

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0086

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 111513). The employer filed a timely request for hearing. On January 7, 2016, ALJ Monroe conducted a hearing, and on January 14, 2016 issued Hearing Decision 16-UI-51122, affirming the Department's decision. On January 22, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Woodburn School District 103C employed claimant as a substitute custodian from January 14, 2013 to October 22, 2015.

(2) The employer expected its substitute custodians to refrain from leaving work early without their supervisor's permission.

(3) On October 9, 2015, claimant was scheduled to work from 1:30 p.m. to 10:00 p.m. At approximately 4:30 p.m., claimant had completed all of the tasks he believed he was required to perform, and was not feeling well. Claimant therefore decided he wanted to leave work early. Claimant's supervisor was no longer on duty, so claimant telephoned his supervisor's assistant, and one of the director of human resource's assistants, to notify them that he wanted to leave work early. Both assistants had gone home for the day.

(4) Claimant had left work early without permission under similar circumstances on prior occasions. He had been told to accurately record the hours he actually worked, but never told that leaving work early without permission under such circumstances violated the employer's expectations. Claimant therefore did not know that leaving work on October 9, 2015 violated the employer's expectations, and believed it was acceptable for him to do so.

(5) The employer discharged claimant for leaving work early without his supervisor's permission on October 9, 2015.

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In the present case, the employer failed to show claimant knew or should have known through prior training, experience or warnings that he was prohibited from leaving work early without his supervisor's permission on October 9, 2015 after having completed all of the tasks he believed he was required to perform, and when not feeling well. The record instead shows that claimant sincerely believed, and had a rational basis for believing through prior experience and a lack of warnings, that leaving work early without his supervisor's permission under such circumstances was acceptable. The employer therefore failed to show that claimant violated the employer's expectations willfully or with wanton negligence, and that his conduct was not a good faith error.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 16-UI-51122 is affirmed.

Susan Rossiter and J. S. Cromwell.

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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