

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0019

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 163025). The employer filed a timely request for hearing. On December 13, 2016, ALJ Vincent conducted a hearing, and on December 16, 2016 issued Hearing Decision 16-UI-73127, affirming the Department's decision. On January 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. However, the employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employers' reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) The Local Buzz Inc. employed claimant as a part-time barber from November 12, 2015 to October 5, 2016.

(2) The employer expected its barbers to average two haircuts per hour. Claimant failed to meet that expectation.

(3) On Mondays, the employer typically scheduled claimant to work from 8:45 a.m. to 6:30 p.m. On Tuesday, October 4, 2016, claimant asked the owner if she could work fewer hours on Monday, October 10, 2016.

(4) On October 5, 2016, the employer discharged claimant primarily for asking to work fewer hours on October 10, and for failing to meet the employer's expectation that she average two haircuts per hour.

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 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. 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). Mere inefficiency resulting from lack of job skills or experience is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant primarily for asking the employer's owner if she could work fewer hours on October 10, 2016. An employer has the right to expect an employee to work their scheduled hours. However, an employer does not have a right to expect an employee to refrain from merely requesting to work fewer hours. Absent a showing that the employer denied claimant's request, and that claimant refused or failed to work her scheduled hours, the employer failed to establish misconduct.

The employer also discharged claimant, in part, for failing to meet the employer's expectation that she average two haircuts per hour. At hearing, the employer's owner asserted that claimant failed to meet that expectation, in part, because she refused to cut some customers' hair, or deliberately took longer than necessary to cut some customers' hair to avoid cutting waiting customers' hair. Audio Record at 8:15-9:50. However, claimant denied that allegation, and the evidence on that issue is, at best, equally balanced. Audio Record at 22:15-23:00. The employer failed to show by a preponderance of evidence that claimant consciously engaged in conduct she knew or should have known would probably result in her failure to average two haircuts per hour. Absent such a showing, the employer failed to establish that claimant's failure to meet that expectation was willful or wantonly negligent, and not mere inefficiency resulting from lack of job skills or experience.

We therefore conclude that claimant's discharge was not for misconduct. She is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 16-UI-73127 is affirmed.

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

DATE of Service: January 20, 2017

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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