

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0503

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 75958). Claimant filed a timely request for hearing. On April 22, 2015, ALJ Clink conducted an interpreted hearing, and on April 29, 2015, issued Hearing Decision 15-UI-37675, concluding that the employer discharged claimant, but not for misconduct. On May 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Freres Lumber Company employed claimant from October 18, 2010 until February 5, 2015, last as a production fork lift operator.

(2) The employer expected that employees would report for work on time, and contact the employer if they were going to be late or were unable to work a scheduled shift. Claimant knew and understood these expectations.

(3) On August 29, 2011, claimant failed to report for work. Approximately six and one-half hours after claimant's shift was scheduled to begin, he called the employer and left a message the supervisor did not understand. (Claimant is a native Spanish speaker, and has limited English proficiency). On August 30, 2011, claimant told his supervisor he had been unable to work the previous day because of personal problems at home. The employer gave claimant a written warning regarding his conduct.

(4) On May 14, 2012, claimant failed to report for work. Claimant's wife called the employer and explained that claimant had not returned from a trip he had made to California. On May 15, 2012, claimant called the employer and requested time off; the employer's superintendent granted claimant leave until May 21, 2012.

(5) On February 2, 2015, claimant was scheduled to work from 4 p.m. to 1:30 a.m. Claimant called his supervisor, the employer's swing shift supervisor, and asked for the night off to take his son to the hospital. Claimant's supervisor granted claimant's request.

(6) On February 3, 2015, claimant called his supervisor, explained that he had personal problems and said that he wanted to talk to the employer's superintendent about taking vacation time to address his problems. Claimant's supervisor told claimant he was not sure what could be done and that the superintendent was on vacation until February 5, 2015. Transcript at 29.

(7) On February 5, 2015, at approximately 9 a.m., claimant called the employer and spoke with the employer's day shift supervisor. The day shift supervisor told claimant that the employer assumed claimant had quit his job and instructed claimant to contact his supervisor.

(8) On or about February 6, 2015, the swing shift supervisor called claimant and discharged him for failing to report for work or contact the employer to explain he would be absent on February 4, 2015.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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.

The employer discharged claimant because he failed to report for work or contact the employer to report he would be absent on February 4, 2015. At hearing, the claimant and his supervisor substantially differed in their testimony regarding their February 3 conversation. Claimant's supervisor testified that when he spoke with claimant on February 3, claimant told him that he wanted time off to address some personal issues, stated that he might travel to Mexico, and was not sure he would return to work. The supervisor asserted that he gave claimant permission to take the night of February 3 off, but directed claimant either to report for work or contact the supervisor on February 4. Transcript at 8. Claimant, however, testified that during the February 3 conversation with his supervisor, he told the supervisor he wanted to take four days of vacation to address his personal issues, and asked to speak to the employer's superintendent about his vacation request. Claimant denied that the supervisor ever told him to report for work or contact the supervisor on February 4; instead, claimant understood that the supervisor had granted him time off until claimant could speak to the superintendent on February 5. Transcript at 29. Absent a reasonable basis on this record for concluding that claimant was not a credible witness, we find his sworn testimony at least as persuasive as the testimony of the claimant's supervisor. The employer therefore failed to show by a preponderance of evidence that claimant engaged in a willful or wantonly negligent violation of the employer's expectations when he failed to report for work or contact the employer to explain he would be absent on February 4, 2015.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-37675 is affirmed. *Decisión de la Audiencia 15-UI-37675 queda confirmada.*

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 18, 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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.