

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0344

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 75032). The employer filed a timely request for hearing. On March 9, 2015, ALJ Kirkwood conducted a hearing at which claimant did not appear, and on March 15, 2015 issued Hearing Decision 15-UI-34824, affirming the Department's decision. On March 27, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Shari's Management Systems, Inc. employed claimant as a server and host from December 12, 2013 until December 2, 2014.

(2) The employer expected claimant to report for work on time for scheduled shifts. The employer expected that if claimant was going to absent from a shift due to illness or for any other reason she would call and speak to a manager at least four hours before the start time of the shift. Exhibit 1 at 5. Claimant understood the employer's expectations.

(3) On July 29, 2014, the employer issued a written warning to claimant for excessive absenteeism by calling in sick on six days that she was scheduled to work between January 18, 2014 and July 29, 2014. Exhibit 1 at 3. The warning advised claimant that further absences could result in her discharge. Claimant signed that warning on July 31, 2014. *Id.*

(4) On September 18, 2014, the employer issued a written warning and suspended her for two shifts for failing to provide a physician's note for an absence that she reported was due to illness. The warning advised claimant that further violations of its attendance expectations could result in her discharge. Exhibit 1 at 4. Claimant signed that warning on September 19, 2014. *Id.*

(5) On Thanksgiving Day, November 27, 2014, claimant was scheduled to work from 11:00 a.m. to 3:00 p.m. Claimant called the employer at 11:20 a.m. and stated that she was unable to report for work due to

an unexpected injury to her ankle. Claimant did not report her absence at least four hours before the start time of her shift.

(6) On November 30, 2014, claimant was scheduled to work from 5:00 p.m. to 8:30 p.m. Claimant called the employer at 4:20 p.m. and stated that she was unable to report for work due to her ankle injury. Claimant did not report her absence at least four hours before the start time of her shift.

(7) On December 2, 2014, the employer discharged claimant for failing to report for work on November 27, 2014 and for failing to notify the employer at least four hours before the start time of her shift that she was going to be absent on November 27, 2014 and November 30, 2014.

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. Absences due to illness or disabilities are not misconduct. OAR 471-030-0038(3)(b). Isolated instance of poor judgment are also not misconduct. OAR 471-030-0038(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 claimant's behavior on November 27, 2014, the employer's witness testified that claimant called in 20 minutes after the scheduled start time of her shift to state that she was unable to report for work as a result of an ankle injury. Audio at ~18:00. Claimant's absence from work on that occasion was more likely than not due to her ankle injury, and absences for such a reason are specifically excluded from the definition of misconduct. OAR 471-030-0038(3)(b). Although failing to provide timely notice of an absence from work constituted a violation of the employer's expectations, it is not enough for the employer to prove that the violation occurred. For the violation to be considered misconduct it must have been committed by claimant with either a willful or wantonly negligent mental state. Based on the witness's account it appears probable that claimant's injury occurred near in time to the start of her shift and she was reasonably unable to give the employer notice of her absence earlier than 20 minutes her shift started. An individual who fails to meet the employer's expectation because she is incapacitated has not acted with a willful mental state, nor acted with a conscious disregard for the standards of behavior the employer expected of her. Absent evidence that claimant's failure to provide timely notice of her absence from work that day was due to a willful or wantonly negligent violation of the employer's attendance expectations, the employer did not meet its burden to establish that claimant's failure on November 27, 2014 to notify the employer of her absence at least four hours before the scheduled start of her shift was attributable to her as misconduct.

From the testimony of the employer's witness at hearing, it appears likely that the employer was going to discharge claimant for not reporting for work on November 27, 2014, whether or not she gave a timely notice of her absence on November 30, 2014, at least four hours before her shift. Audio at ~20:44. However, assuming that claimant's failure to give timely notice of her absence on November 30, 2014 was a proximate cause of her discharge and the untimely notice she provided was wantonly negligent,

claimant's behavior on that day was nonetheless excused from constituting misconduct as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). A claimant's behavior that would otherwise be considered misconduct is excused as an "isolated instance" when it is, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). In addition to being isolated, the excusable behavior must not have been the sort that "exceeds mere poor judgment" by causing an irreparable breach of trust in the employment relationship or otherwise making a continued employment relationship impossible. OAR 471-030-0038(1)(d)(D). In this case, the employer cited several past occurrences of claimant's absences from work, but from the language of the warnings that the employer issued, claimant's absences may have been the result of illness. Exhibit 1 at 3, 4; OAR 471-030-0038(3)(b) (absences due to illness are not misconduct). There was also no evidence in the record that claimant's past absences were the result of willful or wantonly negligent behavior. Without this support, claimant's behavior in failing to give timely notice of her absence on November 30, 2014 was an isolated willful or wantonly negligent violation of the employer's standards. Moreover, claimant's failure to give adequate notice on November 30, 2014, was a relatively minor occurrence in the employment relationship. Claimant did give 40 minutes notice in advance of the start of her shift, and there was no evidence in the record that the employer was unable to arrange coverage for her shift with the notice that claimant did provide. On these facts, an objective employer would not have concluded that a single failure to give the employer four full hours of notice caused an irreparable breach of trust in the employment relationship or otherwise made a continued employment relationship impossible. Although claimant's behavior on November 30, 2014 might have been a willful or wantonly negligent violation of the employer's standards, it was excused from constituting disqualifying misconduct under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 15-UI-34824 is affirmed.

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

DATE of Service: May 15, 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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