

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1257

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2016 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 64905). Claimant filed a timely request for hearing. On November 7, 2016, ALJ Seideman conducted a hearing and on November 8, 2016 issued hearing Decision 16-UI-70731, reversing the Department's decision. On November 14, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McDonald's employed claimant as a crew member and cashier from December 15, 2015 until August 25, 2016.

(2) The employer expected claimant to call in and notify the employer two hours before the scheduled start of a shift if she was not going to report for that shift. Claimant understood the employer's expectations.

(3) On March 8, May 18, June 11, 2016, claimant either did not call to notify the employer that she was not going to report for a scheduled shift or no one answered the employer's phone when she tried to call in. On June 16, 2016, the employer warned claimant she was in danger of being suspended or discharged if she failed to notify the employer of her absence from a scheduled shift.

(4) On August 6, 2016, claimant was scheduled to work a shift that began at 3:00 a.m. Before that shift, claimant tried to reach the employer to notify it that she was going to be absent from the shift, but when she called no one on the night crew answered the phone.

(5) On August 16, 2016, after the end of her scheduled shift, claimant informed the restaurant manager that she was not going to be able to work any shifts until she resolved a health condition. Claimant told

the manager she would call and notify the employer when that condition was resolved and she was able to work again.

(6) On August 19, 2016, despite having told the employer she would not be available to work until she notified the employer, claimant was scheduled to work a shift beginning at 4:00 a.m. Claimant did not know she was scheduled for that shift, did not report for it and did not call in.

(7) On August 20, 2016, claimant went to the workplace to pick up her pay check. At that time, claimant told the opening manager that she was not able to work due to her health condition and that she would notify the employer when she was able to work again.

(8) On August 24, 2016, despite what she had told both the manager and the opening manager, claimant was scheduled to work a shift beginning at 4:00 a.m. Claimant did not know she was scheduled for that shift, did not report for it and did not call in.

(9) On August 25, 2016, the employer discharged claimant for having accrued three absences for which she failed to call in to notify the employer, on August 6, 19 and 24, 2016. The employer did not notify claimant that she was discharged. On September 5, 2016, claimant went to the workplace to pick up her pay check for having worked on August 16, 2016. At that time, the employer notified her she had been discharged for failing to call the employer to report certain absences.

CONCLUSIONS AND REASONS: 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 connected with work. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness contended at hearing that claimant was discharged for "consistently" failing to notify her managers when she was going to be absent, and specifically failing to call in on August 6, 19 and 24, 2016. Audio at ~6:20, ~11:58. However, EAB customarily evaluates only the final alleged policy violation to determine whether claimant engaged in misconduct and is disqualified from benefits. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under an attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, claimant's alleged failure to notify the employer of her absence on August 24, 2016 is the proper focus of our inquiry.

While the employer's witness contended that claimant knew she was scheduled to work on August 24, 2016 and failed to call in to inform the employer that she was going to be absent, claimant contended that she had informed two managers on August 16 and August 20, 2016, respectively that she was not going to work further due to a physical condition and she would notify them when she was able to work again and she had not done so before August 24, 2016. Audio at ~9:06, ~15:24. Claimant further contended she should not have been scheduled to work on August 24, 2016 based on what she had told the employer, she did not know how or why she was scheduled to work that day, and had not called in

because she was not aware that she had been scheduled for that shift. Audio at ~16:25, ~17:00. Claimant had first-hand knowledge of her conversation with the manager about her inability to work after August 16, 2016 and the employer's witness, the area supervisor, had only hearsay information to rebut that it occurred. The ALJ inquired during the hearing if the manager with whom claimant allegedly spoke on August 16, 2016, and who also would have had first-hand information about that conversation and if it actually occurred, was available to testify on the employer's behalf and the employer's witness stated she was not. Audio at ~19:30. Claimant's first-hand account of the conversation she had with the manager was not inherently implausible and it is entitled to greater weight than the employer's hearsay information. On this record, based on claimant's account of her conversation with the manager, claimant should not have been scheduled to work on August 24, 2016 and should not reasonably have been aware that she was so scheduled. Consequently, there was no reason for claimant to call in to report that she was not going to be at work on August 24, 2016. The employer did not show that claimant's failure to call in to report her absence on August 24, 2016 was a willful or wantonly negligent violation of the employer's standards or was misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-70731 is affirmed.

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

DATE of Service: December 13, 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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