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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1174

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 105023). The employer filed a timely request for hearing. On September 18, 2017, ALJ Amesbury conducted a hearing at which claimant did not appear, and on September 19, 2017 issued Hearing Decision 17-UI-92832, affirming the Department's decision. On October 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented new information with the apparent intention of supplementing the testimony of the two witnesses that appeared on its behalf during the hearing. While EAB is authorized to consider new information under certain circumstances, the party offering the new information must show that factors or circumstances beyond it or its witnesses' reasonable control prevented them from offering that information at the hearing. OAR 471-041-0090(2) (October 29, 2006). The employer did not explain why it or its witnesses was prevented from offering the information that was contained in the written argument. Because the employer did not meet the requirements set out in OAR 471-041-0090(2), EAB did not consider the employer's new information. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Shamrock Foods Company employed claimant as a warehouse worker from January 30, 2017 until April 20, 2017. Claimant worked a shift that started at noon.

(2) The employer expected claimant to notify his supervisor, by a voice call, at least two hours in advance of the beginning of his shift if he was going to be absent due to illness. The employer prohibited notification of absences by text message.

(3) On Monday, April 3, 2017, claimant's supervisor exchanged text messages with claimant when claimant did not report for work. In the exchange, claimant informed the supervisor that he was ill and

not going to report for work. Exhibit 1 at 2-3. Claimant apologized for not having reached the supervisor by voice call to report his absence. Claimant stated he had tried to call the supervisor earlier, but that "for some reason, my phone doesn't want to make calls right now." Exhibit 1 at 2. Claimant was not warned about the manner in which he had provided notice of this absence to the supervisor.

(4) On Monday, April 17, 2017, claimant sent a text message to his supervisor at 10:23 a.m. stating that he had tried to reach the supervisor by voice to notify him that he was going to be absent from work that day, but "my phone isn't wanting to work right now." Exhibit 1 at 5. On Tuesday, April 18, 2017, claimant was not scheduled to work. On Wednesday, April 19, 2017 at 10:16 a.m., claimant notified his supervisor by text message that he was still ill and not going to report for work that day. Exhibit 1 at 5. Claimant concluded the text message by stating, "If you want me to give you a call [to report my absence], let me know and I'll text someone to bring me their phone. Exhibit 1 at 5; Audio at ~30:19. The supervisor did not reply to claimant's text message because he had been told never to respond to text messages about employment-related matters. Audio at ~3:41.

(5) Prior to April 20, 2017, the employer had not warned claimant or taken disciplinary action against claimant for any reason. On April 20, 2017, the employer discharged claimant for notifying his supervisor by text message on April19, 2017 that he was going to be absent and for not giving that notice at least two hours in advance of the start of his scheduled shift.

CONCLUSIONS AND REASONS: We agree with the Department and 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. Good faith errors 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).

Although the employer's witnesses testified about the employer's expectations with respect to notifying a supervisor of an absence, that notice was to be provided at least two hours in advance of the start of a shift and that notice must be by a voice call and not by text message, the witness was unable to state whether that expectation was ever communicated to claimant. Audio at ~22:07, ~22:14. From the exhibit that the employer proffered, it appeared that on April 3, 2017 claimant had notified his supervisor by text message of his absence that day because he was unable to make voice calls with his phone, and based on the witness's testimony that claimant had no disciplinary warnings prior to April 20, 2017, the employer likely did not tell claimant at that time that there were no circumstances under which he was allowed to provide notices of absence by text message. Exhibit 1 at 2-3; Audio at ~25:59. When claimant again notified his supervisor by text message on April 17, 2017 that he was going to be absent from work and that his phone still would not allow him to make voice calls, it does not appear that the employer warned him that such notice was inadequate under those circumstances. On April 19, 2017, when claimant's phone still would not allow him to place a voice call to notify his supervisor of his absence that day, it appears that claimant's inability to give notice by a voice call to his supervisor

was caused by an exigency that was beyond his reasonable control. Claimant made reasonable efforts to comply with the employer's expectation when he stated in his text message that he would try to obtain a phone to make a voice call if the supervisor insisted on voice notification. As such, even if claimant understood the employer's expectations, claimant's behavior was not a wantonly negligent violation of the employer's standards.

In addition, since claimant's supervisor had allowed claimant to give text message notice of absences on two recent days when his phone would not allow him to place voice calls without apparently issuing a warning to him, claimant had a rational basis for believing on April 19, 2017 that the employer would permit him to deviate from a strict application of its expectation that he provide notices of absence by voice call if the voice call feature of his phone was not functioning. Accordingly and alternatively, that claimant provided notice of his absence on April 19, 2017 by a text message was, at worst, excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b), since claimant had a credible basis for believing that his supervisor condoned that form of notification, at least under the circumstances of an inability to make voice calls on his phone.

It is undisputed that claimant provided text message notice to his supervisor of his absence at on April 19, 2017 at 10:16 a.m., which violated the employer's two hour notice requirement by 16 minutes. However, the employer did not present evidence ruling out that claimant had first tried to reach his supervisor by voice call in sufficient time to give the required two hours of notice, and this abortive attempt delayed his transmission of the text message and caused it to fall outside the two hour window. As such, the employer did not show that the 16 minute late notice of absence that claimant provided was the result of a willful or wantonly negligent violation of the employer's standards.

Although the employer discharged claimant, it did not show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-92832 is affirmed.

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

DATE of Service: November 7, 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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