5, 2014.

(2) The employer expected employees to report for work on time. The employer expected employees who were going to be late for work to notify the employer. Claimant understood those expectations.

(3) It typically took claimant four to five minutes to drive to work. On September 5, 2014, claimant started driving to work approximately ten minutes before his shift started. However, his drive to work was delayed due to unexpected traffic. Claimant realized he was going to be late for work, and attempted to notify the employer by telephone. However, the employee who took claimant's call put him on hold, and claimant arrived at work before he had a chance to notify the employer he was going to be late.

(4) The employer discharged claimant because he was four minutes late for work on September 5, 2014, and failed to notify the employer he was going to be late.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. 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).

In this case, claimant was four minutes late for work on September 5, 2014 because his drive to work was delayed due to unexpected traffic, and not because he was deliberately late, or consciously engaged in conduct he knew or should have known would probably result in his failure to report for work on time. Claimant failed to notify the employer he was going to be late because he was put on hold by the employee who took his call, and arrived at work before he had a chance to notify the employer. He did not deliberately fail to notify the employer he was going to be late, or consciously engage in other conduct he knew or should have known would probably result in his failure to do so. Claimant therefore did not violate the employer's attendance expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-28370 is affirmed.

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

DATE of Service: January 5, 2015

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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