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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-0529

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 6, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 112749). The employer filed a timely request for hearing. On May 7, 2018, ALJ Schmidt conducted a hearing, and on May 8, 2018, issued Order No. 18-UI-108867, affirming the Department's decision. On May 21, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a written argument. However, the employer 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). The employer's argument also contained some information that was not part of the hearing record, and it failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's argument or any information not received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Gilmer Wood Company employed claimant as a receptionist and customer service representative from April 14, 2014 to February 28, 2018.

(2) The employer expected claimant to report for work as scheduled or speak with the employer's owner or manager in advance of her shift to notify them that she would be late or absent. Claimant was aware of and understood the employer's expectations.

(3) In December 2016 and October 2017, the employer gave claimant written warnings regarding attendance issues and various mistakes she had made performing different aspects of her job, and stated that she must avoid making any more mistakes in her daily work or risk termination of her employment. Exhibit 1. Around this time, claimant was diagnosed with depression and panic attacks and prescribed antidepressant and anxiety medication by her physician to deal with her stress. Although claimant took the medication briefly, she discontinued taking it because it made her sleepy.

(4) Claimant was scheduled to work on February 28, 2018 from 9:00 a.m. to 3:00 p.m. However, the evening of February 27, claimant concluded "things were getting overwhelming at work" and decided to again take her medication to see if it would help, but mistakenly took too strong a dose. Audio Record ~ 37:00 to 37:30. As a consequence, she slept through her entire shift on February 28th and into the evening. At approximately 3:05 p.m. that day, the owner called claimant, and when she did not answer, left a message notifying her that her employment had been terminated "for failure to show up for work with no notice or reason." Exhibit 1. He sent her a letter that day, confirming her discharge and enclosing her final paycheck.

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

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (January 11, 2018) 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. An absence due to illness or other physical or mental disabilities is 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).

The employer had the right to expect claimant to report for work as scheduled or notify the employer in advance of her shift that she would be absent or late by speaking with the owner or manager. At hearing, claimant admitted she understood that expectation and there was no dispute that she violated it on February 28, 2017. Although the employer asserted claimant failed to report for work or call in on February 27th as well, claimant asserted she worked that day and that the employer paid her for it, which the employer did not deny. *Cf.* Audio Record ~ 11:30 to 12:00 and 38:30 to 39:30. Moreover, an employer internal note stated that claimant mistakenly "okayed" a bankcard transaction between "02-26 to 28-2018" and the employer "only discovered this when she did not come to work or phone on February 28th." Exhibit 1. Viewed objectively, the parties' evidence on the issue of claimant's attendance at work is evenly balanced and there is no reason in the record to find that one party is more credible than the other as to whether or not claimant reported for work on February 27, 2018. In a discharge case, when the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer has the burden of proof. Accordingly, we find that the employer failed to establish by a preponderance of evidence that claimant failed to report for work on February 27, 2018.

Although claimant violated the employer's attendance and notice expectations on February 28, 2018, claimant credibly established that she took too strong a dose of prescribed medication on February 27th and, for that reason, slept through her shift on February 28th. Because claimant also credibly testified that she did not believe that it would affect her in the way it did, the record fails to show that claimant's

violations of the employer's expectations were either willful or wantonly negligent. Audio Record ~ 38:00 to 38:30. Accordingly, the employer failed to meet its burden to establish misconduct.

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: Order No. 18-UI-108867 is affirmed.

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

DATE of Service: June 22, 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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