

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1127

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 3, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95751). Claimant filed a timely request for hearing. On September 9, 2015, ALJ Wyatt conducted a hearing, and on September 17, 2015 issued Hearing Decision 15-UI-44474, concluding the employer discharged claimant, but not for misconduct. On September 23, 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).

FINDINGS OF FACT: (1) Hall Street Bar & Grill employed claimant from October 21, 1988 to May 22, 2015.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work to notify the employer. Claimant understood the employer's expectations.

(3) On or about May 10, 2015, claimant asked the employer's general manager for time off from work due to the recent death of claimant's father. The owner told claimant to take a week off, after which he would put claimant back on the schedule, and that if claimant needed additional time off, he needed to "communicate that with" the general manager. Audio Record at 33:30.

(4) The employer scheduled claimant to work on May 20, 21 and 22, 2015. On or about May 17, 2015, claimant decided he needed another week off due to the death of his father, and family and marital issues. On May 17, 2015, claimant telephoned the employer and spoke to a supervisor, who asked how claimant was doing. Claimant told the supervisor that he was unable to return to work that week. The supervisor did not tell claimant he was scheduled to work on May 20, 21 and 22, 2015.

(5) On May 19, 2015, claimant went to the employers' bar and grill, and told a manager he would not be able to return to work that week. The manager did not tell claimant he was scheduled to work on May 20, 21 or 22, 2015.

(6) Claimant believed the supervisor and manager would tell the general manager that claimant was extending his leave of absence, and therefore was not available for work that week. Claimant did not report for work on May 20 or 21, 2015, or notify the employer he would be absent, because he believed the general manager knew he was extending his leave of absence, and claimant did not know he was scheduled to work those days.

(7) On May 21, 2015, claimant spoke with the employer's owner and asked for a pay advance. The owner did not tell claimant that he had been scheduled to work on May 20 or 21, 2015, or that he was scheduled to work on May 22, 2015.

(8) Claimant did not report for work on May 22, 2015 or notify the employer he would be absent because he believed the general manager knew he was extending his leave of absence, and claimant did not know he was scheduled to work that day. The employer discharged claimant for his third consecutive failure to report for work as scheduled or notify the employer he would be absent.

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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for his third consecutive failure to report for work as scheduled or notify the employer he would be absent. It is undisputed that on or about May 10, 2015, the employer's general manager told claimant to take a week off from work due to the recent death of claimant's father, after which the general manager would put claimant back on the schedule, and that if claimant needed additional time off, he needed to "communicate that with" the general manager. At hearing, the employer's general manager testified that on May 17, 2015, a supervisor told him she had informed claimant he was scheduled to work on May 20, 21 and 22, 2015. Audio Record at 11:00. However, claimant testified that the supervisor merely asked him how he was doing, and that he told her he was unable to return to work that week. Audio Record at 20:30. Absent a basis for concluding that claimant was not a credible witness, his firsthand testimony outweighs the employer's hearsay information.

The employer failed to show by a preponderance of evidence that claimant knew or should have known he was scheduled to work on May 20, 21 or 22, 2015. Absent such a showing, the employer failed to establish that claimant's failure to report for work or notify the employer he would be absent was willful or wantonly negligent. We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-44474 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 16, 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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