EO: 200
BYE: 201743

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0178

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 91302). The employer filed a timely request for hearing. On January 18, 2017, ALJ Wyatt conducted a hearing, and on January 20, 2017 issued Hearing Decision 17-UI-75134, affirming the Department's decision. On February 8, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a delivery driver from February 1, 2016 to November 1, 2016.

(2) The employer expected employees to report to work as scheduled. The employer required that an employee notify a supervisor, manager or manager on duty at least two hours in advance of a foreseeable absence or tardiness; if the absence or tardiness was unforeseeable, the employer required as much notice as possible. The employer required employees to personally call to report each absence, and its policy stated that texting "is not an acceptable means of notification." Exhibit 1 at 38. The employer gave a copy of its attendance policy to claimant upon hire.

(3) In August 2016, the employer concluded claimant violated the attendance policy two times and issued her a final warning. The final warning reiterated the attendance policy and notified claimant the employer would discharge her for further violations of it.

(4) The employer scheduled claimant to work on October 27, October 29 and October 31, 2016. Claimant knew she was scheduled to work those days. On October 27, 2016, claimant experienced a migraine headache and was vomiting prior to her shift. She realized she was not going to be able to work, and, at approximately 6:30 a.m., called the employer to report her absence. Claimant

communicated her absence to a coworker without asking to speak to a manger because she was vomiting. Later on October 27th claimant sought medical treatment at a hospital.

(5) Claimant reported to work on time for her October 29th shift and worked as scheduled. On October 30th, claimant realized she was not going to be able to work her scheduled shift on October 31, 2016 because of some urgent personal business. On October 30th, claimant sent a text message to her dispatcher that she would be absent from work on October 31st. The dispatcher replied, "Okay." Transcript at 23. Claimant did not report to work for the October 31st shift.

(6) Because claimant had communicated her October 27th absence to a coworker, and her October 31st absence to a dispatcher through a text message, the employer concluded she had violated its attendance policy and considered that she had "no called, no showed" for both shifts. On November 1, 2016, the employer discharged claimant because of her attendance.

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. 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. Absences due to illness and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Barring exigent circumstances, the employer had the right to expect claimant to report to work as scheduled and notify the employer of her absences in compliance with the employer's attendance policy. Claimant knew or should have understood the employer's policy given that she received a copy of the policy at hire and it was reiterated to her when she received a final warning for a prior violation of it.

The employer discharged claimant for two violations of the attendance policy that occurred on October 27th and October 31st. The October 27th absence was due to illness. Absences due to illness are not misconduct. The employer also discharged claimant, in part, for failing to properly notify the employer of her October 27th absence because when she called to report her absence she spoke with a coworker instead of a manager, supervisor or manager on duty. There is no dispute that claimant's failure to speak to a manager, supervisor or manager on duty constituted a violation of the employer's attendance policy. For such a violation to be considered misconduct, however, it must be done willfully or with wanton negligence. Given claimant's condition on October 27th, however – a migraine headache that was severe enough to induce vomiting and required emergency medical treatment – exigent circumstances existed; it therefore does not appear likely that claimant spoke with her coworker with the intent to violate the employer's attendance policy, nor with conscious disregard of the consequences of her conduct. The October 27th violations were, therefore, not the result of misconduct on claimant's part.

Claimant sent a text message to the dispatcher to notify the employer she was going to be absent from work on October 31st, and the employer lacked evidence to rebut claimant's assertion. There is no real dispute that claimant violated the employer's attendance policy by doing so, given that the policy stated text messages were not an acceptable means of notification, and given that the dispatcher was not a manager, supervisor or manager on duty. It appears, however, that claimant's violation occurred as the result of good faith errors on her part. Claimant testified that she thought the dispatcher counted as a manager, supervisor or manager on duty and she had witnessed the dispatcher accepting text message notifications from her and from other employees. Transcript at 22. When asked whether communicating her absence to the dispatcher was acceptable, claimant replied, "Up until then [her discharge] it had been." Transcript at 14. When asked why she sent a text message instead of calling, she testified, "I thought it was okay" and that when she needed to be off work she "would message [the dispatcher] and if I couldn't get a hold of her then I would call the store. But I'd always been able to get a hold of [] my dispatcher." Transcript at 14-15. With regard to claimant's text message notifying the dispatcher of her October 31st absence, the dispatcher responded, "okay," suggesting to claimant that she had been able to "get a hold of her" and did not also need to call the store. Transcript at 23.

It appears more likely than not on this evidence that claimant sincerely, if mistakenly, believed that she had adequately notified the employer of her October 31st absence by sending a text message to the dispatcher and receiving a response that her absence was "okay," and reasonably, if mistakenly, believed her October 31st absence from work was excused. Because claimant's beliefs were reasonable, and based on a sincere but mistaken belief that she was in compliance with the employer's attendance policy, her violations of that policy was the result of a good faith error. Good faith errors are not misconduct. Therefore, to the extent claimant's discharge was based on the October 31st violations, her discharge was not for misconduct.

For the foregoing reasons, claimant is not subject to disqualification from unemployment insurance benefits because of her discharge from the employer.

DECISION: Hearing Decision 17-UI-75134 is affirmed.

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

DATE of Service: <u>March 3, 2017</u>

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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