

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0580

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 20, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80300). Claimant filed a timely request for hearing. On May 21, 2018, ALJ Seideman conducted a hearing, and on May 23, 2018, issued Order No. 18-UI-109926, concluding the employer discharged claimant, but not for misconduct. On June 6, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted written argument to EAB. However, the employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and the employer's argument, to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) Sonoma Graphic Products employed claimant as a territorial sales representative from February 1, 2017 to March 28, 2018. Claimant had flexible working hours and was not required to report for work or end work at any particular time of day.

(2) The employer expected employees to refrain from committing acts of dishonesty, including falsely reporting the reason for missing work. Claimant understood the employer's expectation as a matter of common sense.

(3) In June 2017, claimant was diagnosed with and treated for pre-diabetes, severe depression and anxiety. Claimant was prescribed and took medication for his conditions.

(4) On Saturday, September 16, 2017, claimant's father, with whom he had a strained relationship, came into town and met with claimant. An altercation ensued, claimant's wife called the police, and eventually, claimant was transported, first to Willamette Falls Community Hospital to have a head injury treated, and then to the Clackamas County Jail, where he was placed into custody, pending a court

appearance on Monday, September 18, 2017. Claimant remained in custody until approximately 10:00 a.m. on September 18, 2017, when the court released him on his own recognizance.

(5) After claimant's release, he immediately went home and discussed the situation with his wife. While doing so, he began shaking and experienced a "panic attack." He and his wife concluded that he was in no condition to work and needed to request a medical leave for his anxiety. He contacted the employer's HR representative and requested a Family Medical Leave Act (FMLA) application. The representative sent him the form and instructed him to complete it and send it back. Claimant then called the employer's part owner, CS, and explained that he needed to take the day off due to his anxiety and also needed a fifteen to thirty day medical leave for his condition. CS responded, "I don't care what you have. It's time for you to f---ing pull up your big boy pants and get to work, or I'll fire you." Audio Record ~ 22:50 to 24:30. Claimant worked the next day, September 19, 2017, and every workday thereafter up to the end of his employment.

(6) Claimant claimed a personal day for his absence from work on September 18, 2017. Later, when asked by the HR representative why he was off work that day, he responded that he had been "out ill." Audio Record ~ 10:15 to 12:15. Claimant believed that he was being honest with the employer in so reporting his absence based on the panic attack he had experienced, his request for FMLA leave and his conversation with CS concerning his anxiety, all of which occurred that same day.

(7) In March 2018, the employer's general manager became aware that claimant had been arrested in September, 2017. He requested the employer's HR representative to investigate the matter. The representative obtained court documents that suggested that claimant had been in custody from September 16, 2017 through at least September 21, 2017, even though claimant had, in fact, been released at 10:00 a.m. on September 18, 2017. Based on those records and claimant's earlier report that he had been "out ill" on September 18, 2017, without speaking to claimant, the employer decided to terminate claimant's employment.

(8) On March 26, 2018, the employer discharged claimant for a "lack of integrity" and not "properly" reporting his absence from work on September 18, 2017, because he had reported his absence that day as "out ill." Audio Record ~ 41:00 to 42:00.

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 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. 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 discharged claimant for allegedly misreporting his absence from work on September 18, 2017 as “out ill” when it appeared he had been in custody. However, at hearing, claimant explained that he had been released from custody at 10:00 a.m. on September 18 and “never lied about anything” because he had medical reasons for taking the day off and had been forthcoming about his anxiety condition that day with both the HR representative and the employer’s part owner. Audio Record ~ 39:45 to 41:00. Given claimant’s testimony, which we find credible, more likely than not, claimant believed he honestly reported the reason for his absence on September 18, 2017 as “out ill.” That belief is supported by the record, given claimant’s undisputed testimony about his flexible work hours and the time of his release from custody that day, which would have enabled him to work had it not been for his subsequent anxiety and panic attack, which he then discussed with the HR representative and CS in the context of requesting FMLA leave. Accordingly, the employer failed to meet its burden to establish, by a preponderance of the evidence, that claimant consciously, i.e. willfully or with wanton negligence, misreported his absence that day, in violation of a standard of behavior claimant knew or should have known the employer had the right to expect of him.

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 his work separation.

DECISION: Order No. 18-UI-109926 is affirmed.

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

DATE of Service: July 9, 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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