

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0631

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 154628). The employer filed a timely request for hearing. On May 16, 2016, ALJ Seideman conducted a hearing, and on May 18, 2016 issued Hearing Decision 16-UI-59860, concluding the employer discharged claimant for misconduct. On May 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wildhorse Resort & Casino employed claimant from May 31, 2005 to March 10, 2016 as a security officer.

(2) The employer expected claimant to know when he was scheduled to work and to report to work on time for his scheduled shifts or contact the employer before his shift began if he was unable to report to work on time. Exhibit 1 at 3-4, 7. The employer considered it a “no call, no show” if an employee failed to contact the employer and reported to work more than one hour late. Exhibit 1 at 3. Claimant received the employer’s written attendance policy at hire and understood the employer’s expectations. Exhibit 2.

(3) The employer scheduled all its security officers, including claimant, to work on Thursday, March 10, 2016 for a special event. The employer posted the schedule that included the March 10 date more than two weeks before March 10. Exhibit 7.

(4) Claimant normally worked Friday through Tuesday, from 3:00 p.m. to 11:00 p.m., with Wednesday and Thursday off from work. Claimant normally checked his schedule on Friday, at the beginning of his work week, and checked the “duty roster” portion of his schedule each day to confirm what job duties the employer expected him to perform each work day. Claimant did not check the schedule on Tuesday, March 8, regarding his work schedule for the upcoming week. Claimant was unaware that the employer had a special event and scheduled him to work on Thursday, March 10, his regular day off.

(5) On March 10, 2016, claimant did not contact the employer before his shift or report to work on time. The employer called claimant and told him he had failed to report to work. Claimant responded that he did not know he was scheduled to work. Claimant then reported to work, two hours late. The employer discharged claimant for failing to call or arrive on time for his scheduled shift on March 10.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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.

The employer had a right to expect claimant to call in or report to work for his scheduled shifts. Claimant understood the employer's expectation, and on March 10, 2016, violated it when he failed to report to work on time or notify the employer he would be late or absent. However, to disqualify an individual from receiving benefits, an employer has the burden to establish by a preponderance of the evidence that a violation of a reasonable employer expectation for which the claimant was discharged was due to misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In Hearing Decision 16-UI-59860, the ALJ concluded claimant's "lack of checking the schedule and duty roster" was a wantonly negligent disregard of the employer's interest, not an isolated instance of poor judgment, and therefore, was misconduct.¹ We disagree and conclude that claimant's failure to check ahead to ensure his work week began on Thursday, and not before, did not rise to the level of wanton negligence necessary to establish misconduct.

Claimant checked the duty roster each day, but did not check his work schedule each day because his work schedule was generally Friday through Tuesday each week. The employer asserted at hearing that "everyone" was told about the upcoming special event. However, claimant testified that he had "no idea" about the special event scheduled on March 10 until the employer called him that day. Audio Record at 22:35 to 22:48. Claimant's testimony was consistent with what he told the employer when the employer called him on March 10. The employer also testified that claimant had a prior "no call, no show." Audio Record at 12:24 to 13:08. However, that incident occurred on a Friday, one of claimant's normal workdays, and was not due to a change in his scheduled work week. Moreover, the employer considered that incident a "no call, no show" because claimant called the employer, but failed to speak to his supervisor, or return subsequent messages telling him to call the supervisor. *Id.* The record fails to show that claimant knew or should have known through prior training, experience or warnings that he should have checked his schedule to ensure the employer did not schedule him for work on his regular day off. Nor do we find the employer's expectation so obvious that claimant should have known the

¹ Hearing Decision 16-UI-59860 at 3.

expectation as a matter of common sense. 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-59860 is set aside, as outlined above.

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

DATE of Service: July 5, 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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