

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1024

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72807). Claimant filed a timely request for hearing. On August 4, 2017, ALJ S. Lee conducted a hearing, and on August 15, 2017, issued Hearing Decision 17-UI-90462, concluding the employer discharged claimant, but not for misconduct. On August 28, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) New Hope Foursquare East Salem employed claimant as a cook from October 26, 2015 to February 27, 2017.

(2) The employer expected its employees to report for work as scheduled and notify the employer if the employee was going to be absent. The employer also expected its employees to perform duties as assigned to them and to follow instructions given to them by supervisors. Claimant was aware of and understood the employer's expectations.

(3) Claimant's usual work schedule was Monday through Friday from 10:30 a.m. to 12:00 p.m. and 12:30 p.m. to 2:30 p.m. Claimant's duties as a cook were varied and included discarding food from the employer's refrigerator that was older than the expiration dates, properly cleaning dishes and preparing lunches and snacks for preschool children that were served by the employer.

(4) In December 2016, claimant's car became inoperable due to blown head gasket which claimant was unable to have repaired due to the excessive cost. Subsequently, claimant had to rely on others for work transportation and those individuals often were late in taking her to work. Public transportation was unavailable to claimant. She also became pregnant about that time and was often too sick to report for work on time or at all. Claimant "did her best" to work as scheduled or notify her supervisor when she would be absent. Audio Record ~ 30:30 to 31:00. Sometimes claimant was unable to use her cell phone

because it was inoperable due to nonpayment. The employer also noticed that claimant occasionally made errors in completing her assigned work duties. On December 29 2016, the employer issued claimant a written warning for “excessive tardiness and absences and not completing required tasks proficiently.” Audio Record ~ 9:30 to 10:00.

(5) On January 27, 2017, claimant was absent from work without notifying the employer and on January 30 was absent from work without giving the employer advance notice. On January 31, 2017, the employer gave claimant a written warning for those reasons and advised claimant that her job was in jeopardy if violations of the employer’s expectations regarding attendance and notice continued.

(6) On February 10, 2017, the employer issued claimant another warning for additional absences, tardiness and occasionally failing to complete assigned tasks. Claimant again was warned that continued work performance problems could jeopardize her job.

(7) On February 23, 2017, claimant reported late for work at 10:51 a.m. because claimant’s ride to work was late that day. The employer also concluded that claimant had not completed her assigned duties for breakfast and snacks the prior evening, February 22, 2017.

(8) When claimant reported for work on February 27, 2017, the employer discharged claimant for her tardiness on February 23, 2017 and her alleged failure to complete her breakfast and snack duties on February 22, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would probably result in a violation of the employer’s expectations. Here, the employer failed to satisfy that evidentiary burden.

The employer discharged claimant for “excessive absences, lateness and failure to follow instructions” following her alleged failure to complete her breakfast and snack duties on February 22 and her tardiness on February 23, 2017. However, claimant denied that she failed to prepare breakfast and snacks on February 22, 2017, which testimony differed from that of the employer’s witness. Cf. Audio Record ~ 11:30 to 12:15; 31:00 to 31:30. In the absence of evidence demonstrating that either witness was not credible, claimant’s denial was at least as persuasive as the employer’s assertion. Where the

evidence is no more than equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its evidentiary burden. Consequently, on this matter we based our findings on claimant's evidence and conclude that claimant did not violate the employer's expectation that she follow its instructions regarding breakfast and snack preparation on February 22, 2017.

With regard to claimant's alleged tardiness on February 23, 2017, claimant did not dispute that she reported late to work that day. However, she explained that her car was still inoperable on that date and that she was probably late because she had to rely on someone else for a ride. When asked by the ALJ, the employer's witness admitted that she didn't ask claimant why she was late to work on February 23. Audio Record ~ 19:30 to 19:55. As there was no dispute that public transportation was not available to claimant, more likely than not, claimant was tardy on February 23, 2017 because she was unable to arrange for timely transportation that day and had no other options. Although claimant violated the employer's expectation regarding timeliness by arriving late for work, the employer failed to show that claimant's violation was willful or the result of wanton negligence.

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

DECISION: Hearing Decision 17-UI-90462 is affirmed.

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

DATE of Service: September 26, 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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