

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1421

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135522). Claimant filed a timely request for hearing. On November 24, 2015, ALJ M. Davis conducted a hearing, and on November 25, 2015 issued Hearing Decision 15-UI-48376, concluding claimant's discharge was not for misconduct. On December 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Garnish Apparel employed claimant as a manager from August 22, 2014 to September 17, 2015.

(2) The employer typically scheduled claimant to work 29 hours per week. Over time, claimant's circumstances changed and she sought additional hours. She also performed freelance work elsewhere and accepted opportunities for paying work when they arose, although she did not actively seek work outside her employment with the employer.

(3) In early September 2015, claimant asked the employer to increase her hours. On September 11, 2015, the employer reduced claimant's guaranteed hours from 29 per week to 23.75 per week, but added 5 additional non-guaranteed hours per week for stylist appointments and 6-12 additional non-guaranteed hours per month for private parties.

(4) Claimant was upset that her guaranteed hours were reduced. Claimant had previously been on friendly terms with the employer's owner but decided the relationship going forward would be strictly business. The owner noticed the change in claimant's behavior toward her and believed claimant was being uncommunicative, which she thought was not conducive to an ongoing employment relationship. The owner sent a message to claimant stating she could improve her attitude and become more positive, quit, or meet with the owner. Claimant told the owner she would meet with her.

(5) On September 17, 2015, claimant and the owner met. During their conversation, claimant mentioned that the owner's message had omitted a fourth option, which was that the owner could fire claimant. The owner believed that, based on claimant's comment and the change in her behavior toward the owner during the previous week, claimant no longer wanted to work for the employer. Although the owner was generally satisfied with claimant's work performance, except for one customer complaint she had received in July 2015, the owner was concerned that claimant would be uncommunicative with customers or that her work performance would decrease if she let claimant continue working.

(6) On September 17, 2015, the employer discharged claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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.

The employer discharged claimant because, after claimant became upset due to a reduction in her guaranteed hours, the owner was concerned that claimant's attitude with customers would change. Until that time, however, the employer was generally satisfied with claimant's work performance, other than one incident that resulted in a customer complaint approximately two months before the discharge. Other than a generalized concern that claimant was not as communicative with her as she had been before her hours were reduced, the employer did not identify any specific incident in which claimant's behavior violated a known and reasonable employer expectation. In the absence of evidence showing that claimant engaged in behavior that violated the employer's expectations or showed a conscious indifference to the standards of behavior the employer had the right to expect of her, the employer has not shown that claimant's discharge was for misconduct.

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-48376 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 6, 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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