

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0426

Hearing Decision 17-UI-79327 is Undisturbed – Application for Review Dismissed
Hearing Decision 17-UI-79523 is Reversed – No Disqualification

PROCEDURAL HISTORY: On February 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81019). On February 15, 2017, the Department served notice of another administrative decision concluding claimant was not able to work during the week including January 15 to January 21, 2017 (decision # 82744). Claimant filed a timely request for hearing regarding each decision. Shortly thereafter, claimant withdrew her request for hearing regarding decision # 82744, and on March 21, 2017, the Office of Administrative Hearings issued Hearing Decision 17-UI-79327, formally dismissing claimant’s hearing request. On March 21, 2017, ALJ Murdock conducted a hearing regarding decision # 81019, and on March 23, 2017, issued Hearing Decision 17-UI-79523, concluding claimant voluntarily left work without good cause. On April 10, 2017, Hearing Decision 17-UI-79327 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On April 11, 2017, claimant filed a late application for review with EAB regarding Hearing Decision 17-UI-79327. On April 11, 2017, claimant filed an application for review regarding Hearing Decision 17-UI-79523 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-79327 and 17-UI-79523. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0425 and 2017-EAB-0426, respectively).

EVIDENTIARY MATTER: The employer offered Exhibit 2 into evidence at the outset of the hearing regarding decision # 81019, but the ALJ did not admit it because the ALJ could not confirm that the employer provided a copy to claimant and the employer could testify to its contents. However, the employer only testified about portions of the exhibit at hearing. OAR 471-041-0090(1) (October 29, 2006) provides that EAB may consider information not received into evidence at the hearing if

necessary to complete the record. The documents submitted by the employer are relevant, and their admission into evidence is necessary to complete the record in this case. Accordingly, the employer's documents, marked as Exhibit 2, are admitted into the record. A copy of Exhibit 2 is included in the copies of this decision mailed to the parties. Any party that objects to the admission of Exhibit 2 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

Claimant submitted written argument to EAB, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching these decisions.

FINDINGS OF FACT: (1) QK Holdings, Inc., an operator of Denny's restaurants, employed claimant as a server from September 15, 2014 to December 26, 2016.

(2) The employer expected claimant to perform work as scheduled or notify the employer if and when she would be absent. Claimant was aware of the employer's expectations as a matter of common sense.

(3) On December 25, 2016, claimant was working a graveyard shift that was scheduled to end the morning of December 26. Early in the morning of December 26, claimant was experiencing excessive bleeding relating to menstruation and took her lunch break to travel to a store for feminine hygiene products. Although she intended to return to work after obtaining the necessary products, she was bleeding excessively and became very weak. She went home instead and ultimately fell asleep for an estimated 12 hours. Although she attempted to notify the employer she would not be returning to work before going home, she was unable to do so and the employer was unaware of what had occurred.

(4) On December 26, 2016, the employer discharged claimant for "walk[ing] out on her shift on 12-26-16" without notifying her manager who "was on duty at the time." Exhibit 2.

(5) On January 5, 2016, claimant had surgery to correct the problem that had caused her to leave work early on December 26, 2016.

CONCLUSIONS AND REASONS: Claimant's late application for review of Hearing Decision 17-UI-79327 is dismissed. We disagree with the ALJ regarding Hearing Decision 17-UI-79523 and conclude the employer discharged claimant, but not for misconduct.

Late Application for Review. ORS 657.270(6) required that claimant's application for review of Hearing Decision 17-UI-79327 be filed no later than April 10, 2017. It was filed on April 11, 2017, and therefore was late. OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). "A reasonable time" is seven days after those circumstances ceased to exist. OAR 471-041-0070(2)(b).

Claimant did not offer any explanation for her late application for review. Accordingly, claimant has not established good cause for the late filing, and her application for review of Hearing Decision 17-UI-79327 must be dismissed.

Work Separation. OAR 471-030-0038(2)(b) (August 3, 2011) provides that if the employee is willing to continue to work for the employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. In Hearing Decision 17-UI-79523, the ALJ concluded that claimant was not discharged but voluntarily quit work on January 2, 2017, when after attempting to contact the general manager by text about her job, claimant failed to follow-up on the general manager's response to contact her when she was on duty. Hearing Decision 17-UI-79523 at 2, 3. However, in so concluding, the ALJ ignored the general manager's own testimony and the employer's business record that unequivocally showed that the general manager terminated claimant's employment on December 26, 2016. Transcript at 13; Exhibit 2. Claimant's attempt, after December 26, to determine if she still had a job showed that she was willing to continue working for the employer, but the employer's prior decision to terminate her that on that day demonstrated that it was not willing to allow claimant to do so. Therefore, the work separation was a discharge.

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) 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. Absence due to illness or other physical or mental disabilities is not misconduct. OAR 471-030-0038(3)(b).

The employer had the right to expect claimant to work as scheduled or notify her supervisor she would be absent. On December 26, 2016, claimant violated those expectations when she failed to return to work after her lunch shift due to her medical emergency without notifying her supervisor. However, claimant's absence was due to a serious medical problem she was experiencing and absence due to illness is not misconduct. OAR 471-030-0038(3)(b). Claimant attempted to notify her supervisor she would not be returning on December 26 but was unable to reach him before falling to sleep for approximately 12 hours due to her condition. Accordingly, claimant's failure to notify the employer she would not return was not because she was indifferent to the consequences of her actions. The employer failed to establish that claimant's violations of the employer's expectations were at least wantonly negligent.

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

DECISION: Claimant's application for review of Hearing Decision 17-UI-79327 is dismissed, and remains undisturbed. Hearing Decision 17-UI-79523 is set aside, as outlined above.¹

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

DATE of Service: May 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.

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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.