

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0374

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 81954). The employer filed a timely request for hearing. On March 7, 2017, ALJ Frank conducted a hearing in which claimant did not participate, and on March 9, 2017, issued Hearing Decision 17-UI-78588, affirming the administrative decision. On March 29, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From August 1 until September 30, 2016, Stonemor Group employed claimant as a family service counselor.

(2) On August 24, 2016, the employer warned claimant in writing that any future incidents of tardiness or unexcused absences would result in termination of her employment. Audio recording at 15:52.

(3) On September 29, 2016, claimant was absent because she overslept.

(4) When claimant reported for work on September 30, 2016, the employer discharged claimant for failing to call in to report she would be absent on September 29.

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) 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 discharged claimant because she had accumulated an excessive number of absences, noting that on August 24, 2016, it had warned claimant that any future unexcused absences would result in her discharge. To determine whether an individual's was for misconduct, however, we first examine the event that was the proximate cause of the discharge, *i.e.*, the event that caused the employer to decide to discharge the individual.

On September 29, 2016, claimant failed to report to work and failed to call the employer to report that she would be absent. When the ALJ asked the employer's witness if claimant would have been discharged had she told the employer she would be absent on September 29, the employer's witness testified that claimant would not have been discharged if she had made such a contact. Audio recording at 14:13. Based on this record, it appears that claimant's failure to contact the employer to report her September 29 absence was the proximate cause of her discharge. That conduct is therefore the focus of our misconduct analysis.

When misconduct is alleged, the employer has the burden to show, by a preponderance of evidence, that claimant willfully or with wanton negligence violated the employer's expectations. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer's witness was unable to present any evidence regarding what were the requirements of the employer's attendance policy, who the policy expected the employee to contact if the employee was unable to report to work, and when the employer required that contact to be made. In addition, evidence in the record indicates that claimant did not report her absence on September 29 because she overslept. The employer therefore not only failed to meet its burden to show what were its expectations regarding attendance, it also failed to meet its burden to show that claimant's failure to report her September 29 absence occurred because she consciously and knowingly violated any such expectations. Because the employer did not demonstrate that the behavior that resulted in claimant's discharge was willful or wantonly negligent, it did not establish that it discharged claimant for misconduct. Claimant is therefore not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-78588 is affirmed.

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

DATE of Service: April 10, 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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