

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0297

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 113752). The employer filed a timely request for hearing. On February 13, 2017, ALJ Lohr conducted a hearing, and on February 17, 2017, issued Hearing Decision 17-UI-77191, affirming the Department's decision. On March 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Peacehealth, a health care system of hospitals and clinics, employed claimant as a certified nursing assistant (CNA) from March 10, 2014 to October 7, 2016.

(2) The employer expected its employees to report for work as scheduled or notify it if the employee would be late or absent from work. Claimant was aware of the employer's expectations.

(3) On or about August 27, 2016, claimant gave the employer two weeks' notice of her intention to quit because working on a fixed schedule was causing her difficulty. However, the following week, the employer's cardiac unit nurse manager (CUNM) offered claimant an internal transfer to a "per diem" position within her unit that would allow claimant to set her own schedule of shifts, within the cardiac and other units. Claimant accepted the transfer on September 4, 2016. Transcript at 25.

(4) The CUNM told claimant that before she could accept a shift within her unit, she needed to work an orientation shift with an experienced member of the cardiac unit to orient her to the unit's protocols. The manager told claimant that she did not care when she scheduled the orientation shift but to schedule it with an experienced designated employee (DE). Claimant scheduled the orientation shift with a DE for the week of October 2, 2016. Between September 4 and the week of October 2, claimant continued to work shifts within her old unit because it was short-staffed.

(5) The CUNM believed that claimant had missed three previously self-scheduled orientation shifts and was unaware that claimant had scheduled the October orientation shift with DE. On or about September

30, 2016, the cardiac unit nurse manager sent claimant a letter inquiring why she had not yet attended an orientation shift, directing claimant to contact her by October 7, and informing claimant that she would assume that claimant had voluntarily resigned if claimant did not contact her by that date. Claimant never received the letter.

(6) The evening before the scheduled orientation shift, claimant learned that she had to travel out of state for a family emergency. She contacted the staffing office and let it know that she could not work the shift the next day due to her emergency. Claimant was out of state during most of the week of October 2 but returned on or about October 8 to work a previously scheduled shift within her old unit scheduled for Sunday, October 9, 2016.

(7) On October 7, 2016, the CUNM terminated claimant's employment and removed her from the employer's system because claimant had not contacted her about attending an orientation shift.

(8) On October 9, 2016, claimant reported for the scheduled work shift within her old unit. After about an hour of work, that unit's manager told claimant that she had been removed from the system and was no longer employed. The nurse manager from the old unit had contacted the CUNM at home and learned why claimant had been removed. She relayed the information to claimant who then left work.

(9) On October 18, 2016, the CUNM sent claimant an email requesting that she attend an investigatory meeting on October 21, 2016. On October 21, claimant responded that she would not be attending the meeting because she had already been terminated. The CUNM responded, "I believe there's been a misunderstanding. We are still considering you for the original position...I terminated you due to receiving no communication from you on your absences and orientation plan...I am still willing to consider you for this position. Please let me know if you're interested...If I don't hear from you by 10-28-16, you will be considered as voluntarily resigning..." Transcript at 30-31. Claimant did not respond to the employer.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. The employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011). "Work" means the continuing relationship between an employer and an employee. OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. OAR 471-030-0038(1)(a).

The parties disagreed on the nature of the work separation with the employer asserting that claimant voluntarily resigned. Transcript at 5. However, the employer's termination of claimant from its computer system on October 7 demonstrated that it was not willing to allow claimant to continue as an employee after that date. Claimant's attendance at her previously scheduled shift on October 9 demonstrated that claimant was willing to continue to work for the employer for an additional period of time after October 7. Under the above cited rules, the work separation was a discharge that occurred on October 7, 2016.

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.

Viewing the record as a whole, the employer discharged claimant because claimant failed to contact the CUNM by October 7 to explain why she had not yet attended an orientation shift as set forth in the CUNM's September 30 letter that claimant never received. However, the employer failed to show that claimant's failure to respond or attend the October orientation shift was due to anything other than a miscommunication and family emergency out of state claimant felt compelled to attend. Moreover, claimant demonstrated that she was not indifferent to the employer's interests by notifying the staffing office before she left that she would not be able to attend the orientation shift and explaining the reason why. The CUNM rightfully characterized the circumstances involved as "a misunderstanding" in her communications with claimant on October 21, 2016. On this record, the employer failed to show that claimant's apparent violations of the employer's attendance expectations were either willful or wantonly negligent.

Accordingly, the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a) and claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-77191 is affirmed.

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

DATE of Service: April 3, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.