

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1905

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 # 84207). Claimant filed a timely request for hearing. On November 17, 2014, ALJ Frank conducted a hearing, and on November 24, 2014 issued Hearing Decision 14-UI-29185, concluding the employer discharged claimant, but not for misconduct. On December 15, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, and the employer's argument, to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) Hair We Are Beauty College employed claimant from January 2, 2014 to August 31, 2014 as a hair design and nail technology instructor.

(2) The employer expected claimant to remain at work during her scheduled work hours and to refrain from engaging in fraud or other conduct that could render claimant unqualified to perform her duties. Claimant understood the employer's expectations.

(3) During August 2014, claimant signed the title of her vehicle indicating she was selling the vehicle before she finished paying for the vehicle.

(4) On August 29, 2014, claimant left her work station before the end of her shift because the police came to her workplace to investigate the transaction involving her vehicle. Claimant returned to her work station and told the lead instructor she had to speak with the police outside the workplace. The lead instructor told claimant to clock out if she was leaving work, and claimant clocked out ten minutes before the end of her shift. Claimant's vehicle was repossessed and towed. Claimant did not know

police were going to arrive at the employer's college. Claimant was not charged with a crime regarding her vehicle.

(5) On August 31, 2014, the employer's owner met with claimant to investigate the August 29, 2014 incident. The owner was concerned that it could be disciplined by the State of Oregon if claimant engaged in fraudulent conduct that could cause her to lose her license to instruct hair design and nail technology.

(6) On August 31, 2014, the employer discharged claimant due to her attendance, and because it was concerned claimant had committed a fraudulent act that could affect her license.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. A willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c). In a discharge case, the employer has the burden to prove by a preponderance of the evidence that it discharged claimant for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, in part, because she violated the employer's attendance policy by leaving work early on August 29, 2014. Absent exigent circumstances, the employer had a right to expect claimant to work her scheduled work hours. Claimant left work early to respond to law enforcement's questions when police arrived unexpectedly at her workplace to investigate a transaction involving claimant's vehicle. The police arrival and investigation were exigent circumstances that caused claimant to leave work early. Claimant was not charged with a crime, and the record does not show claimant consciously engaged in conduct that she should have known would probably result in her missing work. Thus, claimant's early departure from work was not willful or wantonly negligent.

The employer also discharged claimant, in part, because it was concerned claimant might lose her instructor's license as a result of committing fraud regarding the car title. However, the record does not establish that more likely than not, claimant violated any standard that would result in her losing her instructor's license. Accordingly, the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-29185 is affirmed.

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

DATE of Service: February 3, 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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