

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0912

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134052). Claimant filed a timely request for hearing. On September 11, 2018, ALJ D. Kangas conducted a hearing, and on September 12, 2018 issued Order No. 18-UI-116435, concluding the employer discharged claimant not for misconduct. On September 19, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wildhorse Resort & Casino employed claimant from August 8, 2016 until May 27, 2018.

(2) The employer expected employees to report to work when scheduled to work. The employer considered an absence an “unscheduled absence” regardless of whether the employee called before a shift to report that the employee would be absent. The employer’s attendance policy stated that an employee was subject to discharge if the employee had twelve unscheduled absences within a rolling twelve-month period. Claimant understood the employer’s attendance expectations.

(3) On about May 15, 2018, claimant submitted an electronic request to the employer to have May 26, 2018 off from work. On May 22, 2018, claimant checked the computer log to see if her request had been approved, and claimant understood by the message generated by the computer that her request had been approved.

(4) On May 25, 2018, claimant traveled to Idaho to pick up her children who lived in Idaho. Claimant planned to return to Oregon on May 26, 2018, after spending the night in Idaho. Claimant had asked a coworker to pick up claimant’s tips from their workplace that night. The manager on duty asked the coworker about claimant’s whereabouts because claimant was scheduled to start work at 12:30 a.m. on May 26, 2018. The coworker told claimant that the manager was asking about claimant because she was scheduled to work on May 26. Claimant became concerned and called the shift manager. He told claimant her vacation request had not been approved and that she would lose her job if she did not report

to work on May 26 for her shift at 12:30 a.m. Claimant told him that she was already in Idaho, a four or five-hour drive from work. Claimant could not safely return to Oregon in time for her shift.

(5) Claimant did not report to work on May 26, 2018. Claimant's absence on that day was claimant's twelfth unscheduled absence in a rolling twelve-month period.

(6) On May 27, 2018, the employer discharged claimant because claimant violated the employer's attendance policy by accumulating 12 unscheduled absences in a rolling twelve-month period.

CONCLUSION AND REASONS: The employer discharged claimant, 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 that 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. The employer carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for exceeding the maximum number of unscheduled absences from work under its attendance policy. When a claimant is discharged for the number of points accrued under the employer's attendance policy, the incident in which the final points were accrued is the proper focus of the inquiry to determine whether claimant is disqualified from benefits. *See* June 27, 2005 Letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). Because claimant's absence from work on May 26, 2018 resulted in an accrual of the employer's maximum of twelve unexcused absences within twelve months, the proper focus of the misconduct analysis is the May 26, 2018 absence.

It is undisputed that claimant failed to report to work on May 26, 2018. However, claimant provided firsthand testimony of requesting May 26 off work and checking the status of her request on May 22. Claimant understood from the computer-generated message that she heard regarding her vacation request that the employer had approved her request. The employer's witness at hearing testified that the employer's records showed no record of claimant's request or an approval of time off on May 26. Audio Record at 38:29 to 39:23. Our review of the record does not reveal that claimant or the employer's witness lacked credibility. We therefore find the contradictory evidence from the parties as to whether the employer approved time off for claimant on May 26 to be equally balanced between the parties. Where the evidence is equally balanced, the party with the burden of proof, here the employer in this discharge case, has failed to meet its burden. The record therefore shows that claimant was not willful or wantonly negligent in failing to report to work on May 26, 2018 because she reasonably believed she was not scheduled to work that shift. Moreover, we do not find that claimant's failure to report to work on May 26 after she learned on May 25 that she was not excused from work was wantonly negligent because claimant was four or five hours away from her workplace, and could not safely drive back to Oregon in time for her shift.

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

DECISION: Order No. 18-UI-116435 is affirmed.

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

DATE of Service: October 25, 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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