

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0360

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90305). Claimant filed a timely request for hearing. On March 10, 2016, ALJ Shoemake conducted a hearing, and on March 18, 2016 issued Hearing Decision 16-UI-55388, concluding the employer discharged claimant, but not for misconduct. On March 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jerrick Hope-Lang employed claimant from May 4, 2015 to November 20, 2015 as a bartender and bar-back.

(2) The employer expected claimant to report to work on time for his scheduled shifts or contact the employer before his shift if he was unable to report to work on time. Claimant understood the employer's expectations.

(3) On September 24, 2015, claimant did not report to work on time or contact the employer before his shift. Claimant had set an alarm to wake him for his shift, but slept through his shift due to the side effects of a new medication prescribed by his doctor.

(4) The employer sent claimant his work schedule once per week by email. On November 19, 2015, claimant was scheduled to begin work at 9:30 p.m. Claimant did not call the employer before his shift or report to work at 9:30 p.m. At 10:15 p.m., the general manager sent claimant a text message asking him why he did not report to work at 9:30 p.m. Claimant was late for work because he was confused about his schedule and did not know he was scheduled to work that night until he received the text message from the general manager. Claimant offered to report to work within the next five minutes. The manager told claimant he would call claimant if he needed him to report to work.

(5) On November 20, 2015, the employer discharged claimant for failing to report to work on time or contact the employer before claimant's shift on November 19, 2015.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer discharged claimant, 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. Isolated instances of poor judgment and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). 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 because he violated the employer's attendance expectations on November 19, 2015. Claimant failed to call the employer before his shift or report to work on time because he was confused about his schedule, and did not think he was working that night. Audio Record at 40:49 to 41:45. Because the record does not contain evidence of an intentional or conscious error on claimant's part that resulted in his failure to meet the employer's attendance expectations on November 19, it is just as probable as not that claimant's failure to report to work on November 19 was due claimant's carelessness in checking his schedule. To provide misconduct, the employer must show more than carelessness or mere negligence. The employer must show, by a preponderance of the evidence, that claimant's mistake resulted from a conscious act claimant knew or should have known would probably result in a violation of the employer's reasonable attendance expectations. The employer failed to meet this burden.

Even assuming that claimant's failure to call in or report to work on time on November 19 was due to wanton negligence, it would be excused from constituting misconduct as an isolated instance. A claimant's behavior is an "isolated instance of poor judgment" if it is, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(a). Claimant was a "no call, no show" on September 24, 2015. However, claimant's failure to notify the employer of his impending absence on this date was due to a side effect of a newly-prescribed medication which caused him to sleep through his alarm and not due to indifference or a conscious disregard of the employer's interests. Therefore, claimant's November 19 absence was no more than an isolated instance of willful or wantonly negligent conduct.

Claimant was discharged, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-55388 is affirmed.

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

DATE of Service: May 2, 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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