

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0979

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125755). Claimant filed a timely request for hearing. On July 28, 2015, ALJ Murdock conducted a hearing, and on July 31, 2015 issued Hearing Decision 15-UI-42409, concluding the employer discharged claimant, but not for misconduct. On August 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. See ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006). In its argument, the employer asserted that the hearing proceedings were unfair or the ALJ was biased. We reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Aloha Liquor employed claimant from October 11, 2014 to March 30, 2015.

(2) On March 23, 2015, claimant sent the employer's owner a text message stating that she was ill and could not work.

(3) On March 24, 2015, claimant sent the owner a text message stating that she was feeling worse. The owner replied that claimant needed to see a doctor to diagnose and treat her illness with medication. Claimant replied that she could not afford to see a doctor.

(4) On March 25, 2015, claimant sent the owner a text message stating that she had an appointment with a doctor at 10:00 a.m. on March 26, 2015. The owner replied, asking claimant to contact her after her appointment, so that the owner would know what to do regarding claimant's work schedule.

(5) On March 26, 2015, claimant went to the doctor, who diagnosed her illness, prescribed antibiotics, and gave claimant a note excusing her from work through March 29, 2015. Claimant sent the owner a text message stating that the doctor had diagnosed her illness, prescribed medication, and excused her from work for a few more days.

(6) On March 27, 2015, claimant sent the owner a text message informing her that she still was not feeling well.

(7) On March 28, 2015, the owner sent claimant a text message stating that she was not planning on claimant working until March 30, 2015, and that claimant should continue to update her so that she knew how claimant was doing. The owner also asked claimant what the doctor said about claimant returning to work, whether he wrote claimant a work release, and whether claimant had a follow up appointment. Claimant did not reply to the owner's text message. The owner sent claimant two more text messages indicating that she was waiting for claimant to respond. Claimant did not reply to the owner's text messages.

(8) At approximately 8:30 a.m. on March 29, 2015, the owner sent claimant a text message telling her to wake up, and that she was a terrible communicator. Claimant replied that she had a doctor's note excusing her from work for a few days, that she was feeling better after having felt awful the day before, and that she did not know whether she would feel well enough to work on March 30, 2015. The owner sent claimant a text message asking her to call the owner at the employer's store at 11:30 a.m. Claimant fell asleep due to the effects of her illness, and therefore did not call the owner.

(9) At noon, the owner sent claimant a text message complaining that claimant forgot to call her, and that she needed claimant to bring her a doctor's note. Claimant replied that she had fallen asleep, and that she would bring a doctor's note when she reported for work on March 30. Claimant also asked the owner what hours she had claimant scheduled for work. The owner replied, instructing claimant to call her at the employer's store, where she would be until the store closed at 4:00 p.m. Claimant again fell asleep due to the effects of her illness, and therefore did not call the owner. Claimant awakened well after 4:00 p.m., knew the owner was no longer at the store, and therefore did not call the store.

(10) On March 30, 2015, the owner sent claimant a text message complaining that claimant had not called her. The employer discharged claimant for failing to call the owner.

CONCLUSIONS AND REASONS: We agree with the ALJ 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. 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).

In the present case, the employer discharged claimant for failing to call its owner as instructed on March 29, 2015. However, claimant failed to call the owner on March 29, 2015 because she was sleeping due to the effects of her illness. The record fails to show claimant consciously neglected to call the owner, or consciously engaged in other conduct she knew or should have known would probably result in her failure to do so. Claimant's failure to call the employer on March 29 therefore was not willful or wantonly negligent. At hearing, the owner testified that claimant also failed to call her on March 30, 2015. Audio Record at 12:50. However, claimant testified that she called the owner's home phone before the employer's store opened to determine what hours she was scheduled to work, and that the owner did not answer or return her call. Audio Record at 20:40. We find the evidence on that issue equally balanced, and the employer therefore failed to establish by a preponderance of evidence that claimant failed to call the owner on March 30, 2015.

In sum, the employer failed to show that claimant's failure to call the owner on March 29, 2015 was willful or wantonly negligent, or that she failed to call the owner on March 30, 2015. Absent such showings, we conclude the employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-42409 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: September 17, 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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