

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0309

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75850). Claimant filed a timely request for hearing. On February 25, 2015, ALJ Seideman conducted a hearing, and on February 26, 2015 issued Hearing Decision 15-UI-34213, reversing the Department's decision. On March 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Café Au Play employed claimant as a part-time barista from October 15, 2014 until November 7, 2014.

(2) When claimant was hired, she was not an experienced barista. The employer's director told claimant she was going to be scheduled for approximately twenty hours of work each week. The director intended for the claimant to train with the employer's manager until she was able to capably work alone without supervision. The employer hired another part-time barista at approximately the same time it hired claimant.

(3) The employer scheduled claimant to work approximately twenty hours during the first two weeks after she was hired, or through approximately the week ending November 1, 2014. Very shortly after she was hired, claimant applied for a second part-time position with a non-profit organization because of the limited hours she expected to work at the employer's cafe. At approximately the same time that claimant applied for the second job, the employer's manager told claimant that she was leaving work, and asked claimant if she wanted more scheduled work hours to cover the hours that would be available after the manager left. Claimant and the manager discussed claimant's application with the non-profit organization and whether that job would deter claimant from working more hours for the employer if she accepted it. Claimant did not agree immediately to forego the second job to work additional hours for the employer. The manager asked claimant to "keep [her] posted" on the status of her application

with the non-profit organization. Transcript of 3:45 p.m. Hearing on February 25, 2015 (Transcript 2) at 5. The manager did not think that it was practicable for claimant to work simultaneously for the non-profit organization and for the employer.

(4) During claimant's first two weeks working, she trained with the manager who was planning to leave work. On some occasions during this time, the manager asked claimant if she had heard back from the non-profit organization about her application and claimant said that she had not. Around this same time, the employer determined that, after its current manager left work, it was going to promote an existing employee into the manager's position, and it that it was best to divide the hours previously worked by that employee between claimant and the part-time employee who had been hired at the same time as claimant had been.

(5) By approximately the end of claimant's first two weeks working, the employer and the manager thought that to finalize a plan to cover the employer's staffing needs after the manager left, it was urgent that claimant promptly commit to working solely for the employer. Transcript 2 at 5. The manager and the employer were dissatisfied with claimant's responses that she had not heard whether the non-profit organization was going to offer her a job. Both thought that claimant's response, and statements for two weeks that she was waiting to hear from the non-profit organization, indicated that she was not committed to working long-term for the employer. Around this time, the employer reviewed claimant's performance during her first two weeks of training and found that claimant sometimes made mistakes during training, such as failing to balance her till, and also thought that she needed better barista skills. Transcript of 1:30 p.m. Hearing on February 25, 2015 (Transcript 1) at 14-16.

(6) Sometime during claimant's third week of work, claimant told the manager that she was willing to commit to working for the employer, willing to take the additional hours that the employer wanted her to take to cover the hours that were going to be available as a result of the anticipated leaving of the manager and willing to refuse an employment offer from the non-profit organization. Transcript 2 at 7. The manager thought that claimant's commitment "did not sound 100 percent certain" and thought that, if claimant continued to work for the employer, there was no guarantee that she would provide the long-term "stability" that the employer needed after the manager left. Transcript 2 at 8.

(7) On November 7, 2014, at the end of claimant's third week of employment, the employer discharged claimant based on its perception that she was not fully committed to working the hours that the employer wanted her to work as a result of the manager's leaving and its perception that she was not a "good fit" due to the mistakes she had made during her two weeks of training. Transcript 2 at 6.

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. A claimant's inefficiencies resulting from lack of job skills or experience is not misconduct. OAR 471-010-0038(3)(b). The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to the employer's perception that claimant was unwilling to "commit 100 percent" to working the hours that the employer wanted to schedule her for after the manager left, the employer presented no evidence that claimant ever clearly refused to work those hours or ever refused to work any scheduled hours. Transcript 2 at 8. Nor did the employer present evidence that it ever told claimant that it needed a commitment from her by any particular date or plainly told claimant that its desire to know her intentions in connection with her application for a second part-time job was urgent. In addition, it is not apparent what reasonably caused the employer to conclude, only approximately two weeks after claimant applied for the second job, that her inability to provide more definite information about the status of the second application was tantamount to a refusal to work the hours that the employer wanted her to work after the manager left, especially when the employer had not clearly informed claimant that it considered her failure to provide more certain information about her intentions to set its staffing plans awry or to constitute a refusal to work.. Although the employer might have thought claimant's failure to immediately agree to decline the second job showed an insufficient "commitment" to her position with the employer, the depth of claimant's perceived commitment is a subjective measure that is, at best, vague, dependent on circumstances and susceptible to interpretation. An employer cannot reasonably expect a claimant to conform to such a non-objective standard of behavior. On these facts, the employer did not establish that its perception that claimant lacked the necessary commitment to work for the employer in the long-term was a willful or wantonly negligent violation of the employer's standards on claimant's part, or that it was misconduct.

With respect to the work performance "issues" that presented themselves during claimant's first three weeks in training, the employer did not establish that claimant's mistakes or errors were the result of the type of willful or wantonly negligent behavior that must be shown to disqualify her from benefits. The employer did not dispute that claimant did not have experience in working as a barista, and conceded that claimant appeared to be trying to learn those skills when she was in training. Transcript 1 at 16. Claimant's mistakes that the employer's witness cited at hearing were relatively insignificant, and the sort that an employer would expect to occur during an inexperienced employee's first three weeks of training. Transcript 1 at 14-16. A claimant's deficient work performance resulting from a lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b). Absent evidence that claimant's work deficiencies were caused by willful or wantonly negligent behavior, rather than simply a lack of job proficiency, the employer did not meet its burden to show that those deficiencies were disqualifying misconduct.

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

DECISION: Hearing Decision 15-UI-34213 is affirmed.

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

DATE of Service: May 7, 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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