

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0592

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110547). The employer filed a timely request for hearing. On April 29, 2015, ALJ S. Lee conducted a hearing, and on May 2, 2015 issued Hearing Decision 15-UI-37867, affirming the Department's decision. On May 20, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2). Even if we had considered the employer's argument, the outcome of this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Grand Dining, LLC employed claimant as a line cook from November 14, 2014 to February 26, 2015.

(2) The employer expected employees to report to work as scheduled or give advance notice of an absence to the executive or sous chef. The employer's policy provided that two failures to report to work or notify the employer of an absence would result in a discharge from work. Claimant understood the employer's policy and expectations.

(3) Claimant last worked for the employer on February 20, 2015. On February 21, 2015, claimant notified the executive chef that he would be absent from work that day because his child was ill and had to be rushed to the hospital. On February 22, 2015, claimant notified the sous chef that he would be

absent again because of his son's ill health. The sous chef told claimant that his was not a job where he could fail to report to work for several days and remain employed.

(4) From February 23, 2015 through February 25, 2015, claimant was not scheduled to work. On February 26, 2015 he reported to work. Before he began working, the sous chef told him that he was unreliable and fired. Claimant left work. The chef did not know about claimant's interaction with the sous chef, concluded that claimant was absent without notice, and tried to contact claimant by phone and text. Claimant did not respond until several days later, when claimant sent text messages asking about his final check. The chef replied that claimant's final check would be ready on March 5, 2015, at which time claimant collected his check and personal belongings.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The employer alleged claimant voluntarily left work by failing to report to work February 26, 2015 and thereafter. Claimant testified, however, that he reported to work on February 26, 2015 but was discharged by the sous chef before he could begin working. Notably, the employer's witness was not present when claimant reported to the workplace on February 26, 2015, did not have any first-hand observations about what occurred at that time, and was testifying entirely based on hearsay. Absent a basis for concluding that claimant was not a credible witness, his sworn testimony about the events of February 26, 2015 outweighs the employer's hearsay. We therefore conclude that the preponderance of the evidence shows that claimant was told he was fired on February 26, 2015, making the work separation a discharge.

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) 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.

To the extent the employer discharged claimant because of his absences February 21 and February 22, 2015, claimant's absences were due to his son's serious illness and hospitalization. OAR 471-030-0038(3)(b) provides that absences due to illness are not misconduct. By extension of that principle, absences due to the illness of claimant's dependent child are, likewise, not misconduct.

To the extent the employer discharged claimant because he was not reliable enough, the discharge was not for misconduct. Claimant was not absent due to a willful or wantonly negligent indifference to the

employer's expectation that he report to work on time, or as scheduled. Claimant's unreliability was related to his son's serious illness.

To any extent claimant's absences from work between February 23, 2015 and February 29, 2015 contributed to the work separation, those absences were also not misconduct. Claimant was scheduled to be off work from February 23, 2015 through February 25, 2015, so his failure to report to work, contact the employer, or respond to inquiries from the employer during that period were not violations of the standards of behavior the employer had the right to expect of him. Claimant's absence on February 26, 2015 was as a direct result of having been told he was fired by the sous chef, as were his subsequent absences, and not because of his own indifference to any reasonably held expectation on the employer's part.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 15-UI-37867 is affirmed.

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

DATE of Service: July 6, 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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