

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0488

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 120410). The employer filed a timely request for hearing. On April 11, 2017, ALJ Sgroi conducted a hearing, and on April 12, 2017 issued Hearing Decision 17-UI-80870, affirming the Department's decision. On May 1, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a parts specialist from April 9, 2016 to February 6, 2017.

(2) The employer required two hours' advance notice of any foreseeable absences, and as much notice as practicable for unforeseeable absences. The employer provided claimant with a copy of its attendance policy.

(3) The employer considered claimant to have been excessively absent from work. On January 23, 2017, the employer issued claimant a final warning for violating its attendance policy, and notified him that additional instances could result in his discharge.

(4) On February 4, 2017, claimant was absent from work and did not notify the employer of his absence until after his scheduled shift began. On February 5, 2017, claimant worked as scheduled. On February 6, 2017, approximately fifteen minutes before his scheduled shift was to begin, claimant called the manager to report that he would be absent from work.

(5) On February 6, 2017, the employer discharged claimant for failing to report his absence from work two hours in advance of his scheduled shift.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

Although the employer had reasonable concerns about claimant's attendance and prior failures to properly notify the employer of his absences, the employer but did not decide to discharge claimant until February 6th, when he provided only fifteen minutes' notice of his absence from work. That incident was therefore the proximate cause of claimant's discharge, and is the proper focus of the initial misconduct analysis. The employer has the burden to prove its allegations of misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On February 6, 2017, claimant did not provide the employer with two hours' notice of his absence, and instead provided the employer with only fifteen minutes' notice. For claimant's conduct to have violated the policy, however, the employer must show that his absence on February 6th was either foreseeable, thus requiring claimant to have provided at least two hours' notice, or in the alternative that it would have been practicable for claimant to have provided the employer with more than fifteen minutes' notice. The employer did not make the necessary showing; in the absence of evidence that claimant violated the employer's expectations by providing only fifteen minutes' notice of his absence on February 6th, the employer has not proven that claimant's discharge was for willful or wantonly negligent misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-80870 is affirmed.

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

DATE of Service: May 18, 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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