

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0620

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 83458). The employer filed a timely request for hearing. On May 10, 2016, ALJ Murdock conducted a hearing, and on May 11, 2016, issued Hearing Decision 16-UI-59345, affirming the administrative decision. On May 26, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) WinCo Foods employed claimant as a freight handler from October 25, 2006 through January 12, 2016.

(2) The employer's policy required that an employee contact management prior to the employee's scheduled shift if the employee was unable to report to work. The policy also provided that an employee would be suspended or discharged for the first violation of this policy, and discharged for a second violation. Exhibit 1, p. 12. Claimant knew about and understood this policy because he received and read a copy of this policy on October 25, 2007.

(3) The employer's practice was to post the schedule on Thursday for the work week beginning on Sunday; employees were expected to check the schedule to determine their work hours. Claimant's work schedule varied from week to week.

(4) On April 26, 2015, claimant failed to report for his scheduled shift, and failed to contact management prior to the time his shift was scheduled to begin to report he would be absent. The employer suspended claimant without pay from April 29 through May 2, 2015. At the time claimant was suspended, his supervisor warned him that a second violation of the policy requiring that he report his absences would result in his discharge.

(3) On January 11, 2016, claimant was scheduled to work. He was confused about his work schedule, and did not think he was scheduled to work on that date, however. As a result, he did not report for his scheduled shift and did not contact management to explain that he would be absent.

(4) On January 12, 2016, the employer discharged claimant because he failed to report his absence in advance of his scheduled shift for a second time.

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).

The employer discharged claimant because he violated the employer's attendance expectations on January 11, 2016.¹ The employer's policy required that an employee contact management prior to the employee's scheduled shift if the employee was unable to report to work. At the time he was discharged, claimant was well aware of this policy, since he had been suspended for his first violation of the policy in April 2015 and warned that a second violation would result in his discharge. On January 11, claimant was confused about his work schedule, and unaware that the employer had scheduled him to work on that date. As a result, he did not report for his shift and did not contact management to report his absence. The record contains no evidence of an intentional or conscious error on claimant's part, however. As a result, it is more likely than not that claimant's failure to report for work occurred because claimant was careless in checking the weekly work schedule. To prove misconduct, an employer must show more than mere negligence. The employer must demonstrate, by a preponderance of evidence, that claimant's conduct resulted from a conscious act that claimant knew or should have known would violate the employer's attendance policy. The employer failed to meet this burden. Claimant's actions therefore did not constitute misconduct, and he is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

¹ At hearing, the employer asserted that claimant quit, contending that claimant's failure to report for his shift on January 11 constituted abandonment of his job. We disagree. A work separation is considered a voluntary leaving if the employee would have continued to work for the employer for an additional period of time. OAR 471-030-0038(2)(a) (August 3, 2011). The separation is a discharge if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer. OAR 471-030-0038(2)(b). The record establishes that, consistent with its attendance policy, the employer was unwilling to permit claimant to continue working after January 11.

DECISION: Hearing Decision 16-UI-59345 is affirmed.

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

DATE of Service: June 28, 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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