EO: 200
BYE: 201628

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

683
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1315

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75314). Claimant filed a timely request for hearing. On October 12, 2015, ALJ Vincent conducted a hearing, and on October 19, 2015 issued Hearing Decision 15-UI-46122, reversing the Department's decision. On November 16, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument requesting that EAB reopen the hearing to allow testimony from a witness who was not present at the hearing. EAB construes the employer's request as one to have EAB consider new information under OAR 471-0411-0090 (October 29, 2006), which allows EAB to consider new evidence not presented during the hearing if the party offering the new evidence shows that it was prevented by factors or circumstances beyond its reasonable control from presenting it at the hearing. In support of its request, the employer asserted only that the witness it identified wanted to present testimony. The employer's bare assertion does not satisfy the threshold requirement of OAR 471-041-0090 for EAB to consider new evidence. For this reason, the employer's request to consider new evidence is denied.

In Hearing Decision 15-UI-46122, the ALJ stated that Hearing Exhibit 1 was admitted into evidence without objection. EAB has reviewed the audio record of the hearing and no exhibits were admitted into evidence. EAB also cannot locate in the electronic case file any documents that either party submitted

as potential exhibits. The ALJ's reference to the admission of Exhibit 1 appears to have been a clerical error. No such exhibit exists in this hearing record.

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a housekeeper from May 18, 2015 until July 17, 2015.

(2) The employer expected claimant to comply with the reasonable instructions of her supervisor. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime before July 15, 2015, claimant had problems dealing with a coworker or supervisor.

(4) On Friday, July 15, 2015, claimant was instructed to attend a meeting with the housekeeping supervisor. Claimant thought that the meeting would involve a discussion of her difficulties with the coworker or supervisor and might possibly lead to the imposition of disciplinary sanctions on her. Claimant immediately called the Service Employees International Union (SEIU) and consulted with a representative about the scheduled meeting with her supervisor. The representative told claimant not to appear at the meeting until SEIU arranged for union representation and a representative was able to appear with her to the meeting.

(5) After claimant spoke with the union representative on July 15, 2015, she tried to contact the housekeeping supervisor but was not able to reach her directly. Claimant left a voicemail message for the supervisor stating that she was not going to report for the meeting because SEIU had advised her not to until she had union representation, and SEIU was not able to arrange for that representation at the time of the scheduled meeting. Also on July 15, 2015, claimant sent several text messages to the supervisor notifying her that she was not going to appear at the meeting on the advice of SEIU and repeated what she had stated in her voicemail message. When the supervisor did not respond to claimant's voicemail message or her text messages, claimant again contacted the SEIU representative for instructions. The representative repeated that claimant should not report for the scheduled meeting, and told claimant that she would contact claimant's supervisor about SEIU's instructions to claimant and assured claimant she would "not be in trouble" for not attending the meeting. Audio at ~13:38.

(6) On Monday, July 17, 2015, after claimant reported for work, she received a text message from the housekeeping supervisor informing her that she had been discharged for failing to attend the meeting on July 15, 2015. Claimant immediately called the supervisor but was unable to reach her directly. Claimant left the supervisor a voicemail message stating that she had not attended the July 15, 2015 meeting on the advice of an SEIU representative. The housekeeping supervisor responded to claimant's voicemail message by text message telling claimant that she was not subject to union protections or entitled to union representation since she was still a probationary employee. Claimant then called the SEIU representative with whom she had been dealing. The representative told claimant that she would call the housekeeping supervisor to inform her that claimant had not reported for the meeting on her advice, that claimant was entitled to union representation, and that claimant could not be disciplined for failing to appear at the meeting until representation had been arranged for her. A short time later, the union representative called claimant back. The representative told claimant that the supervisor had told her that claimant was discharged for a reason other than failing to report for the July 15, 2015 meeting. The representative told claimant that the supervisor had not disclosed to her the precise reason why she

was discharged. Claimant then called the employer's administrative office to try to determine the reason for her discharge. Claimant did not receive a clear answer from that office.

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. 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. A conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Because no witnesses for the employer testified at the hearing, and claimant was given conflicting information about the cause of her discharge, it is difficult to know the reason that the employer discharged claimant. To the extent that claimant was discharged because she failed to report for the July 15, 2015 meeting, we accept claimant's unrefuted testimony that, even though she was a probationary employee, she was entitled to union representation at disciplinary meetings, a purpose of the July 15, 2015 meeting was, likely, to discipline claimant, and she refused to attend the meeting based on advice from her union representative and the representative's assurances that she would not get in trouble for refusing to attend the meeting. Audio at ~9:07, ~10:50, ~12:40. When an employee has union protections under a collective bargaining agreement that guarantees union representation during disciplinary proceedings and the employee does not appear for a disciplinary meeting because, through no fault of the employee, a union representative is not able to attend, an employer policy that requires the employee to attend that meeting unrepresented is unreasonable on its face. On this record, claimant's failure to report for the July 15, 2015 meeting was not misconduct under OAR 471-030-0038(1)(d)(C). As well, claimant took every reasonable step to inform the housekeeping supervisor that she was not attending the July 15, 2015 meeting on the advice of SEIU. Even if claimant was not entitled to union representation at the July 15, 2015 meeting, since claimant made these reasonable steps to notify her supervisor in advance of the meeting that she was not going to attend it and her supervisor did not object, she did not reasonably know that if she did not attend the meeting she would probably be in violation of the employer's standards. For this additional reason, claimant's failure to attend the meeting was not wantonly negligent behavior, and did not constitute misconduct.

To the extent claimant was discharged for some reason other than her failure to report for the July 15, 2015 meeting, the employer presented no evidence suggesting that claimant engaged in misconduct since it did not call any witnesses at hearing to explain the reason(s) for claimant's discharge. The employer did not meet its burden to show that, for some reason other than failing to appear at the July 15, 2015 meeting, claimant willfully or with wanton negligent violated the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-46122 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 15, 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.