EO: 700
BYE: 201547

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

728
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0147

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80109). Claimant filed a timely request for hearing. On February 11, 2015, ALJ Frank conducted a hearing, and on February 12, 2015, issued Hearing Decision 15-UI-33448, concluding claimant was discharged, but not for misconduct. On March 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sports Vision Inc. employed claimant as a sales associate from April 12, 2014 to December 19, 2014.

(2) The employer expected claimant to report for work as scheduled or notify the employer if he would be absent. The employer's unwritten policy was for claimant first to call the employer's business number and either report his expected absence or leave a message, and second to call a co-owner, Todd, to report his expected absence. The employer's other co-owner (Patricia) verbally notified claimant about this call-in procedure when claimant was hired.

(3) On November 25, 2014, claimant was unable to report for work as scheduled and called Todd who did not answer his phone. Claimant then contacted a coworker, whom he notified of his expected absence. The owner's co-owner Patricia considered claimant to be a no-call, no-show on November 25, 2014.

(4) On Friday, December 16, 2014, claimant was scheduled to work at 9:30 a.m. When he awoke at approximately 8:47 a.m., he determined he was ill from the flu and called co-owner Todd and notified him that he would not be at work that day due to illness. Todd stated, "I hope you get well soon." Audio Record at 24:20 to 24:35.

(5) On December 19, 2014, when claimant reported for work, co-owner Patricia notified claimant she was discharging him for failing to call or report for work as scheduled on November 25 and December 16, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct.

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; 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, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

At hearing, Patricia, one of the employer's owners, asserted claimant quit and claimant asserted he was discharged. However, there was no dispute that claimant reported for work on December 19, 2014, at which time Patricia notified claimant his employment had ended. Because claimant was willing to continue to continue to work for the employer on and after December 19 but was not allowed to do so, the work separation was 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) (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. Under OAR 471-030-0038(3) (b), absence due to illness is not misconduct.

As a preliminary matter, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, the evidence shows the employer's co-owner Patricia notified claimant on December 19 that his employment was ending for what she considered a "no call, no show" on both November 25 and December 16, 2014. Audio Record ~ 16:15 to 17:05. However, because the last incident of claimant's failure to report for work preceding his discharge occurred on December 16, 2014, that incident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer discharged claimant for failing to call or report for work as scheduled on December 16, 2014. There was no dispute that the reason claimant did not report for work that day was illness, and under OAR 471-030-0038(3) (b) absence due to illness is not misconduct. Claimant also asserted that he notified Todd by phone that morning that he would not be at work for that reason and that Todd responded, "I hope you get well soon." The employer's witness presented hearsay evidence that

claimant did not speak to Todd that morning. Audio Record ~ 21:00 to 21:45. Absent a basis for concluding that claimant was not a credible witness, we gave his firsthand testimony under oath more weight than the employer's hearsay evidence and found facts in accordance with claimant's testimony. By notifying an owner that he would be unable to report for work due to illness as soon as he made that determination and at least 45 minutes prior to the start of his shift, the record shows that claimant complied with the owners' expectations for reporting his absence and was therefore not indifferent to the employer's interests or wantonly negligent.

In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to meet its burden here. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-33448 is affirmed.

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

DATE of Service: <u>March 30, 2015</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.