

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0572

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 91308). The employer filed a timely request for hearing. On May 4, 2015, ALJ Holmes-Swanson conducted a hearing, at which claimant failed to appear, and on May 11, 2015 issued Hearing Decision 15-UI-38253, concluding claimant's discharge was for misconduct. On May 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Roth IGA Foodliner employed claimant, last as a deli clerk, from July 19, 2013 until shortly after February 1, 2015.

(2) The employer expected employees to report to work as scheduled. The employer expected employees unable to do so to notify the employer of the absence as early as possible. The employer told employees that it would be nice if they provided at least two hours advance notice. Audio recording at ~17:10. Claimant understood the expectation. Claimant had a history of calling in sick. The employer told claimant that she needed to be more reliable.

(3) In the final incident prior to discharge, the employer scheduled claimant to work on February 1, 2015 at 12:30 p.m. At 12:00 p.m., only 30 minutes prior to the start of her shift, claimant called the employer to report that she would be absent. Claimant reported that she was sick and unable to work her scheduled shift. She said she did not call the employer earlier than 12:00 p.m. because she was asleep and did not know she was scheduled to work at 12:30 p.m. Claimant's absence left the employer very short-handed.

(4) Shortly after claimant missed her February 1, 2015 shift, the employer's managers took claimant aside and told her she was discharged.

(5) The employer also had concerns and had given claimant a final written warning about the quality of her customer service, but did not discharge her until after her February 1, 2015 absence from work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-38253, the ALJ found as fact that the employer expected employees "to notify the employer at least two hours before the start of the shift." Hearing Decision 15-UI-38253 at 1. However, the employer's policy actually stated that employees were merely required to notify the employer of the absence "at the earliest possible opportunity," and the employer's witness testified that employees were told it would be "nice" if employees provided two hours' notice. *See* Exhibit 1, handbook page 18; Audio recording at ~17:10. The ALJ also concluded that claimant's conduct in calling the employer 30 minutes before her shift to report her absence due to illness was "willful." Hearing Decision 15-UI-38253 at 3. We disagree.

As a preliminary matter, the uncontroverted record evidence is that claimant was absent on February 1, 2015 because she was sick. Absences due to illness are not misconduct. *See* OAR 471-030-0038(3)(b). Therefore, to the extent the employer decided to discharge claimant because of her absence, claimant's discharge was not for misconduct, even though she had been warned about previous absences due to illness and even though her absence left the employer short-handed.

The employer also discharged claimant because she notified the employer of her absence only 30 minutes prior to the beginning of her shift. Employees were told that the employer preferred to be notified of absences two hours before the start of their shifts, but the policy merely required that employees notify the employer of absences at the "earliest opportunity." In this case, claimant did not notify the employer of her absence earlier because she had been sleeping until she called. There is no evidence that claimant had any opportunity to call the employer earlier than 12:00 p.m. to report her absence. Therefore, her failure to call earlier cannot be considered a violation of the employer's attendance policy, much less a willful or wantonly negligent one.

The employer did not prove that claimant's discharge was for misconduct. Therefore, claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-38253 is set aside, as outlined above.

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

DATE of Service: July 2, 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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