

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0468

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 150316). The employer filed a timely request for hearing. On April 4, 2017, ALJ A. Mann conducted a hearing, and on April 5, 2017 issued Hearing Decision 17-UI-80319, concluding the employer discharged claimant for misconduct. On April 24, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) United Way of Columbia Willamette employed claimant as a finance and resource development coordinator from August 17, 2015 to December 12, 2016.

(2) The employer expected claimant to report to work as scheduled, work at the office unless preauthorized to work at home, and notify the employer if she was going to be absent or tardy. The employer's policy provided that its "assets and property, including equipment, supplies, and facility should be used in a reasonable and prudent way for organizational business purposes." Transcript at 24.

(3) The employer had concerns about claimant's punctuality and attendance. She had a history of tardy arrivals, absences and working from home without being preauthorized to do so. The employer talked to claimant about her attendance on at least two occasions, reminded her to notify the supervisor if she was going to be out of the office, and noted the issue on her six-month performance evaluation.

(4) The employer's business was closed on December 3, 2016, but claimant entered the employer's building at 2:08 p.m., 2:23 p.m., 3:48 p.m., 9:39 p.m. and 11:32 p.m. On Sunday, December 4, 2016, claimant entered the building at 1:11 a.m. and 6:44 p.m.

(5) On December 5, 2016, the employer scheduled claimant to work. At 6:54 a.m., claimant sent the employer an email before her shift to report that she was ill and would be absent from work. Claimant did not respond to voicemails her supervisor sent her throughout the day. At 7:04 p.m. and 9:47 p.m., claimant entered the employer's building.

(6) On December 6, 2016, the employer scheduled claimant to work. Claimant was absent again. She wanted to work from home but had difficulty logging in and was in contact with tech support about her access. Because of her technical difficulties she did not make contact with her supervisor until the supervisor called her that afternoon, at which time claimant reported that she was ill.

(7) The employer realized on December 6, 2016 that claimant had been entering the building during hours she was not working, and disabled claimant's keycard access to the building. On December 6, 2016, at 9:27 p.m., claimant attempted to enter the employer's building but could not.

(8) On December 7, 2016, the employer scheduled claimant to work. Claimant notified the employer prior to her shift that she would be absent due to illness. She did not return calls to the employer during that day.

(9) On December 12, 2016, the employer scheduled claimant to work. Claimant was again absent from work without notifying the employer before her shift. Later that day she spoke with her supervisor and went to the employer's building attempting to pick up some work so she could work from home. The employer met with claimant about accessing or attempting to access the building after-hours. Claimant explained that she had been staying in her car when she argued with her boyfriend, and had parked in front of the employer's building and entered it to use the restroom or for other personal reasons. On December 12, 2016, the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that claimant's discharge was 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.

The ALJ concluded that claimant's discharge was based on her after-hours entry into the employer's building on days she was absent from work, and that the discharge was for misconduct. Hearing Decision 17-UI-80319 at 4. The ALJ reasoned that claimant had "received the employer's policy and knew or should have known about the employer's expectations" that she not enter the employer's building after-hours. The ALJ then found that although claimant testified she entered the building to retrieve work, the timing and frequency of her entries were inconsistent with that explanation, and did not adequately explain why she needed to pick up work at night. In addition, the ALJ noted that claimant did not report hours worked on the occasions she entered the building. The ALJ concluded that all these facts considered together, meant all of claimant's entries into the building were for "personal purposes" that violated the employer's expectations. *Id.* We disagree.

The employer alleged that claimant violated its policy by entering the building after-hours for personal reasons. Although claimant testified that some of her after-hours entries were to pick up work, she also testified that she entered the building for personal reasons such as using the bathroom or getting food from her desk. The employer's policy, while requiring that its property and facility "should be used in a reasonable and prudent way for organizational business purposes," did not expressly prohibit employees from entering the building after-hours, providing that the after-hours use of the building did not amount to an "imprudent" or "unreasonable" use of the building. Not only is there little evidence suggesting that claimant was responsible for taking anything that did not belong to her, misusing the employer's equipment, causing a loss to the employer, or damaging the employer's property when accessing the building after-hours, the record also affirmatively shows that claimant knew of other employees who had entered the building after-hours, and that she "was never told explicitly that I couldn't go in over the weekend." Transcript at 36, 37. Claimant had to use a keycard checked out to herself to access the building, which makes it unlikely that she would have done so, especially with such frequency, if she understood it would violate the employer's expectations. Given that the employer's policy was vague, not routinely enforced, and claimant did not know she was violating the employer's policy by accessing the building after-hours for the reasons she accessed it, the record fails to show that claimant's conduct was either a willful or conscious violation of the standards of behavior the employer expected of her.

Claimant's discharge was, therefore, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-80319 is set aside, as outlined above.¹

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

DATE of Service: May 15, 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.