

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0082

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105202). Claimant filed a timely request for hearing. On January 7, 2016, ALJ Wyatt conducted a hearing, and on January 14, 2016 issued Hearing Decision 16-UI-51077, reversing the Department's decision. On January 20, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Pickers employed claimant from October 27, 2014 until October 19, 2015. The employer operated a small convenience store and delicatessen. Claimant worked as a cook, customer service representative and in other capacities, as needed.

(2) The employer expected claimant to report for work when she was scheduled or to notify the owner if she was going to be absent. Claimant understood the employer's expectations as a matter of common sense.

(3) On August 19, 2015, the employer's owner issued to claimant for failing to notify the employer of her absence from work on August 16, 2015 and for taking excessively long breaks.

(4) Sometime before October 17, 2015, the employer's owner, claimant and other local residents were notified that their electrical utility was shutting off power to a specified area that included the store and claimant's residence starting on the night of October 17 to 18, 2015 and continuing until 6:00 a.m. on October 18, 2015. Claimant was scheduled to work on October 18, 2015. Electrical service to the store did not resume by 6:00 a.m. on October 18, 2015.

(5) Sometime prior to 9:30 a.m. on October 18, 2015, claimant sent a text message to the owner stating that electrical power was not restored at her residence and inquiring if it had been at the store. Exhibit 1 at 2. The owner replied that the store did not have electricity, but she understood it was going resume at 9:30 a.m. *Id.* Claimant responded “Ok I’m on my way.” *Id.* Claimant started travelling to the store, with her husband driving her in his truck. The owner sent claimant another text message, stating, “Now they say [the power will not be on until] 11:30. Stay home til you get power.” *Id.* Claimant replied, “Ok” and returned to her residence. *Id.*

(6) Sometime around 10:15 a.m. on October 18, 2015, electrical service resumed at the store. Sometime before 11:00 a.m., claimant’s husband notified her that he had a job cutting wood he needed to report to at 11:30 a.m. Claimant’s husband needed to take the truck, their only vehicle, to travel to the job. Claimant’s husband contacted a friend of his to drive claimant to work. Claimant’s husband took the one cell phone they owned with him when he left at approximately 11:00 a.m. At approximately 11:00 a.m., just after claimant’s husband departed, electricity was restored at claimant’s residence. Claimant did not discover the electricity was back on until approximately noon. The friend that claimant’s husband had contacted did not arrive to drive claimant to work. Claimant then discovered that receiver for the cordless phone in her residence had been left on during the power outage and its battery was completely drained. Sometime around approximately 1:30 p.m., claimant completed charging the battery to the cordless phone. However, claimant realized the phone numbers for the owner and the store were stored in the cell phone that was in her husband’s possession, and she could not notify the owner of her transportation difficulties without those numbers. Claimant was not able to use the cordless phone to reach her husband, either to tell him her ride had not arrived or to obtain the phone number she needed to contact the employer since the husband’s job was at location out of cell phone range. It did not occur to claimant to call directory assistance to obtain the needed phone numbers. Claimant lived in a rural area thirteen miles from the store, and did not have any nearby neighbors whom she could ask to help her get to work or to communicate with the employer.

(7) On October 18, 2015 at 12:35 p.m., the owner sent a text message to claimant asking, “When will you be in?” Do you want your job? Bruce is covering [for you] but he’s not happy.” Exhibit 1 at 3. Claimant did not receive this message because it was transmitted to the cell phone which her husband had with him.

(8) On October 18, 2015, sometime around 6:30 p.m., claimant’s husband returned to his and claimant’s residence. At 6:46 p.m., claimant sent a text message to the owner and stated, “Craig [claimant’s husband] just got home he had the phone if so, do I have a job or not”. Exhibit 1 at 3 (Punctuation omitted in original). The owner replied to claimant that she needed to think about whether she was going to continue to employ claimant.

(9) On October 19, 2015, the employer discharged claimant for failing to report for work on October 18, 2015 and for failing to notify the employer if she was unable to report.

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. 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).

This record does not support the inference that claimant either was trying to evade reporting for work on October 18, 2015, or was indifferent to the employer's expectation that she attend work as scheduled. That claimant early in the day on October 18, 2015 had already begun to travel to work when the owner told her to wait until electricity was restored at her residence before reporting shows that she was willing to work that day and intended to do so. The events that followed, claimant's husband taking their only vehicle to get to his job, the alternate transportation he tried to arrange for her not appearing, his taking the cell phone that had the employer's numbers stored in it, and his working at a location where he did not have cell phone reception, were all unfortunate occurrences impacting claimant's ability to report for work or notify the employer which she could not reasonably have foreseen. These exigent circumstances prevented claimant from complying with the employer's standards. While claimant did not think of using directory assistance to obtain the employer's or owner's phone numbers as an alternative to accessing the numbers stored in the cell phone, there was no evidence that she consciously aware of this option and consciously disregarded it. Absent such evidence, the employer did not demonstrate that any of claimant's behaviors on October 18, 2015 were willful or wantonly negligent, a necessary predicate to establishing misconduct. *See* OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a). Even if claimant failed to exercise reasonable care in averting the occurrence of the apparently exigent circumstances, or in pursuing alternate means to obtain a ride to work or to determine the employer's and owner's phone number for purposes of notifying the employer of her absences, a fair reading of OAR 471-030-0038(1)(c) shows that such a failure exercise due care is insufficient to establish the consciously aware mental state needed to show disqualifying misconduct.

Although the employer discharged claimant, it did not demonstrate that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-51077 is affirmed.

Susan Rossiter and J. S. Cromwell, participating

DATE of Service: February 11, 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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