EO: 200
BYE: 201739

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

732
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0055

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 165535). Claimant filed a timely request for hearing. On December 16, 2016, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for December 30, 2016. On December 30, 2016, ALJ Vincent conducted a hearing at which the employer failed to appear, and on January 6, 2017, issued Hearing Decision 16-UI-74260, concluding that the employer discharged claimant, but not for misconduct. On January 13, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer included a letter in which the employer's vice president – human resources asks that the case be reopened. The employer's request is construed as a request to have EAB consider new information under OAR 471-041-0090(2), which allows EAB to consider new information if the party presenting the information shows that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. In support of its request, the employer's representative states that "I was on vacation from December 21, 2016 – January 3, 2017 and did not receive the notice of hearing for December 30, 2016 until my return. I am the only person in the company that would have seen this notice and/or attended this hearing." We note that because OAH sent the notice of hearing by first class mail on December 16, 2016, it is highly probable that the notice of hearing arrived at the employer's Tempe, Arizona office (where the vice president – human resources works) on or before December 20. Even assuming that the notice of hearing arrived at the employer's office after the vice president went on vacation, it was well within the employer's control to have her mail checked during the almost two weeks she was away from office, so that the hearing notice could have been discovered and, if necessary, a postponement could have been requested. The employer's request to present new evidence is therefore denied.

FINDINGS OF FACT: (1) From August 2011 until September 19, 2016, Mach 1 Air Services employed claimant, last as an operations supervisor.

(2) Sometime prior to September 18, 2016, the employer promoted claimant from her position as operations agent in its Portland, Oregon office to a position as operations supervisor in its Hayward, California office. Claimant was scheduled to begin her new job in California on September 12, 2016.

(3) After claimant was promoted, the lease on her Oregon apartment expired. Because claimant knew she would soon be moving to California, she did not want to lease another apartment. With the permission of her manager, claimant slept at the employer's office for the approximate two week period between the date on which her apartment lease expired and the date she was planning to move to California.

(4) On September 11, 2016, claimant's boyfriend had emergency surgery. Claimant contacted her supervisor, and the supervisor agreed that claimant could postpone the date on which she was expected to begin work in California until September 19, 2016 so that claimant could care for her boyfriend.

(5) On September 18, 2016, claimant reported to the employer's Hayward, California office at approximately 8 p.m. A coworker told claimant that she could spend the night at the office and talk to the manager the following morning. Claimant spent the night at the office, sleeping at her desk.

(6) On September 19, 2016, the employer discharge claimant for violating its policies by sleeping at her desk, and for failing to report to work in California on September 12.

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 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) (August 3, 2011) 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, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The employer discharged claimant because it concluded she violated its policies by sleeping at her desk on the night of September 18, 2016, and because it believed she failed to report to work in California on September 12. The record failed to establish, however, that it made claimant aware of a policy that prohibited her from sleeping in the employer's office. To the contrary, claimant believed that it was permissible to spend the night in the employer's offices because her Portland supervisor allowed her to spend the night in the employer's office for approximately two weeks. In regard to the employer's contention that claimant was expected to report to work in California on September 12, and failed to do so, the record shows that claimant received permission from the employer's managers to delay her transfer to California until September 19.

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 failed to demonstrate that claimant consciously engaged in conduct she knew or should have known probably violated the employer's expectations. The employer therefore failed to meet its burden to demonstrate that it discharged claimant for misconduct, and claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-74260 is affirmed.

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

DATE of Service: January 19, 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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