

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1288

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 155248). The employer filed a timely request for hearing. On October 9, 2015, ALJ Shoemake conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46061, concluding the employer discharged claimant for misconduct. On October 30, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Federal Express Corporation employed claimant from December 28, 2011 to July 17, 2015. Claimant lived and worked for the employer in Oregon.

(2) The employer expected employees to report for work as scheduled. Claimant understood that expectation.

(3) The employer allowed claimant to take vacation leave from June 21 through 28, 2015. Claimant was scheduled to report for work on Monday, June 29, 2015 at 1:20 p.m. On June 22, claimant booked a same-day flight to Texas online, and attempted to book the flight back to Oregon for June 28. However, claimant accidentally booked the return flight for June 29. Claimant failed to notice her mistake, and flew to Texas.

(4) At approximately 3:30 p.m. on June 26, claimant received an email confirming that her return flight was on June 29. Claimant mistakenly believed the airline had canceled her June 28 flight and rescheduled her to return on June 29. At 3:45 p.m., claimant conveyed that information to the employer's operations manager, and stated that she was therefore unable to report for work on June 29. The operations manager told claimant she was expected to report for work on June 29 as scheduled.

(5) Claimant telephoned the airline and learned that she mistakenly had booked her return flight for June 29. She attempted to change flights so that she could report for work on June 29 but was unable to do so. Claimant therefore did not report for work on June 29 as scheduled. She reported for work as scheduled on June 30.

(6) On June 30 or July 1, claimant told the operations manager that she mistakenly booked her return flight for June 29, and was unable to change flights so that she could report for work that day. The operations manager mistakenly determined that claimant had lied to her when stating that the airline canceled her June 28 flight and rescheduled her to return on June 29.

(7) The employer discharged claimant for failing to report for work on June 29 as scheduled, and allegedly lying to the operations manager by initially stating that the airline canceled her June 28 flight and rescheduled her to return on June 29.

CONCLUSIONS AND REASONS: We agree with the Department, and not 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 Hearing Decision 15-UI-46061, the ALJ found that claimant lied to the operations manager by initially stating that the airline canceled her June 28 flight and rescheduled her to return on June 29, and later admitting that she mistakenly had booked her return flight for June 29.¹ Based on that finding, the ALJ determined that, "Given the inconsistent statements claimant made to the employer about the return flight, the more persuasive evidence is that claimant knew from the beginning that she could not be at work on June 29, 2015 and was dishonest with the employer about why she could not report to work as scheduled."²

At hearing, however, claimant repeatedly explained that she initially told the operations manager that the airline canceled her June 28 flight and rescheduled her to return on June 29 because she mistakenly believed that was what happened, and later corrected herself after learning that she accidentally had booked the return flight for June 29. Audio Record at 21:30-22:30, 23:45- 24:45, 26:50-27:30. The employer's operations manager testified that claimant gave the same explanation on July 1, and admitted that if claimant knew from the beginning that she could not be at work on June 29, she would have been

¹ Hearing Decision 15-UI-46061 at 3.

² *Id.*

allowed to take the day off had she requested to do so in writing 72 hours in advance. Audio Record at 15:50-16:35. The preponderance of evidence therefore shows that claimant initially told the operations manager that the airline had canceled her June 28 flight and rescheduled her to return on June 29 because she sincerely believed it had done so. Thus, to the extent claimant was discharged for allegedly lying to the operations manager, her discharge was not for misconduct.

Absent another basis for the ALJ's implicit determination that claimant was not a credible witness, the preponderance of evidence shows that claimant accidentally booked her return flight for June 29 and was unaware of her mistake until June 26, at which time she immediately notified the employer and attempted to change flights so that she could report for work as scheduled, but was unable to do so. The record therefore fails to show that claimant consciously engaged in conduct she knew or should have known would probably result in her failure to report for work on June 29, or that she was indifferent to the consequences of her actions. Claimant may have been careless, arguably negligent, but the employer failed to establish that she willfully failed to report for work on June 29, or that her failure to do so was the result of *wanton* negligence as defined under OAR 471-030-0038(1)(c) .

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-46061 is set aside, as outlined above.³

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 24, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.