EO: 700
BYE: 201539

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

213
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0075

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85814). Claimant filed a timely request for hearing. On January 16, 2015, ALJ S. Lee conducted a hearing, and on January 23, 2015 issued Hearing Decision 15-UI-32293, reversing the Department's decision. On January 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wildhorse Resort & Casino employed claimant as a part-time guest associate from March 20, 2014 until September 12, 2014.

(2) The employer had a written policy requiring employees to contact, in advance of the start of a shift, the supervisor on duty or, if that supervisor was not available, an employee in their department if they were going to be absent from a scheduled shift. The employer interpreted this policy as requiring the actual employee who was going to be absent to personally make the required contact, and did not consider contact by someone on the employee's behalf to constitute a sufficient notice. Claimant understood that she was expected to contact a supervisor before her shift began if she was going to be absent, but was not aware that contact by another person on her behalf was not adequate notice.

(3) Sometime before September 2014, claimant was convicted of a felony crime. As a result of that conviction, claimant was placed on probation and a probation officer monitored her activities. One of the conditions of claimant's probation was avoiding subsequent criminal charges. If claimant was charged with any crimes while on probation, whether or not those charges were ultimately upheld, claimant would violate her probation and was subject to a jail sentence.

(4) On the night of September 6, 2014, claimant and her boyfriend went out to a bar. Two people at the bar, with whom claimant's boyfriend was acquainted, offered to drive claimant home after stopping at

the residence of an unknown person. Claimant had never met these two people before. Claimant and her boyfriend got into the car and, soon after, a police officer stopped the car. When the officer searched the car, he discovered a shotgun or hunting rifle hidden under a pile of materials on the floor of the car. The police officer took all of the car's occupants, including claimant, into custody and transported them to the local jail. When claimant reached the jail, she persuaded the police officer to allow her to call the employer on her cell phone before she entered the jail and her telephone access became limited. Because it was very late at night and no employees other than the night auditor would be available, claimant telephoned the employer's main phone number and left a message. In that message, claimant stated that she was going to be unable to report for her next scheduled work shift, on September 7, 2014, because she had been arrested and incarcerated. Claimant also stated that she had been arrested because of a firearm in the car in which she had been riding and that did not know when she was going to be released and able to return to work. Claimant told the employer in that message that she would try to contact it when she had more information. After September 7, 2014, claimant's next scheduled shifts were on September 9, 2014 and September 12, 2014.

(5) Sometime after claimant was incarcerated, she learned that she was being held for a probation violation due to a charge of unlawful possession of firearms that had been brought against her based on her status as a convicted felon and the gun that had been found in the car in which she had been riding. Claimant's probation officer visited claimant in jail and told claimant that she was going to recommend a jail sentence for the probation violation. Claimant asked the probation officer to call one of the employer's managers and tell the manager that she was still in jail and was not going to be able to report for work as scheduled on September 9, 2014. On September 9, 2014, claimant's probation officer called the employer's employment manager and told the manager that claimant was still incarcerated and had been charged with the crime of unlawful possession of firearms. The probation officer told the manager that the charges against claimant were "serious" and that she "probably" would not be able to report for work "for awhile." Transcript at 14. Because claimant had not personally called the employer to notify it that she was going to be absent on September 9, 2014, but had tried to do so through her probation officer, the employer considered her absence a "no call/no show" and a violation of its attendance policy Transcript at 11.

(6) Sometime between September 9, 2014 and September 12, 2014, claimant arranged with a female friend who visited her at the jail to notify the employer that she was still in custody and did not know when she would be released. The female friend did so. Claimant also asked her boyfriend when he visited her at the jail to similarly contact the employer. Claimant did not attempt to call the employer herself from jail to personally report her absences because the inmates had access only to a pay phone that restricted them from placing any other than collect calls. Claimant knew only the employer's main number, which was answered by an automated system. Claimant also knew that the jail's pay phone would not be able to detect from the employer's automated phone answering system that a call was accepted and would disconnect any call made to the employer's main telephone line.

(7) Sometime after September 9, 2014, claimant received a sentence of nine days on the probation violation charge. On September 12, 2014, claimant was still in jail and did not report for work or call the employer to notify it of her absence. Because claimant did not personally contact a supervisor to report her absence on that day, the employer considered it a "no call/no show" and a second violation of its attendance policy. Transcript at 11. The employer's attendance policy stated that two "no call/no shows" resulted in an employee's discharge. On September 12, 2014, the employer discharged claimant

for accruing two absences for which she did not personally call the employer, on September 9 and 12, 2014.

(8) On approximately September 14, 2014 or September 15, 2014, claimant was released from jail. That same day, claimant went to the workplace to try to meet with the hotel manager. She was able to do so, and the manager told her that she had been discharged as of September 12, 2014. Approximately two weeks later, around September 28 or 29, 2014, the criminal charge of unlawful possession of firearms, which led to claimant's incarceration, was dismissed.

CONCLUSIONS AND REASONS: 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. The employer has the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Based on the testimony of the employer's witnesses about the employer's attendance policy, it is not clear that the policy was sufficiently specific to place claimant on reasonable notice that she needed to personally contact the employer if she was going to be absent or that contact on her behalf, by a third-party, was inadequate notice. Transcript at 6, 7, 10, 36. However, for purposes of this decision, we assume that claimant was aware that the employer's attendance policy was violated if she did not personally contact the employer to provide notice of an absence. While the employer's witnesses appeared to argue at hearing that discharge was an appropriate penalty to impose on claimant because a provision of the employer's attendance policy mandated discharge after two "no call/no show" occurrences, the inquiry here is not limited to determining whether claimant violated the employer's policy, but whether claimant should be disqualified from benefits based on the nature of the behavior underlying the policy violation. Transcript at 7, 12, 36. Based on OAR 471-030-0038(3)(a), although claimant might have violated the objective terms of the employer's attendance policy, to operate to disqualify her from benefits, the employer must show that claimant's willful or a wantonly negligent mental state gave rise to the behavior that violated that policy.

In cases where a claimant is unable to comply with an employer's attendance policy because of incarceration, the appropriate inquiry for purposes of determining whether claimant is disqualified from benefits is whether claimant willfully or with wanton negligence created the situation that led to that incarceration. *See Weyerhauser Company v. Employment Division*, 107 Or App 505, 509, 812 P2d 44 (1991). Here, the employer did not dispute claimant's testimony that she was unaware of the presence of the gun in the car that gave rise to the charge of unlawful possession of firearms and subsequently to the probation violation for which she was jailed. Transcript at 18. Nor did the employer challenge claimant's testimony that the firearms charge was ultimately dismissed. Transcript at 20. The crime of

unlawful possession of firearms requires that the convicted felon must have "knowingly" been in possession of the gun at issue. ORS 166.250(1) and ORS 166.250(1)(c)(C). Nothing in this record suggests that claimant had the requisite mental state to be convicted, and the firearms charge was likely dismissed because the prosecutors accepted claimant's explanation that she had been ignorant of the gun's presence in the car and did not "possess" that gun. In addition, there are no facts in the record showing or tending to show that claimant was wantonly negligent for accepting a ride in that car on September 6, 2014. Nothing indicates that claimant knew or reasonably should have known that the other people in that car possibly had a gun hidden in it or might otherwise engage in behavior during that ride that, if claimant was involved, probably would lead to a violation of her probation. On this record, the evidence is insufficient to establish that any willful or wantonly negligent behavior on claimant's part led to her incarceration, the circumstance that made her unable to comply with the employer's expectation of personal notice of an absence.

While the employer seemed to take the position at hearing that claimant might have been able to personally call the employer while she was incarcerated, and thus comply with the terms of its attendance policy, it did not directly dispute claimant's testimony that she was unable to place a collect call from the jail pay phone to the employer's automated main line. Transcript at 31, 32. Although the employer's witness may be correct that claimant could have called her supervisor's direct line from the jail phone, the employer did not dispute that claimant was unaware that her supervisor had a direct line. Transcript at 32. It does not appear to have been wantonly negligent for claimant not to have known about her supervisor's direct line. Given that she was unable to personally contact her supervisor while in jail, claimant took the reasonable steps that were available to her to notify the employer of her absences, including successfully insisting that the police officer allow her to call the employer late at night on September 6, 2014 before transferring her to the jail, arranging for her probation officer to call the employer on her behalf about her absence on September 9, 2014 and arranging for her friend and boyfriend to call the employer after September 9, 2014 to advise it that she was still unable to report for work due to incarceration. Based on this record, the employer did not demonstrate that it was willful or wantonly negligent behavior for claimant not to have placed a personal call to the employer when she was in jail.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-32293 is affirmed.

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

DATE of Service**: March 11, 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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