

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0215

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 160619). The employer filed a timely request for hearing. On February 4, 2016, ALJ K. Monroe conducted a hearing, and on February 12, 2016 issued Hearing Decision 16-UI-52925, affirming the Department's decision. On February 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Supported Independence Services employed claimant as a direct support professional from July 28 to November 6, 2015.

(2) The employer expected employees to report for work as scheduled. The employer expected employees unable to report for work to notify the employer at least two hours before their shift started. Claimant understood the employer's expectations.

(3) The employer typically scheduled claimant to work Thursdays and Fridays, day shift. The employer posted hard copies of monthly work schedules, which employees checked to confirm their schedules. In September 2015, however, the employer implemented "shift planning" software that allowed employees to check their schedules using a computer or cell phone. Exhibit 1.

(4) On September 20, 2015, claimant volunteered to work the swing shift on Saturday, October 31, 2015. The employer scheduled claimant to work that shift. Claimant subsequently was involved in an automobile accident and took a two to three week medical leave of absence, during which she forgot she was scheduled to work on October 31, 2015.

(5) On October 27, 2015, claimant was released to work. A manager reminded claimant she was scheduled to work the swing shift on Friday, October 30, 2015. After clocking in to work on October 30, claimant checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31.

(6) On October 31, 2015, claimant failed to report for work as scheduled or notify the employer she would be absent. The employer discharged claimant for that reason.

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).

The employer discharged claimant for failing to report for work or notify the employer she would be absent on October 31, 2015. On September 20, 2015, claimant volunteered and therefore was scheduled to work on October 31. However, she subsequently was involved in an automobile accident and took a two to three week medical leave of absence, during which she forgot she was scheduled to work on October 31. At hearing, the employer alleged that a manager reminded claimant on October 27 that she was scheduled to work on October 31, and that a supervisor reminded her again on October 30. However, the employer's evidence on that issue consisted entirely of hearsay. *See* Exhibit 1 at 11. Claimant testified that the manager reminded her she was scheduled to work the swing shift on October 30, and that neither he nor the supervisor reminded her she was scheduled to work on October 31. Audio Record at 23:50, 26:15. Absent a basis for concluding that claimant was not a credible witness, we find the evidence on that issue, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant was reminded she was scheduled to work on October 31.

After clocking in to work on October 30, claimant checked the posted hard copy of the monthly work schedule, which did not indicate that she was scheduled to work on October 31. At hearing, the employer argued that claimant should have used the employer's shift planning software to check her work schedule. Audio Record at 19:15. However, the record fails to show claimant knew or should have known through prior training, experience or warnings that the posted schedule probably was incorrect. Absent such a showing, the employer failed to establish claimant violated its expectations willfully or with wanton negligence.

We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 16-UI-52925 is affirmed.

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

DATE of Service: March 7, 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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