

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0350

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 152941). The employer filed a timely request for hearing. On February 24, 2017, ALJ Frank conducted a hearing, and on March 3, 2017 issued Hearing Decision 17-UI-78122, concluding that claimant's discharge was for misconduct. On March 22, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Nall Communications, LLC employed claimant from February 2, 2016 until December 13, 2016, last as foreman of a line crew.

(2) The employer expected that claimant would provide ten days' advance notice of an intention to take a vacation, and would not take a vacation unless he had approval from his supervisor. Claimant understood the employer's expectations.

(3) Sometime before December 11, 2016, claimant and his crew were assigned to work on an out-of-town project. Claimant and the crew were advised that they would work overtime, with little time off, until at least December 16, 2016, the anticipated completion date of the out-of-town project. The employer arranged for out-of-town lodging for claimant and the crew until the project was completed. Sometime before December 11, 2016, claimant also requested, and the employer approved, a vacation for him beginning on December 19, 2016, after the out-of-town project was completed.

(4) On Saturday, December 10, 2016, a member of claimant's crew made comments in claimant's presence about claimant's inability to perform his job capably. That day, claimant left the job site and traveled back to his residence, which was 80 miles from the job site. As of December 10, 2016, claimant had worked 16 straight days and accumulated approximately 180 work hours in those 16 days. On Sunday, December 11, 2016 at 4:30 a.m., claimant sent a text message to his supervisor stating that he was not going to be at work that day and that he wanted his vacation to start that day rather than on December 19, 2016. Claimant's shift was scheduled to begin that day at 6:30 a.m. Claimant's supervisor tried to reach claimant later that day, but was not able to do so.

(5) On Monday, December 12, 2016, early in the work day, claimant phoned the employer's human resources representative. Claimant told the representative that he had concerns about his supervisor and about the comments that the crew member had made on December 10, 2016. Claimant also told the representative that he needed time off because of the long hours he had been working and that he wanted to start his vacation immediately. The representative told claimant she would "investigate the situation" and determine if the status of the out-of-town project was such that the employer "could afford" to allow claimant to have a vacation. Audio at ~19:37. The representative told claimant she would get back to him when she obtained this information. The representative did not tell claimant that his request to immediately start his vacation was denied and did not instruct him that he needed to report for work immediately or until or unless his vacation was approved. Audio at ~20:00.

(6) On Tuesday, December 13, 2016, the employer discharged claimant for trying to begin his vacation early without advance notice from the employer, because the employer believed claimant knew the importance of completing the out-of-town project on time and claimant already had an approved vacation that was scheduled to begin on December 19, 2016. Audio at ~20:20. The human resources representative never got back to claimant about his vacation request as she had promised to do before he was discharged.

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. 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).

In Hearing Decision 17-UI-78122, the ALJ concluded that the employer discharged claimant for misconduct. The ALJ reasoned that claimant left the work area on December 11, 2016 without permission, that claimant "remained unwilling to complete the project" after December 11, 2016, that the employer sustained "detriment" by claimant's absence and that claimant's willful behavior constituted "an insubordinate refusal to work." Hearing Decision 17-UI-78122 at 4. We disagree.

While claimant failed to report for work on December 11 and 12, 2016, the ALJ erred in concluding that claimant's behavior constituted an "insubordinate refusal to work." First, claimant called before his shift was scheduled to begin on December 11, 2016 to notify his supervisor that he was not going to report for work and wanted to begin his vacation early, which was not an act in apparent defiance of the supervisor's authority or that evidenced indifference to the employer's interests. Second, on December 12, 2016, presumably before his shift was scheduled to begin that day, claimant called the human resources representative to report his absence that second day and seek permission for an early start to

his vacation. Rather than denying claimant's request, instructing him to report for work immediately, telling him he was going to be discharged or even expressing disapproval of claimant's actions, the representative told claimant she would determine whether his vacation request could be allowed and would get back to him. Audio at ~19:37. Given this accommodating response from the human resources representative, it does not appear that claimant's behavior up to that point was in conspicuous violation of the employer's expectations as claimant understood them, or that claimant knew or reasonably should have been aware that the employer would consider his attempt to hasten the start of his vacation tantamount to an insubordinate refusal to work. Indeed, claimant's testimony that he would have reported for work on December 12, 2016 had he been so instructed by the human resources representative or any employer representative was un rebutted. Audio at ~11:45. Although claimant's absences from work on December 11 and 12, 2016 might have delayed somewhat the employer's completion of the out-of-town project, as the ALJ noted, the issue is not whether claimant's behavior might have contributed to this result, but whether claimant's behavior in seeking an earlier start to his vacation was a willful or wantonly negligent violation of the employer's standards as claimant reasonably understood them. On this record and in light of the human resource's representative's response to claimant's request on December 12, 2016, the employer did not meet its burden to show that claimant's behavior on December 11 and 12, 2016 was a willful or wantonly negligent violation of the employer's standards.

While the employer discharged claimant, it did not show that the discharged was caused by claimant's misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-78122 is set aside, as outlined above.¹

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

DATE of Service: April 13, 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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¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.