

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1206

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83823). Claimant filed a timely request for hearing. On September 22, 2017, ALJ Janzen conducted a hearing, and on September 26, 2017 issued Hearing Decision 17-UI-93328, affirming the Department's decision. On October 13, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Select Home Care employed claimant as a caregiver from October 9, 2012 to May 19, 2017.

(2) The employer expected claimant to report to work for scheduled shifts on time, or notify the employer if he was going to be late or absent. Claimant understood the expectations. Since 2016, claimant had several attendance problems and got confused about the work schedule; the employer had in the past warned him for failing to notify the employer that he would be arriving late to work and failing to work shifts he had agreed to work, and reminded him to check his work schedule.

(3) The employer initially scheduled claimant to work at 7:00 p.m. on May 19, 2017. On May 9, 2017, claimant went to the library and used a computer to print a copy of his work schedule. Employees' work schedules were subject to change "continuously," and on May 18, 2017, the employer rescheduled claimant to report to work at 7:00 a.m. on May 19th instead of 7:00 p.m.¹ On May 19, 2017, claimant

¹ Audio recording at ~ 42:05.

failed to report to work at 7:00 a.m. and did not notify the employer that he would be absent that day. At the time of the missed shift, claimant was not aware or did not remember that the employer had changed his work schedule.

(4) The employer tried for several hours to reach claimant after he missed his shift, but claimant did not respond to the employer's calls. When the employer reached claimant, claimant said he did not know he had been scheduled to work at 7:00 a.m. The employer believed claimant had been adequately informed of the 7:00 a.m. shift and discharged him for failing to report to work or notify the employer that he would be absent.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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. The employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded that claimant's discharge was for misconduct, finding as fact that "[t]he employer confirmed a shift change with claimant the day before [May 19th] that rescheduled his start time from 7:00 p.m. to 7:00 a.m."² The ALJ reasoned that "[w]hile claimant testified that he believed his shift started at a different time that day, the record established that the employer contacted claimant the day before to confirm the start time of his shift. Claimant should have been aware of his shift's start time and his failure to report for work was, therefore, wantonly negligent."³ We disagree with the ALJ that "the record established" claimant knew his May 19th work schedule had changed.

There is no dispute in this case that claimant failed to report to work on May 19th and failed to notify the employer of his absence, thereby violating the employer's expectations. In order for claimant's violation to constitute misconduct and disqualify him from receiving unemployment insurance benefits, however, the employer must also prove that it is more likely than not that claimant's violation was the result of willful or wantonly negligent conduct on his part.

² Hearing Decision 17-UI-93328 at 1-2.

³ *Id.* at 3.

In this case, neither party presented documentary evidence of claimant's work schedule, the date it was changed, or the method by which the employer communicated the schedule change to claimant. The employer's witness provided hearsay evidence that the scheduling coordinator called claimant on May 18th and spoke to him about the schedule change for his May 19th shift so he would have known he was to report to work at 7:00 a.m. instead of 7:00 p.m.⁴ Claimant disagreed with the employer's account, and testified that although he had received calls changing his work schedules in the past, not only did he not recall receiving a conversation with anyone about his schedule on May 18th, his phone records did not show that he had received such a call.⁵ Both parties' testimony was plausible and earnest; absent a basis for finding one party's testimony more credible than the other, the evidence about whether or not claimant knew he was scheduled to work at 7:00 a.m. on May 19th, and, therefore, the evidence about whether or not claimant's absence and failure to notify the employer that he would be absent from work were willful or wantonly negligent, is no better than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has not met its burden.

We therefore conclude that claimant's May 19th violation of the employer's expectations was not willful or wantonly negligent, and claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-93328 is set aside, as outlined above.⁶

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

DATE of Service: November 15, 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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⁴ Audio recording at ~ 42:00.

⁵ Audio recording at ~ 50:00.

⁶ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.