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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0734

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140938). Claimant filed a timely request for hearing. On May 28, 2015, ALJ Wyatt conducted a hearing, and on June 3, 2015 issued Hearing Decision 15-UI-39462, reversing the Department's decision. On June 16, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented information not introduced into evidence at the hearing. The employer did not explain why it did not offer this new information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Banner's Restaurant employed claimant as a server from May 10, 2014 until March 6, 2015.

(2) The employer expected claimant to report for work as scheduled. Claimant understood the employer's expectation as a matter of common sense.

(3) Beginning in approximately November 2014, claimant was off from work on maternity leave. Until claimant's leave began, the employer's owner prepared a written work schedule for claimant and the other employees which was posted in the restaurant. Sometime after claimant left on leave, the employer's business slowed down significantly and the owner regularly contacted employees to inform them if he wanted them to work on particular days or not.

(4) In approximately February 2015, claimant notified the owner that she was prepared to return to work from leave. Shortly after, claimant returned to work. On February 5, 2015, the owner sent claimant a text message telling her that he wanted her to work, "as needed," on Tuesdays, Thursdays and Fridays.

Transcript at 8. The message also stated that claimant's hours would change from those set out in it depending on whether business "picks up or not." Transcript at 8. Claimant did not receive the owner's text message. Transcript at 20, 28, 44. In practice, regardless of the February 5, 2015 text message, the owner would call claimant and tell her whether she was going to work on that day, or claimant would call the owner to learn whether she was expected to report for work on any given day. Claimant's hours "always change[d]" from those set out in the February 5, 2015 text message. Transcript at 29.

(5) On Sunday, March 1, 2015, claimant sent a text message to the owner telling him that she was not able to work that day because she had broken a front tooth and hoped to be able to see her dentist on Monday, March 2, 2015. Claimant later spoke with the owner and he excused her from work that day. The first day claimant was able to see her dentist was Tuesday, March 2, 2015 and she had her broken tooth repaired at that visit.

(6) On or after March 2, 2015, claimant attempted to contact the owner on both his personal cell phone and at the restaurant "several times" to notify him that her tooth was repaired and to ask when she could next work. Transcript at 18, 23, 24, 37. When claimant was unable to reach the owner at those phone numbers, she left messages for him.

(7) On Friday, March 6, 2015, the employer discharged claimant for failing to failing to report for work as scheduled on Tuesday, March 3, Thursday, March 5 and Friday, March 6, 2015.

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. 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).

The employer's owner contended that the employer discharged claimant because she did not report for work as scheduled on March 3, 5 and 6, 2015, relying exclusively on the text message of February 5, 2015 to establish that she was actually scheduled to work every Tuesday, Thursday and Friday. Transcript at 7, 16, 29. However, the owner did not demonstrate that claimant ever received the February 5, 2015 text message. The owner also did not specifically rebut claimant's testimony that, in actual practice, claimant and the owner did not rely on the February 5, 2015 text message as a firm schedule that determined the days on which claimant was expected to report for work, but conferred orally on or shortly before a particular day to decide whether the employer needed claimant to work that day. Transcript at 18, 19, 22, 42. While the owner asserted that the hours set out in the February 5, 2015 text message were claimant's fixed schedule, he conceded that claimant's hours were very often different from those in the text, and they were either cancelled or changed "on a weekly basis." Transcript at 29. The owner's testimony about the allegedly fixed nature of claimant's schedule cannot be reconciled with his testimony about how the schedule was routinely and regularly deviated from and superseded by his oral communications with claimant. On this record, the employer did not meet its

burden to establish that, in light of customary practice, claimant was reasonably aware that she was actually scheduled to work on March 3, 5 or 6, 2015.

To the extent the employer discharged claimant because she did not maintain contact with the owner after March 1, 2015 to learn whether the employer needed her to work, claimant testified that she tried to contact the owner by phone on several occasions on or after March 2, 2015 to inquire whether and when she should next report for work. Transcript at 18, 23, 24, 37. While the owner denied claimant tried to reach him on or after March 2, 2015, there was no reason in the record to prefer the testimony of one party over the other. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer, who is the party who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division,* 25 Or App 661, 550 P2d 1233 (1976). It is at least as likely as not that claimant made reasonable attempts to contact the owner to learn when she was expected to work again after her tooth was repaired on March 3, 2015 and her failures to report for work were attributable to the owner's failure to return her phone calls. Because the evidence on that issue is no better than equally balanced, the employer did not meet its burden to show that claimant willfully or with wanton negligence failed to maintain contact with the owner after March 2, 2015 to learn her work schedule.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from unemployment benefits.

DECISION: Hearing Decision 15-UI-39462 is affirmed.

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

DATE of Service: <u>August 7, 2015</u>

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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