

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0981

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110040). The employer filed a timely request for hearing. On June 13, 2017, ALJ Meerdink conducted a hearing at which claimant failed to appear, and issued Hearing Decision 17-UI-85544, affirming the Department's decision. On June 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On July 18, 2017, EAB issued Appeals Board Decision 2017-EAB-0749, reversing Hearing Decision 17-UI-85544 and remanding the matter to the Office of Administrative Hearings (OAH) for further proceedings. On August 9, 2017, ALJ Meerdink conducted a hearing at which claimant again failed to appear and issued Hearing Decision 17-UI-89998, again concluding that the employer discharged claimant, not for misconduct. On August 16, 2017, the employer filed an application for review of Hearing Decision 17-UI-89998 with EAB.

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

FINDINGS OF FACT: (1) Dick's Sporting Goods, Inc. employed claimant from October 2016 until February 22, 2017 as a part time cashier.

(2) The employer's attendance policy was based on a point system and provided for progressive discipline. Employees accrued points for each incident of tardiness, absence with notice, and absence without notice ("no call, no show"). Exhibit 1. Claimant understood or should have understood the employer's policy from verbal and written warnings she received from the employer.

(3) On February 16, 2017, claimant received a final written warning based on accumulated points from incidents of tardiness and absences with notice. Claimant had no absences without notice.

(4) Claimant did not have a set work schedule. Employees' written schedules were posted in the employer's office two weeks in advance. The employer scheduled claimant to work on February 20, 2017. Claimant did not report for work or contact the employer that day.

(5) On February 22, 2017, claimant reported to work. The store manager discharged claimant for accumulating more points than the employer permitted under its attendance policy when she failed report to work or contact the employer on February 20.

CONCLUSIONS 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because she had accrued sufficient violations to warrant discharge under the employer's attendance policy. Because claimant's "no call, no show" on February 20, 2017 caused the excessive accrual of attendance points that resulted in her discharge, we focus on this event to determine whether claimant's discharge was misconduct. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge).

On February 20, claimant did not report to work for her scheduled shift or contact the employer regarding her absence. Claimant's work schedule was posted in the employer's office. As a matter of common sense, claimant knew that the employer expected her to check the schedule and note the days and times she was scheduled to work. However, although the record shows claimant failed to report to work, the record fails to show that claimant consciously failed to report to work without notifying the employer on a day that she knew she was scheduled to work, as opposed to unintentionally misreading the schedule for that day or missing work for some other reason not attributable to a conscious disregard of the employer's interest. Claimant's mere absence and failure to call the employer, especially where she had no prior absences without notice, are insufficient for us to infer that she knowingly missed work and failed to call the employer on February 20. The record therefore fails to establish that claimant's "no show, no call" was willful or the result of wanton negligence, as defined in OAR 471-030-0038(1)(c), and not mere carelessness or ordinary negligence, which does not constitute misconduct.

The employer therefore failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-89998 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 11, 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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