EO: 200
BYE: 201614

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

705
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0015

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153020). Claimant filed a timely request for hearing. On June 22, 2015, ALJ M. Davis conducted a hearing, at which both claimant and the employer appeared, and on June 24, 2015 issued Hearing Decision 15-UI-40572, reversing the Department's decision. On July 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB). On August 25, 2015, EAB issued Appeals Board Decision 2015-EAB-0796, reversing the ALJ's decision and remanding the matter to the Office of Administrative Hearings (OAH) for additional evidence.

On August 25, 2015, OAH mailed notice of a hearing scheduled for September 14, 2015, at which time the employer appeared and claimant did not appear. On September 14, 2015, ALJ M. Davis issued Hearing Decision 15-UI-44307, dismissing claimant's request for hearing based on her failure to appear at the September 14th hearing. On October 4, 2015, claimant filed a request to reopen with OAH. On October 26, 2015, OAH mailed notice of a hearing scheduled for November 10, 2015.[1] On November 19, 2015, OAH mailed notice of a hearing scheduled for December 7, 2015. On December 7, 2015, ALJ M. Davis conducted a hearing, at which time claimant appeared and the employer did not appear, and on December 15, 2015 issued Hearing Decision 15-UI-49372, reversing decision # 153020 and concluding claimant's discharge was not for misconduct. On January 4, 2016, the employer filed an application for review of Hearing Decision 15-UI-48372 with EAB.

[1] Although OAH scheduled a hearing for November 10, 2015, the record OAH transmitted to EAB indicates that no hearing was convened in this matter on that date, and no hearing decision issued, nor does the record include any information explaining why the November 10th hearing was not held. Likewise, although OAH subsequently mailed notice of a hearing scheduled for December 7th, the record OAH transmitted to EAB fails to include any information as to the reason the December 7th hearing was scheduled. The only explanation for those events appears in Hearing Decision 15-UI-49372, where the ALJ wrote that Hearing Decision 15-UI-44307 was issued in error and vacated, "claimant's request to reopen" was not needed, and that "on November 19, 2015, the OAH issued a Notice of Hearing for the remand hearing, scheduling a hearing for December 7, 2015." Hearing Decision 15-UI-44307 at 1.

The employer failed to certify that he provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. We considered the remainder of the hearing record, including the employer's previous arguments and submissions on the record, when reaching this decision.

FINDINGS OF FACT: (1) Market of Choice, Inc. employed claimant as a kitchen worker from October 1, 2014 to April 9, 2015.

(2) The employer expected claimant to report to work as scheduled or notify the employer if she was going to be absent from work. The employer's policy required that the employer assign "occurrence" values to each attendance deviation and discharge employees with more than 7 occurrences. Claimant understood the employer's expectations and attendance policy.

(3) On February 21, 2015, claimant sustained a concussion. On February 22, 2015, claimant went to an emergency room. From February 23, 2015 through February 26, 2015, claimant reported to work for her regular shifts. She felt like she was on autopilot during her shifts, and all of the individuals with whom claimant worked repeatedly asked her if she was okay. On March 1, 2015, claimant's ex-husband and sister took claimant to an emergency room for treatment because she was demonstrating abnormal behavior. Claimant was diagnosed with a concussion.

(4) On March 1, 2015 and March 2, 2015, the employer scheduled claimant to work. Claimant reported to work and on at least one occasion was released early. It was abnormal for claimant's supervisor to release employees early. In claimant's experience, the supervisor only released people from work early if they were very sick.

(5) On March 2, 2015, claimant formed the belief that her grandmother was going to hurt herself. While making strange comments about that, and spontaneous references to ISIS, claimant tried to stop her grandmother from driving away by standing behind her grandmother's vehicle, then jumping on top of the car when her grandmother did not stop. Claimant told her sister to call the police to intervene with her grandmother; when police arrived, however, they discovered claimant displaying aberrant behavior and arrested her for assault, harassment and criminal mischief. On March 3, 2015, police booked claimant into jail for charges including criminal mischief in the second degree because, when claimant jumped on her grandmother's car, she dented it. During the booking and intake process, claimant became distraught and repeatedly hit her head against the floor until she had a bump on her head.

(6) The employer scheduled claimant to work on March 3, 2015, March 4, 2015 and March 7, 2015. Claimant did not report to work for any of those shifts because she was incarcerated. Claimant did not attempt to contact the employer to notify it of her absences because she lacked access to a phone. On March 7, 2015 or March 9, 2015, claimant was released from jail. The employer scheduled claimant to work on March 8, 2015, March 9, 2015, March 10, 2015 and March 11, 2015. Claimant did not report to work for any of those shifts because she did not know she was scheduled to work. She did not immediately attempt to contact the employer because her phone had been destroyed in the February 21, 2015 incident that resulted in her concussion.

(7) On March 10, 2015, claimant continued to experience symptoms related to her concussion and March 3, 2015 head injury, including dizziness, sleeplessness, feeling "weird," and saying odd things.

(8) On March 11, 2015, claimant spoke with her supervisor and agreed to meet with the employer on March 12, 2015. By that time, claimant had accrued 21 attendance occurrences, which far exceeded the employer's attendance occurrence maximum of 7. The employer wanted to know the reason for claimant's absences from work. On March 12, 2015 and March 16, 2015, the employer and claimant met. Claimant reported that she had a concussion and a second head injury. The employer told her to focus on healing rather than working. Claimant believed the employer planned to allow her to resume working when she recovered from her head injuries.

(9) On April 9, 2015, the employer discharged claimant for accruing too many absences.

(10) On May 27, 2015, claimant pled guilty to the crime of criminal mischief in the second degree. Exhibit 1, Lane County Case Summary, page 3 of 4. At the time of her guilty plea, claimant was not acting normally, had "blocked a lot of things," and was suffering from post traumatic stress disorder (PTSD). Audio recording at ~28:45, 31:28, 32:02. Claimant also understood that if she entered that plea she could obtain an evaluation and treatment for her mental health, and, if she successfully completed probation, the conviction would be erased from her record. Audio recording at ~1:2:00.

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.

The employer had the right to expect claimant to report to work as scheduled or notify the employer when she expected to be absent from work, and claimant understood those expectations. There is no dispute in this case that claimant's repeated failures to report to work or notify the employer of her absences between March 3, 2015 and March 11, 2015 violated the employer's expectations, and that the resultant attendance occurrence accruals far exceeded the amount allowed under the employer's attendance policy. For claimant's violations of the employer's expectations and policy to constitute misconduct, however, claimant must have acted, or failed to act, with a willful or wantonly negligent mental state when she missed work, or when she engaged in the conduct that prevented her from working or reporting her absences. *See Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991).

It is undisputed that claimant sustained a concussion on February 21, 2015. Claimant's coworkers, supervisor, ex-husband and sister all considered claimant's behavior between February 21, 2015 and

March 2, 2015 to be so odd that they inquired about her health, released her from work early, or compelled her to seek emergency medical attention. During the incident that led to claimant's arrest and incarceration, which resulted in her absences from work between March 3 and March 9, she was making odd statements about her grandmother's mental state and ISIS and threw herself on top of a moving car, all of which were out of character. At the time, she was suffering from undiagnosed and untreated PTSD. Notwithstanding that claimant's conduct resulted in criminal charges, or that she pled guilty to criminal mischief in the second degree, given claimant's concussion, PTSD, the general state of her mental health, and the fact that she was at least in part motivated by her interest in using the plea to obtain a mental health evaluation and treatment, we find it more likely than not that claimant did not act willfully or with wanton negligence at the time she engaged in the conduct that resulted in her inability to report to work as scheduled.[2]

With respect to claimant's absences from work after her release from jail, it is more likely than not that claimant was not aware she was scheduled to work. She was not aware of her work schedule prior to going to jail, was not able to check her schedule from jail, had formed a belief based on speaking with a friend that she was not scheduled to work, and, when she spoke with her supervisor on March 11, 2015, was not advised that she was scheduled to work or had missed several shifts since being released from jail. Nothing in this record indicates that claimant knew, had the opportunity to find out, or was told that she was scheduled to work between March 9 and March 11, 2015. Because the record fails to show that claimant was aware she was scheduled to work, her failure to report to work was not attributable to her as willful or wantonly negligent conduct.

Claimant also failed to notify the employer of her absences during her period of incarceration and for a few days thereafter. However, claimant testified, unrefuted, that the reason she failed to notify the employer of her absences was that she lacked the ability and money to place calls to the employer while she was incarcerated, and called the employer as soon as she could after being released. Claimant's failure to call the employer was, therefore, not willful, and was not the result of claimant's conscious indifference to the employer's expectations.

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

DECISION: Hearing Decision 15-UI-49372 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>January 20, 2016</u>

[2] ORS 164.354 provides that criminal mischief in the second degree must include either tampering or interfering with the property of another (with resultant damages exceeding $500) with the intent to cause substantial inconvenience, or intentionally or recklessly damaging the property of another (with resultant damages exceeding $500). Although claimant pled guilty to criminal mischief II, given claimant's mental health, undiagnosed and untreated PTSD and concussion at the time of her guilty plea, this record fails to show that claimant acted with "intent" (defined in ORS 161.085(7) as acting "with a conscious objective to cause the result or to engage in the conduct"), or recklessly (defined in ORS 161.085(9) as when an individual is "aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exist," when the "risk" is "of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation"), with regard to damaging property at the time of the events that resulted in claimant's incarceration and, consequently, her inability to report to work as scheduled.

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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