

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0692

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145539). Claimant filed a timely request for hearing. On April 3, 2014, ALJ Shoemake conducted a hearing, and on April 8, 2014 issued Hearing Decision 14-UI-14562, concluding claimant's discharge was not for misconduct. On April 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision, to the extent the argument was based on the hearing record.

FINDINGS OF FACT: (1) Nature Bake employed claimant as a bread tanner from August 4, 2012 to February 6, 2014.

(2) The employer expected claimant to maintain regular attendance and report to work on time. Claimant understood the employer's expectations.

(3) Claimant had a history of absenteeism and tardiness. On November 21, 2013, the employer issued claimant a final written warning, warning him that he might be discharged for further instances of absenteeism or tardiness if those instances caused him to exceed the maximum number of attendance occurrences allowed under the employer's attendance point policy.

(4) On January 31, 2014, the employer scheduled claimant to report to work by 7:59 a.m. Claimant woke up at his regular time and was told that a vehicle accident had blocked his customary route. Claimant hurried to leave for work earlier than usual. Claimant did not take the time before leaving for work to check maps for alternative routes, and was not familiar enough with alternative routes that he knew them without a map. Instead, he drove his usual route, expecting that although he would be

delayed due to the accident blocking the road, he had left early to accommodate delays and would be detoured around the accident.

(5) Claimant encountered longer delays and heavier traffic than he had expected. He had not anticipated that the detour might force him to backtrack, causing an additional delay. At approximately 7:30 a.m., claimant called the employer's attendance hotline to report that he might be late because he was stuck in traffic due to the accident, and, ultimately, claimant clocked in after his scheduled start time.

(6) On February 6, 2014, the employer discharged claimant because his tardiness on January 31st caused him to exceed the maximum number of allowable attendance points.

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. 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.

On January 31, 2014, claimant violated the employer's attendance points policy because his tardy arrival to work caused him to exceed the maximum number of points he was allowed to accrue under the policy. At issue is whether claimant's violation of the employer's policy was willful or wantonly negligent. There is nothing in this record suggesting that claimant acted with willful intent when he reported to work late on January 31st. Rather, his tardiness was an unintended consequence of heavy traffic on his commute to work.

The employer argued that claimant's conduct was wantonly negligent because he knew of the traffic-blocking accident before he left for work, and chose a route that would cause him to encounter the accident instead of choosing an alternative route, suggesting that claimant's choice of routes demonstrated his indifference to the employer's expectation that he report to work on time. However, claimant did not know any alternative routes, so his failure to take one did not demonstrate indifference. Several other actions claimant took on January 31st demonstrated that he was not indifferent to the expectation that he report to work on time, including that he left work early in anticipation of delays, traffic and a detour, and that he called to notify the employer that he was probably going to be tardy as soon as he realized that he was not going to arrive at work on time. That claimant did not anticipate the extent of the delays, traffic and a detour that forced him to backtrack, or that, in retrospect, taking the time to map an alternative route might have been a better choice, does not make claimant's conduct at the time wantonly negligent. Claimant attempts to report to work on time despite the accident demonstrated he was not indifferent to the employer's expectation that he do so.

Although claimant violated the employer's expectations, he did not do so willfully or with conscious indifference to the employer's expectations of him. Because he did not act willfully or with wanton

negligence, his discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 14-UI-14562 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: May 28, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.