

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0499

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged not for misconduct within 15 days of a planned voluntary leaving without good cause (decision # 80833). Claimant filed a timely request for hearing. On April 5, 2017, ALJ Amesbury conducted a hearing at which the employer failed to appear, and on April 6, 2017 issued Hearing Decision 17-UI-80469, concluding the employer discharged claimant not for misconduct. On April 26, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review of Hearing Decision 17-UI-80469, the employer requested that a new hearing be held to allow the employer to participate. The employer's statement is construed as a request to have EAB consider new information regarding claimant's work separation under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information not offered into evidence at the hearing if the party presenting the information shows that circumstances beyond the party's reasonable control prevented the party from offering the information at the hearing. The employer did not offer any information regarding its failure to appear, and has not asserted that factors or circumstances beyond its reasonable control prevented it from doing so. EAB therefore did not consider the employer's new information when reaching this decision.

FINDINGS OF FACT: (1) Wackenhut employed claimant from December 29, 2015 until February 1, 2017.

(2) Before February 1, 2017, claimant had not received any warnings from the employer for attendance or other behavioral issues.

(3) In January 2017, claimant gave her site manager a letter stating she would quit work on February 17, 2017. Claimant was seeking work with the employer in Arizona, but did not have a job offer from the employer in Arizona when she submitted her notice of resignation.

(4) On January 30, 2017, claimant began to drive to work during a winter storm. Claimant was not able to drive safely in the winter driving conditions. Midway to work, claimant pulled off the road, called her shift supervisor, and reported to the supervisor that she was unable to report to work that day because she was unable to drive safely to work due to the road conditions and because she was experiencing a panic attack. Claimant's site manager called claimant shortly after claimant had called her shift supervisor and expressed to claimant that he was dissatisfied that claimant did not report to work that day.

(5) On February 1, 2017, claimant's site manager called claimant and discharged her, effective immediately. The site manager did not state the reason for the discharge.

CONCLUSIONS AND REASONS: EAB agrees with the ALJ and concludes that the employer discharged claimant, but not for misconduct.

At hearing, claimant argued that she did not intend to quit work on February 17, 2017, but, rather, wanted to transfer to a job with the same employer in Arizona. Audio Record at 30:35 to 31:02; 33:08 to 34:32. Claimant asserted that she was permitted to "amend" her final date of work if she was unable to find a timely transfer option with the employer in Arizona. Audio Record at 21:49 to 22:10. However, we need not resolve whether claimant's notice of resignation was a voluntary quit because the record shows that the employer discharged claimant on February 1, 2017, more than 15 days in advance of claimant's planned date to leave work on February 17, 2017. While ORS 657.176(8) sets forth the requirements for when a discharge that intervenes between an announced voluntary leaving and the planned date of the leaving may be disregarded and the work separation treated as if the discharge had not occurred, that exception requires that the discharge occur no more than 15 days before the date of the planned voluntary leaving. ORS 657.176(8)(c). Given that claimant's discharge occurred 16 days before the date that would have been claimant's last day, the exception of ORS 657.176(8) does not apply to this work separation regardless of whether claimant intended to quit on February 17. Accordingly, whether claimant is disqualified from benefits depends upon whether she was discharged for misconduct connected with work on February 1.

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

Because claimant was discharged two days after she called in and missed work, and her site manager was dissatisfied that claimant had missed work, we infer based on the record that the employer discharged claimant due to missing work on January 30, 2017. We also infer that the employer expected claimant to report to work for her scheduled shifts, and that claimant understood that expectation as a matter of common sense. Claimant missed work on January 30, 2017 because she was unable to drive to work due to inclement weather and a panic attack. Given that claimant did not know she would be unable to drive to work until she was already driving to work, it was not unreasonable for claimant to

wait until the morning of January 30 to report that she would be absent that day. Absent evidence of a safe alternative for claimant to travel to work, the inability to report to work due to unsafe driving conditions is not the result of wanton negligence. Moreover, claimant was having a panic attack on January 30 and absences due to illness or other physical or mental disabilities are not misconduct. The employer did not meet its burden to establish that it discharged claimant for willful or wantonly negligent behavior.

The employer discharged claimant, but not for misconduct. She is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 17-UI-80469 is affirmed.

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

DATE of Service: May 22, 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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