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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
2018-EAB-0384

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154823). Claimant filed a timely request for hearing. On April 6, 2018, ALJ Turner conducted a hearing, and on April 12, 2018, issued Order No. 18-UI-107197, affirming the Department's decision. On April 17, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Sunnyside Memory Care Community employed claimant, last as a care partner, from June 4, 2017 to January 8, 2018.

(2) The employer had a written attendance policy that required employees to report for work as scheduled or notify their supervisor directly, in advance of their shift, when they were unable to do so. Exhibit 3. The policy provided that phone messages, emails and text messages were not acceptable forms of notification. The policy also provided that a failure to report for work for a scheduled shift without notice would be deemed a "no call/no show" and considered self-termination. Exhibit 3. Claimant acknowledged her receipt of a copy of the employer's policy at hire.

(3) On January 2, 2018, claimant became ill during her shift and notified her supervisor (M), who allowed her to go home before the end of her shift. Claimant was scheduled to work on January 3, but told the employer's executive director (P) in advance of her shift that she was ill and unable to work. Claimant was next scheduled to work on January 5, but again told the employer's executive director (P) in advance of her shift that she was ill and unable to work. On that day, claimant also texted a co-

worker (C) that she was ill and would not be at work, because she understood (C) was responsible for scheduling a replacement to cover claimant's shift.

(4) Claimant's illness worsened, and on January 6, 2018, claimant went to a hospital emergency room where she was diagnosed with the flu, prescribed medication and given a medical note advising that she should remain out of work until her fever resolved and she felt sufficiently recovered from the flu. Exhibit 1. Claimant was not scheduled to work on January 6 but was scheduled to work on January 7, 8, 9 and 12, 2018.

(5) On January 7, 2018, claimant remained extremely ill and had no one to assist her. At 10:49 a.m. and 12:10 p.m., (C) texted claimant and asked her if she was going to make it to work for her shift, scheduled to begin at 2:00 p.m. Claimant responded to the text, "No I have the flu just got out of the hospital they started me on new medicine so it will be awhile." Exhibit 1. Claimant did not call anyone at the employer because she was extremely ill and believed that after her responsive text to the person responsible for scheduling her replacement the employer would know she remained ill, would not be in that day, and it "[would] be a while" before she could return. Transcript at 42-45. Although someone at the employer apparently attempted to contact claimant by phone, claimant was not aware of the call and did not answer. Later that day, the employer directed its controller to process claimant's final check because it concluded that under its policy, claimant had self-terminated as a "no call/no show." Transcript at 13-14.

(6) On January 8, 2018, claimant did not report for work or contact the employer because she remained extremely ill and assumed the employer was aware that she had been in the hospital, was on medication and it "[would] be a while" before she was able to work. *Id.* That day, the employer discharged claimant for being a "no call no show" on January 7 and 8, 2018. Exhibit 3.

(7) On January 12, 2018, claimant felt better and reported for work with the medical note from the hospital emergency room. However, when she arrived, she was told that she had been "terminated" previously as a no call no show and the employer would not change its decision. Transcript at 57.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

Work Separation. 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. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). By reporting for work as scheduled on January 12 with the medical note from the hospital, claimant demonstrated that she was willing to continue to work for the employer and by notifying claimant that it had previously ended her employment as a "no call/no show", the employer demonstrated that it would not allow her to do so. The work separation therefore was a discharge.

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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, 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). 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 violate the employer's expectation.

The employer discharged claimant, in part, for failing to report to work as scheduled on January 7 and 8, 2018. There was no dispute that claimant was ill on each of those days, and unable to work. Under OAR 471-030-0038(3)(b), claimant's absences from work did not constitute misconduct.

The employer also discharged claimant for failing to directly notify a supervisor, in accordance with its written attendance policy, that she would be absent from work on January 7 and 8, 2018. In Order No. 18-UI-107197, after finding that claimant did not call in on any of those days to report that she would be absent, the ALJ concluded that the employer discharged claimant for misconduct, reasoning,

> Claimant asserted at hearing that she was so ill she was unable to call the employer to inform them of her absence. This testimony is not persuasive. If claimant was able to use her phone to send a text to a co-worker, she could have used her phone to call her supervisor. When claimant failed to call or come in to work on January 7 [or] 8…, claimant knew or should have known that she was violating the employer's policies and reasonable expectations. As such, claimant's conduct was, at a minimum, wantonly negligent.

Order No. 18-UI-107197 at 4. We disagree and conclude the employer failed to meet its burden of proof.

The employer concluded based on claimant's receipt of and training regarding its attendance policy at hire and her past compliance with the requirement that she notify a supervisor in person if she was going to be absent from work due to illness, that she simply disregarded her obligation to notify the employer as required on January 7 and 8. However, the employer did not dispute claimant's assertion that she was hospitalized for her illness on January 6, remained extremely ill on January 7 and 8 and diligently responded to a text from its scheduler on January 7 "wondering if you're gonna make it today for swing?" by stating that she would not because she had "just got out of the hospital they started me on new medicine so it will be awhile." Exhibit 1; Transcript at 43-45.

Where misconduct is alleged, the employer has the burden to show, by a preponderance of the evidence, that claimant willfully or with wanton negligence violated a reasonable employer expectation. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Such a showing requires more than evidence of a mistake or failure to exercise due care; it requires evidence of a willful disregard of, or 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 her conduct* and knew or should have known her conduct would probably result in violation of standards of behavior the employer had the

right to expect of her.[1] Willful or wantonly negligent conduct may not be inferred from results alone. On this record, even if claimant violated the employer's notification expectation in question on January 7 and 8, her conduct did not demonstrate conscious indifference to the employer's interests and was understandable given what had occurred over the previous week and her contact with the scheduler on January 7. Accordingly, the employer failed to meet its burden to show that claimant's conduct was at least wantonly negligent.

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

DECISION: Order No. 18-UI-107197 is set aside, as outlined above.[2]

J. S. Cromwell and S. Alba;
D. P. Hettle, not participating.

DATE of Service: <u>May 22, 2018</u>

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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[1] *See* OAR 471-030-0038(1)(c); *see also Appeals Board Decision,* 12-AB-0737, April 9, 2012 (absent evidence that claimant was conscious he was not paying close enough attention, his failure to pay attention was not wantonly negligent); *Appeals Board Decision*, 12-AB-0229, February 23, 2012 (absent evidence that claimant was conscious she was making a mistake at the time she made it, her mistake was not wantonly negligent); *Appeals Board Decision*, 11-AB-0810, March 24, 2011 (absent evidence that claimant was conscious that she was failing to be careful, the failure was not wantonly negligent); *Appeals Board Decision*, 11-AB-0777, March 17, 2011 (absent evidence that claimant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Appeals Board Decision*, 10-AB-1426, June 14, 2010 (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Appeals Board Decision*, 10-AB-0949, May 14, 2010 (absent evidence claimant's failure to read restricted delivery label was conscious, failure was not wantonly negligent).

[2] 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.