

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0994

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 26, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 103425). Claimant filed a timely request for hearing. On July 27, 2015, ALJ S. Lee conducted a hearing, and on July 30, 2015 issued Hearing Decision 15-UI-42357, concluding claimant's discharge was not for misconduct. On August 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Barlow Trail Roadhouse employed claimant as a dishwasher from January 5, 2014 to May 3, 2015.

(2) The employer expected employees to report to work as scheduled, or notify the employer in advance if they are unable to work a scheduled shift. The employer assessed "points" for each attendance occurrence, and discharged employees who had more than nine points in any quarter. The employer gave claimant a copy of the policy. The employer also issued warnings to claimant for significant attendance problems she had prior to April 2015. Claimant understood the employer's expectations.

(3) In early April 2015, the employer scheduled claimant to work Sunday and Monday evenings and Tuesday and Wednesday mornings. On or about April 22, 2015, claimant asked the employer if her schedule would be remaining the same, and he told her that as far as he knew it would.

(4) On May 1, 2015, claimant volunteered to work on May 2, 2015. On May 2, 2015, however, she was too ill to work, and called the employer to report that she would be absent.

(5) On May 2, 2015, the employer posted a schedule requiring claimant to work at 9:00 a.m. on Sunday, May 3, 2015. Claimant was not normally scheduled to work in the mornings on Sundays, and the employer did not notify claimant of her new work schedule.

(6) On May 3, 2015, claimant planned to work her normal 5:00 p.m. shift. She called the restaurant and the bartender said if she was scheduled to work on May 3, 2015, she thought it would be for claimant's usual evening shift. Claimant reported to work for the 5:00 p.m. shift. The employer discharged her for failing to work her 9:00 a.m. shift that morning, or failing to report her absence.

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.

The employer had the right to expect claimant to report to work as scheduled or notify the employer if she was going to miss a scheduled shift. Claimant understood the expectation, and, on May 3, 2015, violated it by failing to report to work for her 9:00 a.m. shift or notify the employer that she would be absent. For claimant's violation to be considered misconduct, however, it must be the result of either an intentional or conscious act on claimant's part. In this case, the employer scheduled claimant to work a shift that was not part of her usual schedule, and did not notify her that she was scheduled to work. Because claimant was not aware that she was scheduled to work, her absence and failure to notify the employer she would be absent were not intentional or conscious conduct on her part, and were not attributable to her as misconduct.

Therefore, 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-42357 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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