

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0194

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 100938). Claimant filed a timely request for hearing. On January 25, 2016, ALJ Shoemake conducted a hearing in which the employer did not participate, and on January 26, 2016, issued Hearing Decision 16-UI-51672, concluding that the employer discharged claimant, but not for misconduct. On February 16, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In its application for review, the employer's representative requested "a new hearing to present testimony in this matter." The employer's request is considered a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information demonstrates that circumstances beyond its reasonable control prevented it from presenting the information at the hearing. The employer's representative provided no reason why the employer was unable to participate in the hearing and offer the information it now wants EAB to consider. The employer's request for a new hearing is therefore denied.

FINDINGS OF FACT: (1) The employer, D Industries, employed claimant as an industrial warehouse recycler from January 27, 2014 until November 5, 2015. At the time of his work separation, claimant worked for Sysco, one of the employer's clients, and was assigned to the night shift.

(2) If an individual was unable to report for his assigned shift, the employer expected that person to notify the supervisor or the lead worker. Claimant understood this expectation. Because claimant's supervisor did not work the night shift, however, claimant contacted the lead worker if he was unable to work his scheduled shift.

(3) On November 3, 2015, claimant reported for his assigned shift but was unable to work because he was feeling ill. He left a note for the lead worker in which he told the lead worker he was going home because he was sick and that he would not report for work on November 4 if he was still feeling unwell.

Claimant left work on November 3, and did not report for his assigned shift on November 4 because he was still ill.

(4) On November 5, 2015, claimant reported for his assigned shift. A Sysco foreman informed claimant that he no longer worked there; he was unable to provide claimant with any reason for the discharge. A few days after his discharge, claimant spoke to his supervisor, who told claimant he had been discharged because he failed to notify the employer he would be absent on November 3 and 4, 2015. When claimant mentioned the note he left for the lead worker, the supervisor said he was unaware of any such note.

CONCLUSION AND REASONS: We agree with the ALJ and conclude 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. 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).

In regard to his absences from work on November 3 and 4, 2015, claimant testified that he complied with the employer's expectations by notifying the lead worker he was leaving work early on November 3 because he was ill, and would not report for his scheduled shift on November 4 if he was still feeling unwell. Because the employer did not participate in the hearing, there was no evidence in the record to rebut claimant's account of his actions. The employer therefore failed to meet its burden to demonstrate that claimant's conduct constituted a willful or wantonly negligent violation of the standards of behavior the employer expected of claimant. Accordingly, we conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-51672 is affirmed.

Susan Rossiter and D. H. Hettle;
J. S. Cromwell, not participating.

DATE of Service: February 24, 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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