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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-0445

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 22, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 162606). The employer filed a timely request for hearing. On April 4, 2018, ALJ Snyder conducted a hearing, and on April 6, 2018 issued Order No. 18-UI-106848, affirming the Department's decision. On April 25, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument to EAB but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For that reason, EAB did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant as a delivery specialist from February 7, 2017 until December 27, 2017.

(2) The employer expected employees to call in to report an absence at least two hours before their shift started, and any failure to do so would be considered a "no call/no show." The employer's attendance policy provided that an employee who was a "no call/no show" on three consecutive days would be discharged. Claimant understood the employer's expectation.

(3) Claimant lived in Sandy, Oregon and commuted to work using his truck. In early to mid-December 2017, claimant had the transmission in his truck repaired. After the repair, claimant continued to experience problems with the transmission. On December 20, 2017, claimant drove his truck to Portland, Oregon and the transmission began spontaneously popping out of gear. On December 22, 2017, claimant drove his truck to work and, during his drive home, the transmission in the truck started grinding and continued jumping out of gear. After that day, the truck was not drivable. Claimant's next scheduled work days were December 27, 28 and 29, 2017.

(4) After December 22, 2017, claimant called the mechanic who had repaired the transmission to inquire about additional repairs to the transmission to get his truck drivable, but "got the runaround." Audio at ~21:12. Claimant tried to have that mechanic refund the cost of the initial transmission repair so he could have the transmission repaired by a different mechanic, but the first mechanic refused to give him a refund. Unless claimant received a refund, he could not afford to have the transmission repaired again. Claimant ultimately retained the services of any attorney to assist in obtaining a refund from the first mechanic. Claimant looked into renting a car or using a taxi or private car service to commute to work, but could not afford the cost of either. Because public transportation did not serve the area in Sandy in which claimant lived, using it to commute to work was not an option. Claimant believed he had no alternatives for commuting to work other than having his truck repaired so that he could use it.

(5) Between December 22 and 27, 2017, claimant called the manager of the store at which he worked several times to inform him of that his truck was not drivable, he could not afford to have it fixed, and that he was unable to find an alternative way to commute to work. Claimant told the manager that he had retained an attorney to try to secure a refund from the first mechanic to allow him to have additional work done on the truck's transmission. Claimant told the manager that he was trying to find a way to get to work. The manager told claimant that he understood and to continue to keep him "posted." Audio at ~22:33. Claimant did so.

(6) On December 27, 2017, claimant called the store manager at least two hours before the time his shift was scheduled to start and told him he would not be able to report for work because he still had not been able to have his truck repaired, and he did not have any way to reach work other than by driving his truck. When claimant was not able to give the manager a "definite date" when he would be able to commute to work, the manager told claimant that "at this point, I can't rely on you to come back in and I'm going to have to find a replacement for you." Audio at ~ 23:22. Claimant then asked the manager if he was letting him go and the manager replied, "Yes, I'm sorry. I'm going to have to let you go." Audio at ~23:37.

(7) On December 29, 2017, the employer processed the termination of claimant's employment. The employer determined that claimant was a "no call/no show" on December 27, 28 and 29, 2017, and under its attendance policies, that claimant had quit work on his last day actually worked, December 22, 2017.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct.

The first issue this case presents is the nature of claimant's work separation. If the claimant could have continued to work for the employer for an additional period of time at the time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant 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 was a discharge. OAR 471-030-0038(2)(b).

The employer argued at hearing that claimant's work separation should be considered a voluntary leaving because that was how the employer's policies characterized a work separation based on three "no call/no shows." Audio at ~11:04. Despite how the employer's policies may define the nature of such a work separation, EAB must do so based on the standards set out at OAR 471-030-0038(2) even if that results in a characterization that is different from that in the employer's policies.

Here, although claimant was temporarily unable to commute to the workplace for scheduled shifts, he remained in contact with his manager after December 22, 2017 up to December 27, 2017. It was claimant's manager who informed claimant on December 27, 2017, presumably on behalf of the employer, that the employer was not willing to allow him to continue working and would replace him. Applying OAR 471-030-0038(2) to these facts, claimant's work separation was a discharge on December 27, 2017, when claimant's manager told him that he had to "let [him] go."

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 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).

It is not disputed that transportation difficulties prevented claimant from reporting for his scheduled shift on December 27, 2017 and, had he not been discharged on that day, would have prevented him from reporting for work on December 28 and 29, 2017. Claimant contended that that he kept his manager informed as to his efforts to secure transportation to the workplace between December 22, 2017 and December 27, 2017, and that he notified his manager that he was unable to report for work on December 27, 2017 at least two hours before the start of his scheduled shift, which was in compliance with the employer's attendance policies. Audio at ~19:30, ~27:34. While the employer's witness at hearing disputed claimant's testimony, he did not have first-hand knowledge of the communications between claimant and claimant's manager, and appeared to be basing his testimony on hearsay from some unidentified source(s). Audio at ~ 11:49, ~28:49. Claimant's testimony, based on first-hand information, is entitled to greater evidentiary weight than that of the employer's witness. Claimant's testimony as to his contacts with his manager and his compliance with the employer's policies in notifying his manager of his absence on December 27, 2017 therefore is accepted as accurate.

As of claimant's discharge on December 27, 2017, the employer did not establish that claimant had violated its policies or expectations or had engaged in any willful or wantonly negligent violations of its standards. While claimant might have been unable on that day to give a "definitive date" when his truck would be repaired and he would be able to report for work, that he could not does not appear to have violated any employer's standards of which he reasonably should have been aware, and the employer did not suggest any. To the extent claimant's manager discharged claimant due to uncertainty about his ability to report for scheduled work after December 27, 2017, it appears that claimant's transportation difficulties, which caused that uncertainty, were a matter beyond claimant's reasonable control and not attributable to any willful or wantonly negligent behavior on claimant's part. While the employer's witness suggested claimant should have used public transportation to get to work on December 27, 2017 and thereafter, and claimant's failure to do so was wantonly negligent, he did not dispute that claimant's residence was not on a bus route and did not appear to have first-hand knowledge on this matter to

dispute claimant's conclusion that using public transportation was not an option. Audio at ~30:24. The employer's witness also did not suggest what other efforts that claimant should have, but did not make, to seek transportation to work, or show that it was willful or wantonly negligent of claimant not to have pursued those specific alternatives. Finally, assuming claimant did not call in to work to report absences from work on December 28 and 29, 2017, claimant had been discharged by his manager on December 27, 2017, and would not have had any reason to call in after that day, so his failure to do so could not have been willful or wantonly negligent behavior.

The employer did not show that claimant engaged in willful or wantonly negligent behavior for which it discharged him. The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-106848 is affirmed.

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

DATE of Service: May 29, 2018

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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