

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1844

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81727). Claimant filed a timely request for hearing. On November 13, 2014, ALJ Clink conducted a hearing, and on November 19, 2014 issued Hearing Decision 14-UI-28999, concluding claimant's discharge was not for misconduct. On December 2, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Shari's Management, Inc. employed claimant from July 12, 2010 to September 13, 2014. Claimant primarily worked for the employer as a server, but also covered shifts as a cook and a supervisor.

(2) The employer expected claimant to report to work on time for all of her scheduled shifts, or provide advance notice if she was unable to do so. Claimant understood the employer's expectations. Claimant had an extensive history of attendance problems including tardiness, missing a shift, and failure to provide adequate notice of her tardiness and absences. The employer issued claimant approximately four written warnings because of her conduct. Claimant knew the employer required her to improve her attendance and she understood that future incidents would, at a minimum, result in her suspension from work.

(3) The employer's schedules typically covered Thursdays through Wednesdays. The employer typically scheduled claimant to work Wednesdays through Saturdays. Claimant worked for the employer on Thursday, September 4th through Saturday September 6th. On September 6th, claimant took a photograph of her schedule for following week, and noticed that the employer had not scheduled her to work her usual Wednesday shift on that schedule.

(4) The employer scheduled claimant to work her regular shift on September 10th. At some point between September 6th and September 10th, claimant deleted the photograph she had taken of her

September 4th through September 10th work schedule. At some point prior to September 10th, claimant looked at the photo she had taken September 6th of her September 11th through September 17th work schedule and saw that she was not scheduled to work Wednesday. Claimant did not look carefully enough at the dates on the photo, and mistakenly concluded that she was not scheduled to work on September 10th. She did not realize that she was looking at the Wednesday, September 17th schedule rather than the September 10th schedule. Because she looked at a picture of the wrong work schedule, she did not report for work for her scheduled shift on September 10th.

(5) On September 13, 2014, the employer discharged claimant because of her failure to report to work on September 10th.

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.

The incident that prompted the employer to discharge claimant when it did was her failure to report to work for a scheduled shift on September 10, 2014. The employer had the right to expect claimant to report to work as scheduled. Claimant understood the employer's expectation, and, on September 10th, violated it. For claimant's violation to constitute misconduct, however, it must have been the result of claimant's willful or wantonly negligent conduct.

Here, claimant did not intend to miss a shift of work on September 10th, so her violation was not willful. Moreover, she had an extensive history of attendance-based warnings, and, to the extent she could, had taken steps to avoid engaging in further attendance violations. For example, after missing a shift of work in August 2014, claimant took more care in checking the schedule, and she tried to ensure she allowed enough time to get to work when she anticipated possible delays. Transcript at 24, 26. Claimant's conduct demonstrates that she was generally aware of the employer's expectations with respect to her attendance, and that she attempted to modify her behavior in order to meet them. With respect to the September 10th incident, claimant had checked her work schedule the last time she was at work, took photographs of the posted work schedule, and, prior to September 10th, she checked her schedule to see if she was working. The fact that she checked the wrong schedule was merely an inadvertent mistake, and not indicative of her conscious indifference to the expectation that she report to work when scheduled. Therefore, claimant's conduct in that incident was not wantonly negligent.

The employer discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 14-UI-28999 is affirmed.

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

DATE of Service: January 13, 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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