

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0516

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 1, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144626). Claimant filed a timely request for hearing. On April 27, 2015, ALJ Kirkwood conducted a hearing, and on April 28, 2015 issued Hearing Decision 15-UI-37587, affirming the Department's decision. On May 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cayuse Technologies LLC employed claimant from July 9, 2009 to February 24, 2015 as an executive assistant.

(2) The employer expected claimant to report to work on time and limit her lunch break to one hour, or notify the employer if she was unable to report to work on time or had to miss work during her shift. Claimant understood the employer's expectations.

(3) Claimant suffers from dizziness due to vertigo. Claimant's husband has posttraumatic stress disorder and depression, and engages in suicidal behavior.

(4) From November 12, 2014 to December 8, 2014, claimant arrived late or took time off from work on eight separate occasions. On December 12, 2014, the employer gave claimant a final written warning about her attendance.

(5) On December 18, 2014, the employer approved claimant's request for intermittent family medical leave to take time off work, as necessary, to address her husband's medical needs. Claimant and her supervisor recorded the time she used for family medical leave.

(6) Before claimant left for work on February 20, 2015, claimant's husband made threats of suicide and was "being abusive" toward her son. Audio Record at 11:17-11:25. Claimant called and told a

supervisor what had occurred and that she would be late to work and might need to take time off from work throughout the day to address the situation. At noon, claimant began her lunch break, and went to a domestic violence center to obtain resources she had requested from the center. Claimant expected to complete her visit to the center and return to work by 1:00 p.m. The center personnel requested that claimant complete their intake process. Claimant began the intake process with 30 minutes left in her lunch break. Claimant called her supervisor at 2:49 p.m. when she completed the intake process, and told her she would be back to work soon. Claimant returned to work at 3:08 p.m.

(7) On February 24, 2015, the employer discharged claimant for violating its attendance policy.

CONCLUSIONS AND REASONS: We disagree 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 has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because she allegedly took an unapproved extended lunch when she returned from her lunch break two hours late on February 20, 2015 after seeking assistance from a domestic violence center regarding her concerns about her son's safety and her husband's threats of suicide. The employer had a right to expect claimant to refrain from taking an unapproved lunch break of more than one hour, absent illness or other exigent circumstances. Claimant understood that expectation.

In Hearing Decision 15-UI-37587, the ALJ concluded claimant violated the employer's attendance expectations with wanton negligence by agreeing to begin an intake at a domestic violence center when she had only 30 minutes left in her lunch break, and consequently returning to work two hours late.¹ We disagree. Claimant did not miss work on that occasion with the intent to violate the employer's attendance policy, or because she was indifferent to the employer's expectations. Her absence was caused by her need to address a family emergency. An absence for an exigent circumstance such as a family emergency is not a willful or wantonly negligent disregard of the standards of behavior the employer had a right to expect of the claimant. Moreover, the record shows that claimant did not know she would be at the center past the end of her lunch break, and that, even had she known, she already told her employer before she reported to work the morning of February 20, 2015 that she might have to miss work throughout the day to address the emergency that arose that morning. The employer

¹ Hearing Decision 15-UI-37587 at 3.

therefore failed to show by a preponderance of evidence that claimant knew or should have known the employer had not approved her extended lunch break on September 20.

Because the employer did not establish that it discharged claimant for a violation of its expectations regarding attendance, it failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-37587 is set aside, as outlined above.²

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*.

DATE of Service: June 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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.