

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0958**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On August 21, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 65836). Claimant filed a timely request for hearing. On September 18, 2018, ALJ Snyder conducted a hearing, and on September 25, 2018, issued Order No. 18-UI-117201, affirming the Department's decision. On October 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) The Regent employed claimant from April 17, 2018 until July 13, 2018 as a food prep and dishwasher.

(2) The employer's attendance policy provided that an employee's failure to report to work or contact the employer eight hours before the beginning of a scheduled shift with a valid reason for missing work would result in immediate discharge. The employer expected claimant to contact the executive chef directly. Claimant understood as a matter of common sense that the employer expected her to contact the employer before her shift if she was unable to work due to illness.

(3) On July 12, 2018, claimant worked most of the day with the executive chef and later told the sous chef she was dissatisfied with her working conditions. Before July 13, 2018, claimant received no warnings, verbal or written, regarding attendance.

(4) On July 13, 2018, claimant was scheduled to work at 10:30 a.m. At 8:05 a.m., when the employer's receptionist began her shift, claimant called and told her she was unable to work due to illness that day. She did not contact the employer again on July 13. The receptionist told the executive chef that claimant did not report to work. The executive chef did not know why claimant failed to report to work. He told the sous chef to direct claimant's husband, who also worked for the employer, to call claimant and tell her to come to work.

(5) Because claimant did not report to work on July 13, 2018, and did not contact the executive chef to give him a reason why she was missing work, the executive chef called and left claimant a telephone

message, stating only, “You have to show up to work. You didn’t show up. You’re not coming back.” Audio Record at 18:15 to 18:21. Claimant understood from the message that she was discharged.

(6) On July 15, 2018, claimant went to the workplace and asked the general manager if she could do “odd jobs” such as cleaning or answering the telephone for the employer. Audio Record at 12:59 to 13:11. Claimant told the general manager she could not work with the executive chef. The general manager told claimant she could apply for work with another work site affiliated with the employer, or the manager might be able to get claimant a job there.

**CONCLUSION AND REASONS:** We conclude the employer discharged claimant not for misconduct.

In Order No. 18-UI-117201, the ALJ concluded that claimant’s work separation was a voluntary quit because claimant told the general manager on July 15, after she missed work on July 13, that she was unwilling to work with the executive chef, and could have continued working in the kitchen where she had been working before July 13. Order No. 18-UI-117201 at 2. The ALJ further concluded that claimant voluntarily left work without good cause because her preference against working with the executive chef did not amount to a grave situation. Order No. 18-UI-117201 at 3. We disagree that claimant voluntarily left work, or that she is disqualified from benefits based on her work separation.

**The Work Separation.** If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (January 15, 2018). If claimant was willing to continue to work for the 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).

Claimant and the employer disputed whether claimant quit or was discharged. Although the employer asserted that claimant quit when she told the general manager on July 15 that she would not work with the executive chef, the work separation occurred on July 13 when the executive chef left claimant a voicemail message stating, “You’re not coming back [to work.]” Claimant’s subsequent refusal on July 15 to work with the executive chef did not change the discharge into a quit, and claimant’s attempt to regain employment with the employer on July 15 showed claimant was generally willing to continue the employment relationship, but not with the executive chef. Although claimant was dissatisfied with working with the executive chef, claimant did not say she had decided to quit and the preponderance of the evidence shows claimant did not report to work on July 13 due to illness, not because she resigned.

Based on claimant’s attendance at work and expressed dissatisfaction with her working conditions on July 12, it is understandable that the executive chef formed a mistaken belief that claimant failed to report to work because she was not willing to work for the employer. However, the executive chef’s belief was based on speculation. The executive chef objectively showed the employer’s unwillingness to allow claimant to continue working when claimant failed to report to work on July 13 by telling claimant the employer would not allow claimant to continue working, making the work separation 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) (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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she failed to report to work on July 13 and did not notify the executive chef directly that she would be absent. To the extent the employer discharged claimant because she missed work on July 13, the employer discharged claimant not for misconduct because absences due to illness are not misconduct. Although the executive chef speculated at hearing that claimant was not sick on July 13 because she worked all day on July 12 (Audio Record at 18:29 to 18:49), claimant testified that she was sick and there is no reason in this record to doubt her credibility on that matter.

To the extent the employer discharged claimant because she failed to notify the employer in advance of her shift that she would miss her shift due to illness, the employer did not show by a preponderance of the evidence that claimant failed to notify the employer within a reasonable time period that she would miss her shift on July 13. The record does not show that claimant knew eight hours before her shift began that she was too sick to work. Although eight hours' advance notice would be unreasonable in certain circumstances, in general, the employer's expectation that claimant contact the employer in advance of her shift if she was unable to work was a reasonable expectation that claimant knew or should have known as a matter of common sense. The preponderance of the evidence is that, on July 13, claimant called the employer's receptionist when the receptionist came on duty, before claimant's shift, and told the receptionist she was not able to work that day due to illness. The executive chef testified that the receptionist told him that claimant "didn't show up to work" (Audio Record at 16:41 to 16:55), but the record does not contain firsthand evidence from the receptionist contradicting claimant's testimony that claimant spoke with the receptionist that morning and told her that she was unable to work due to illness.

It is undisputed that claimant did not contact the executive chef on July 13 regarding her absence that day. Although it is a reasonable expectation that claimant be required to contact a specific person regarding absences, the record is, at best, equally balanced as to whether claimant knew or should have known that expectation. 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 general manager testified that kitchen employees were told to contact the executive chef directly, and that he often received calls from such employees. Audio Record at 27:46 to 28:14. However, claimant testified that she was never told to contact the executive chef if she was not reporting to work, and that she did not receive a handbook stating that requirement. Audio Record at 14:45 to 14:53, 28:50 to 29:04. Moreover, claimant testified that she had not received written or verbal warnings before July 13 for missing work or reporting to work late (Audio Record at 11:02 to 11:13), and therefore would not have been advised of the employer's attendance expectations pursuant to a prior warning. Nor do we find the employer's expectation so obvious that we can infer that claimant knew or should have known as a matter of

common sense that her conduct in reporting her absence to the receptionist probably violated the employer's attendance expectations. The employer therefore failed to establish by a preponderance of the evidence that claimant violated its expectations willfully or with wanton negligence when she failed to contact the executive chef directly.

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-117201 is set aside, as outlined above.

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

**DATE of Service: November 6, 2018**

**NOTE:** This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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](http://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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