

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-0099

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 8, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 82959). Claimant filed a timely request for hearing. On January 13, 2015, ALJ Logan conducted a hearing, and on January 15 issued Hearing Decision 15-UI-31885, concluding the employer discharged claimant, but not for misconduct. On January 30, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Postal Express Inc. employed claimant from August 7 to November 20, 2014.

(2) The employer expected employees to complete their scheduled shifts. The employer expected employees unable to complete their shift to notify the employer they were leaving work early.

(3) On November 14, 2014, claimant left work early because she injured her shoulder and was no longer able to perform her duties. The employer discharged claimant for failing to complete her shift, and allegedly failing to notify the employer she was leaving work early.

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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

To the extent the employer discharged claimant for leaving work early on November 14, 2014, claimant did so because she injured her shoulder and was no longer able to perform her duties. Claimant's absence from work was due to a physical disability. Absences due to physical disabilities are not misconduct.

To the extent claimant was discharged for allegedly failing to notify the employer she was leaving work early, the evidence on that issue is equally balanced. Absent a preponderance of evidence showing that claimant failed to notify the employer, we cannot find misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-31885 is affirmed.

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

DATE of Service: March 9, 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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