

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0249

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 81140). The employer filed a timely request for hearing. On February 24, 2015, ALJ Clink conducted a hearing, and on February 27, 2015 issued Hearing Decision 15-UI-34272, affirming the Department's decision. On March 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marion County employed claimant from May 24, 2001 to May 6, 2014 as a group worker in the Marion County Juvenile Department.

(2) The employer expected claimant to be truthful when giving official statements regarding her employment, and to report on time to designated work assignments. Exhibit 1. Claimant understood the employer's expectations.

(3) During March 2014, claimant's supervisor reported to management that an employee told him claimant had said the supervisor was racist and sexist. Claimant did not initiate a complaint against her supervisor with the employer. However, the employer conducted an investigation into the supervisor's behavior. Claimant denied stating that the supervisor engaged in racist and sexist behavior toward her at work.

(4) On April 10, 2014, claimant had an ankle injury that limited her mobility, and fell behind in completing her duties at her first work assignment. Claimant realized she was going to be late for her second work assignment at a different location. She attempted to notify a supervisor, but no supervisor was available at that time. Claimant called a coworker at the other location and told him she was "running late." Transcript at 27. He told her, "There's nothing right now going on. Court is over. Don't worry. Don't stress it." Transcript at 27. Claimant was late for the second work assignment.

(5) On May 6, 2014, the employer discharged claimant because she allegedly was untruthful during a workplace investigation, and because she was late for a work assignment.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant 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 bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, in part, because it perceived claimant's statements during the employer's investigation as "misleading, evasive, contrary to witness statements and sufficiently inconsistent over time to call [claimant's] honesty into question." Exhibit 1. The employer's human resources analyst testified at hearing that claimant was untruthful during the investigation about her supervisor because she said she had not complained about her supervisor, and other information from the investigation showed that she had. However, the employer provided only hearsay evidence regarding claimant's alleged statements about her supervisor, and the human resources analyst admitted that claimant made no allegations directly to him about her supervisor engaging in racist or sexist behavior at work. Transcript at 31, 33. Absent a reason to disbelieve claimant's testimony, her sworn testimony that she was truthful during the employer's investigation outweighs the employer's hearsay evidence to the contrary. The employer therefore failed to show by a preponderance of the evidence that claimant was untruthful during the investigation.

The employer also discharged claimant, in part, because she was late for her second work assignment on April 10, 2014. However, claimant was late because she fell behind in her duties at her first work assignment due to an ankle injury, and not because she consciously engaged in conduct she knew or should have known would probably result in her being late. Claimant attempted to notify a supervisor she would be late, and then notified her coworker, demonstrating that she was not indifferent to the consequences of her actions. Claimant therefore did not violate the employer's expectations willfully or with wanton negligence.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-34272 is affirmed.

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

DATE of Service: April 23, 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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