

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1404

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93434). On September 10, 2015, decision # 92434 became final without the employer having filed a request for hearing. On September 24, 2015, the employer filed a late request for hearing. On September 30, 2015, ALJ Kangas issued Hearing Decision 15-UI-45178, dismissing the employer's hearing request subject to the employer's right to renew the request by providing additional information about the request to the Office of Administrative Hearings (OAH) by October 14, 2015. On October 12, 2015, OAH received the employer's response. On October 22, 2015, OAH mailed a letter canceling Hearing Decision 15-UI-45178, and mailed a Notice of Hearing scheduling a hearing for November 9, 2015. On November 9, 2015, ALJ M. Davis conducted a hearing, and on November 13, 2015 issued Hearing Decision 15-UI-47607, allowing the employer's late request for hearing, and concluding that claimant's discharge was not for misconduct. On December 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

No adversely affected party requested review of the portion of Hearing Decision 15-UI-47607 allowing the employer's late request for hearing. We therefore confine our review to the issue of claimant's discharge.

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Bruce Chevrolet, Inc. employed claimant as a salesman from January 13, 2014 to July 15, 2015.

(2) The employer expected claimant to be honest about work-related matters. Claimant understood the employer's expectation, or should have understood it as a matter of common sense.

(3) On July 11, 2015, claimant last worked for the employer. During his regularly scheduled days off, July 12 and July 13, claimant traveled from his residence to Roseburg, Oregon to visit his children. He planned to return to work on July 14, 2015.

(4) On July 14, 2015, claimant notified the employer that he would be absent from work due to illness. Claimant had flu symptoms and spent most of the day in bed in his hotel room.

(5) On July 14, 2015, claimant's children traveled between Roseburg, Coquille, Bandon and Bridge, Oregon. Claimant's children had claimant's cell phone with them, and, because of a certain setting on claimant's social media website, claimant's social media website registered and listed all the places where claimant's cell phone was located throughout the day. According to claimant's social media website, his phone was in Roseburg at approximately 12:14 p.m., Coquille at approximately 12:48 p.m., Bandon at approximately 2:31 p.m., Bridge at approximately 3:59 p.m., and Roseburg at approximately 8:27 p.m. Exhibit 2. The distance between Roseburg and Coquille is 67.1 miles, which takes approximately one hour twenty-one minutes to drive.¹

(6) The employer had access to claimant's social media website, and viewed all the places listed. The employer concluded that claimant had lied about being absent due to illness and spent the day traveling to the listed locations. On July 15, 2015, the employer discharged claimant for being dishonest about the reason for taking July 14, 2015 off work.

CONCLUSIONS AND REASONS: We agree with the Department and 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 has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant based on its conclusion that he had been dishonest about the reason for his July 14 absence from work. The employer had the right to expect claimant to be honest about work-related matters, and claimant knew or should have known the expectation as a matter of common sense. In support of its allegation that claimant was traveling instead of sick in bed, the employer supplied copies of claimant's social media website content showing that claimant's cell phone traveled between Roseburg, Coquille, Bandon, and Bridge, Oregon at particular times during the day of July 14.

¹ We take notice of these generally cognizable facts. <http://www.mapquest.com/directions/from/us/oregon/roseburg-282038150/to/us/oregon/coquille-282029858>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

The employer's evidence is insufficient to prove misconduct for several reasons. First, the record fails to show that claimant had his cell phone with him on July 14. He did not post any personal messages or photographs of himself in the listed locations. Second, the data on claimant's social media website was not accurate. For instance, claimant's social media website shows claimant's cell phone was in Roseburg at 12:14 p.m. and in Coquille 34 minutes later at 12:48 p.m. However, it is a generally cognizable fact that Coquille is located over 67 miles from Roseburg, a distance which generally takes over an hour to drive. It is therefore implausible that claimant's cell phone could have been in the listed locations at the listed times, thus demonstrating that the data displayed on claimant's social media website was not an accurate or reliable indicator of the location of either claimant or his phone at the listed times. Third, the employer did not submit evidence that claimant asserted he was at home, or in bed, on July 14. In fact, the text messages the employer submitted showed only that claimant was claiming to be sick and planned to return to work on July 15. Exhibit 2. The text messages the employer submitted did not include any statement by claimant concerning his location or activities on July 14. The only text message describing claimant's location was sent by the employer, stating "hope you're doing better are you in bed hopefully you're sleeping and you're not getting this message . . ." Exhibit 2. Therefore, the record does not show that claimant ever described his location or activities on July 14, much less establish that he was dishonest about them. Absent a reason to disbelieve claimant's testimony, or evidence that claimant was not where he said he was on July 14, it is at least as likely as it is not that claimant was not dishonest about his circumstances on July 14, and was, in fact, absent because he was too sick to work. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-47607 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 5, 2016

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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