

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1029

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102155). Claimant filed a timely request for hearing. On October 10, 2018, ALJ S. Lee conducted a hearing, and on October 18, 2018 issued Order No. 18-UI-118355, reversing the Department's decision. On October 25, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer included a handwritten note on its application for review stating that it had relevant text messages in addition to those that claimant offered and the ALJ admitted into evidence during the hearing as Exhibit 1. We construe the employer's note as a request to have EAB consider those text messages under OAR 471-041-0090(2) (October 29, 2006), which authorizes EAB to consider information offered for the first time on review if the party offering it shows that it was prevented from doing so during the hearing by factors or circumstances beyond its reasonable control. The employer did not explain why it did not present the text messages at the hearing or otherwise show that factors or circumstances beyond its reasonable control hindered it from doing so. For this reason, the employer's request is denied.

FINDINGS OF FACT: (1) Erickson's Sentry Market employed claimant from June 17, 2017 until August 21, 2018, last as a person-in-charge (PIC).

(2) The employer expected claimant to report for work as scheduled or notify the employer if she was going to be absent. Claimant understood the employer's expectations. During her employment, claimant contacted either the store manager or the bookkeeper, who also performed some human resources functions, if she was not going to report for a scheduled shift.

(3) Sometime around mid to late July 2018, claimant complained to the employer that the store manager was sexually harassing her. Although the employer expected that claimant and the store manager would

not speak to each other while the employer investigated claimant's allegations, no employer representative informed claimant that she was prohibited from communicating with the store manager.

(4) Beginning on July 31, 2018, claimant was away from work using accrued vacation time because she was a victim of domestic violence and needed to prepare for and attend a trial on stalking charges that had been brought against the individual who had abused her. The domestic violence and sexual harassment issues were separate and involved different individuals. The stalking trial was scheduled for August 7, 2018. The employer was aware of the domestic violence proceedings and claimant's emotional distress over them.

(5) After July 31, claimant and the employer's bookkeeper communicated almost every day, often by text message. In early August 2018, claimant and the bookkeeper discussed when claimant would be emotionally able to return to work. On August 13, 2018, the bookkeeper sent claimant a text message stating that she had asked the general manager when the employer expected claimant to return to work, and the general manager had stated "whenever you [claimant] decide you want[] to come back just tell [the front end manager] when you are ready to be put back on the [work] schedule." Exhibit 1 at 10.

(6) On August 16, 2018, the employer posted its work schedule for the upcoming week, which included claimant, even though she had not informed the employer she was ready to return. On August 18, 2018, claimant asked the bookkeeper by text message about the posted schedule. On August 19, 2018, the bookkeeper responded to claimant and told her, "[The front end manager] just said your vacation is over and you get put back on the schedule to work... That's all I know. You'll have to touch base with [the front end manager]." Exhibit 1 at 13. Claimant decided she was not emotionally able to return to work, and called the front end manager to have her name removed from the work schedule. The front end manager told claimant that the store manager had told her to schedule claimant for work on August 20, 2018. Claimant told the front end manager that she was not ready to return to work. The manager told claimant that "everyone has things going on" and she should report for work as scheduled. Audio at ~34:44. Claimant told the front end manager that the general manager had told her earlier she would not be required to return to work until she was "ready" and she was not "ready." Audio at ~34:44. The front end manager did not remove claimant's name from the work schedule.

(7) On August 20, 2018, claimant sent a text message to the store manager stating that she "still had issues going on" with the stalking case and was not going to return to work that week. Exhibit 1 at 14. Claimant also mentioned that she thought some miscommunication was occurring as to her return to work. The manager did not receive claimant's message because he had blocked communications originating from claimant's cell phone due to claimant's allegations against him. However, claimant did not know the manager had blocked communications from her, and the display on her cell phone did not indicate that her message to the manager was not delivered or had failed in any way. Claimant did not report for work on August 20.

(8) On August 21, 2018, the employer discharged claimant for not reporting for work on August 20 and failing to notify the employer that she was going to be absent from work.

CONCLUSIONS AND REASONS: 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) (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. The employer carries the burden to establish 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 because she did not report for work on August 20 and allegedly did not notify the employer that she going to be at absent that day. Notably, the employer did not contend that claimant violated its expectations by missing work for the reasons she did on August 20, or that informing the store manager of an absence by text message at the time claimant sent the text would not have been not adequate notice to the employer if the manager had received that text. The salient issue is whether claimant's act of trying to contact the store manager by text message on August 20 to inform him of her work absence, or the store manager's failure to receive that text was willful or wantonly negligent behavior on claimant's part in violation of the employer's standards.

Claimant testified that no employer representative ever informed her that she was prohibited from communicating with the store manager after she made sexual harassment allegations against him. Audio at ~38:50. While the employer's witness, the bookkeeper, thinks she "might have told" claimant that she should not "talk" to the store manager while the employer was investigating the allegations, she did not suggest that any other employer representative informed claimant of a prohibition against all communications with the store manager and her testimony on whether and of what specifically she informed claimant was diffident and uncertain. Audio at ~48:15. The preponderance of the evidence shows that claimant did not know and was not reasonably aware on August 20 that she was prohibited from notifying the store manager by text message of her absence from work that day. It was not willful or wantonly negligent for claimant to have communicated her absence to the store manager by text message.

In addition, that the store manager had blocked communications originating from claimant's cell phone and did not receive the text she sent to notify him of her absence on August 20 was not an occurrence that claimant reasonably should have anticipated. It was not shown that claimant was informed or otherwise knew that communications transmitted from her phone were blocked from receipt by the store manager's phone and claimant's testimony that her cell phone did not show that her message to the store manager had failed or otherwise was undeliverable was plausible and un rebutted. On this record, it was not willful or wantonly negligent for claimant to have thought that the text message she sent to notify the store manager of her absence on August 20 would be received by the manager and would constitute adequate notice to the employer.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-118355 is affirmed.

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

DATE of Service: November 28, 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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