EO: 200
BYE: 201548

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

347
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0146

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 73422). The employer filed a timely request for hearing. On February 3, 2015, ALJ S. Lee conducted a hearing, and on February 4, 2015 issued Hearing Decision 15-UI-32955, affirming the Department's decision. On February 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. In its argument, the employer asserted that the ALJ erred in excluding its exhibit (Exhibit 1) from the hearing record. Prior to commencement of an evidentiary hearing that is held by telephone, each party must provide to all other parties and the ALJ copies of documentary evidence that it will seek to introduce into the record. OAR 471-040-0023(4) (August 1, 2004). Immaterial or unduly repetitious evidence shall be excluded. OAR 471-040-0025(5) (August 1, 2004). A party may seek to introduce documentary evidence in addition to evidence described in OAR 471-040-0023(4) during the telephone hearing, and the ALJ shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. OAR 471-040-0023(5). Erroneous rulings on evidence shall not preclude the ALJ from entering a decision unless shown to have substantially prejudiced the rights of a party. OAR 471-040-0025(5).

We have reviewed Exhibit 1in its entirety. The ALJ allowed the employer's witnesses a reasonable opportunity to offer the information contained in Exhibit 1 into evidence through testimony, and Exhibit 1 is unduly repetitious of the employer's witness' testimony on the primary issues in this case, whether claimant knew or should have known that his failure to report for work as scheduled on December 11, 2014, or failure to notify the employer on December 11 that he would be absent, probably violated the employer's expectations. Exhibit 1 therefore is not material to those issues, and its inclusion was not necessary to conduct a full and fair hearing. Thus, to the extent, if any, the ALJ erred in excluding Exhibit 1, the erroneous ruling did not substantially prejudice the rights of the employer.

FINDINGS OF FACT: (1) Bushwacker Inc. employed claimant from November 18, 2013 to December 11, 2014.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work as scheduled to notify the employer. If an employee failed to report for three consecutive shifts without notice, the employer considered the employee to have abandoned his job. Claimant understood the employer's expectations.

(3) On December 2, 2014, claimant injured his eye at work, went to a hospital emergency room for treatment, and was scheduled to see an ophthalmologist on December 4, 2014. On December 4, 2014, claimant saw the ophthalmologist, who scheduled claimant for a follow up appointment on December 11, 2014.

(4) Based on his conversation with the ophthalmologist on December 4, claimant believed he was not released to return to work before his follow up appointment on December 11. Claimant therefore did not report for work as scheduled as scheduled on Friday, December 5, or Monday, December 8.

(5) On December 8, 2014, the employer's workers compensation insurance carrier informed the employer's human resources manager that the ophthalmologist had released claimant to return to work on December 8 with restrictions. Claimant's supervisor sent claimant a text message asking claimant if he had been cleared to work. Claimant replied with a text message indicating that he was not released to return to work before his December 11 doctor's appointment. Claimant's supervisor replied with a text message indicating that the human resources manager's documents showed otherwise, and asking claimant to call the human resources manager. Claimant did not receive that text message, and therefore did not reply or call the human resources manager.

(6) Also on December 8, 2014, the employer's human resources manager mailed claimant documents informing him that he had been released to work with restrictions. However, claimant did not receive the documents until after December 11, 2014.

(7) Claimant did not report for work as scheduled on December 9 or 10, 2014. On December 10, claimant's supervisor sent claimant a text message asking if he had spoken to the human resources manager, and again indicating that according to the human resources manager's paperwork, claimant had been cleared to work. Claimant did not receive that text message, and therefore did not reply or contact the human resources manager.

(8) Claimant did not report for work as scheduled on December 11, 2014. That morning, claimant had his follow up appointment with the ophthalmologist and understood he was released to return to work. Claimant drove to work, gave the receptionist a note from the ophthalmologist regarding his December 11 appointment, and was willing to return to work for the employer. However, the employer telephoned claimant and left a voice message terminating his employment.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that the employer discharged claimant, not for misconduct.

The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id*.

The employer considered an employee who failed to report for three consecutive shifts without notice to have abandoned his job. However, the record shows that as of December 11, 2014, claimant was willing to continue working for the employer for an additional period of time, but was not allowed to do so by the employer. The work separation therefore is a discharge.

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) 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 final incident resulting in claimant's discharge was his failure to report for work on December 11, 2014, and failure to notify the employer on December 11 that he would be absent. However, the record fails to show that claimant knew or should have known from his conversation with the ophthalmologist on December 4 that he was released to return to work before his December 11 follow up appointment. Claimant did not receive his supervisor's text messages indicating that he had been released to work, and did not receive paperwork indicating that he had been released to return to work until after he was discharged. The record therefore fails to show claimant knew or should have known that failing to report for work as scheduled on December 11 probably violated the employer's expectations.

With respect to claimant's failure to notify the employer on December 11 that he would be absent from work that day, the record shows that both claimant and his supervisor considered claimant's December 8, 2014 text message notice that he would not report for work before his December 11 doctor's appoint. The record fails to show claimant knew or should have known that failing to notify the employer again on December 11 probably violated the employer's expectations.

We therefore conclude that 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 15-UI-32955 is affirmed.

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

DATE of Service: April 8, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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