

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1227

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On September 15, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90836). Claimant filed a timely request for hearing. On October 2, 2017, the Office of Administrative Hearings issued notice of a hearing scheduled for October 16, 2017 at 2:30 p.m. to the parties' addresses of record with the Department. On October 16, 2017, ALJ Seideman conducted a hearing, at which the employer failed to appear, and on October 17, 2017, issued Hearing Decision 17-UI-94687, concluding the employer discharged claimant, but not for misconduct. On October 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Blue Nile Sewing Contractors Inc. employed claimant as a production worker from April 2007 to approximately August 24, 2017.

(2) On Friday, August 18, 2017, claimant worked four hours at the employer's place of business before the employer sent her home after explaining that there was no work for her.

(3) On Saturday, August 19, 2017, the employer left claimant a message explaining that there was no work for her and not to come in on Monday, August 21. The employer's message claimant led claimant to believe that its business was slow and there would be no work for her until the employer contacted her. On Monday, August 21, claimant filed a claim for unemployment insurance benefits.

(4) Claimant received no calls from the employer during the week of August 21. On August 24, 2017, claimant called the employer's office to inquire about whether there would be work for her during the week of August 28, 2017. The employer did not answer or return claimant's call.

(5) On August 28, 2017, claimant went into the employer's place of business to inquire about whether there was work for her that week. The employer's representative "was very angry that [claimant] had

gone to unemployment” and told her that her job was terminated because claimant “didn’t call” the week before. Transcript at 5-6.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving; if the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so, the separation is a discharge. OAR 471-030-0038(2) (August 3, 2011).

The administrative decision states that the employer discharged claimant on August 24, 2017 because she did not call in or report for her scheduled shifts. Record Document. However, the hearing record shows that after claimant was sent home early on August 18 due to lack of work and then contacted the next day to not report for work on August 21 for the same reason, the employer led claimant to believe there would be no work for her until the employer contacted her. By calling the employer on August 24 to inquire about possible work the next week, claimant demonstrated that she was willing to continue to work for the employer. Because the employer did not return claimant’s call or allow her to continue to work on or after she called on August 24, 2017 or when she reported to the employer’s place of business on August 28, 2017, the work separation was a discharge.

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) 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).

The employer did not appear at hearing and thus, presented no evidence. Based on claimant’s testimony, the employer discharged her for the stated reason that she “didn’t call” in for work the week before, which is contrary to claimant’s sworn testimony that she did. Although the employer may have had its own reason or reasons to discharge claimant, the record fails to show that it did so because claimant consciously violated a known and reasonable employer expectation.

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 this work separation.

DECISION: Hearing Decision 17-UI-94687 is affirmed. *Decisión de la Audiencia 17-UI-94687 queda confirmada.*

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

DATE of Service: November 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.