

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0932

*Reversed
Disqualification*

PROCEDURAL HISTORY: On April 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 84027). Claimant filed a timely request for hearing. On May 16, 2014, ALJ Wyatt conducted a hearing, and on May 23, 2014, issued Hearing Decision 14-UI-18303, concluding that the employer discharged claimant not for misconduct. On May 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT (1) Tuality Healthcare employed claimant as an occupational therapist from September 13, 2011 to April 4, 2014.

(2) The employer expected claimant to report for work on time. The employer's attendance policy provides that an employee will be considered tardy if not on the job and ready to begin work at the start of the employee's shifts. An employee is considered ready to work if the employee has clocked in, has proper equipment in hand, and is properly attired as required by the employee's job description. The policy further provides that an employee who has more than six unscheduled absences or tardies in a rolling 12-month period may be subject to disciplinary action. (Exhibit 1). Claimant knew and understood the employer's expectation and attendance policy.

(3) The time clock which claimant was expected to use was located on the first floor of the building where claimant worked; the clinic where claimant worked was located in the basement of the same building. The time clock permitted an employee to clock in no more than seven minutes before the time the employee's shift was scheduled to start. Claimant was unable to use the stairs to reach her work station because of recent knee surgery. Using the elevator, it took a minimum of three minutes to travel from the time clock on the first floor to the clinic where claimant worked in the basement. If the elevator was delayed, it could take longer.

(4) Claimant's work shift began at 9 a.m.; she often had patient appointments scheduled for this time.

(5) Between October 15, 2012 and January 14, 2013, claimant clocked in after 9 a.m. on six occasions, and clocked in by 9 a.m. but arrived at her work station after that time on three occasions. On January 14, 2013, claimant's supervisor verbally warned her that any further violations would result in a written warning. Claimant never stated that she was tardy because of traffic problems encountered on her way to work or because the elevator was slow.

(5) Between January 14, 2013 and September 30, 2013, claimant clocked in after 9 a.m. on two occasions, and clocked in by 9 a.m. but arrived at her work station after that time on four occasions. On October 10, 2013, claimant's supervisor warned her in writing that she was expected to have no further violations of the employer's attendance policy and that failure to meet this expectation would result in her discharge.

(6) Between October 14, 2013 and March 29, 2014, claimant clocked in before 9 a.m. but arrived at her work station after that time on 16 occasions. On each of these 16 occasions, claimant had a 9 a.m. appointment scheduled and was not ready for her patient.

(7) On April 4, 2014, the employer discharged claimant for repeatedly violating the attendance policy by failing to arrive at her work station, ready to see patients, by the start of her shift.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant 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.

The employer discharged claimant because she repeatedly violated the employer's attendance policy by failing to arrive at her work station no later than 9 a.m. Based on the employer's written policy and the two corrective actions she had received, claimant understood that she was required to be at her work station and ready to see patients by 9 a.m. Claimant explained that she was late arriving at her work station because she needed to take the elevator from the first floor, where she clocked in to the basement, where she worked, and "she never knew when the elevator was going to show up on time." (Transcript at 29). After the October 13, 2013 warning she received, however, claimant knew that the employer expected her to be at her work station by 9 a.m., and that her job was in jeopardy if she failed to do so. Claimant took no steps to change her habits, e.g., arrive at work earlier so that travel to her work station would not be delayed by uncertain elevator service. Claimant knew that elevator service in

her building was unpredictable; her failure to take action to solve this problem and meet the employer's attendance expectations constituted wanton negligence and misconduct.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b) because claimant's repeated tardiness in reporting to her work station constituted a pattern of wantonly negligent behavior. *See* OAR 471-030-0038(1)(d)(A). From October 12, 2012 to April 4, 2014, the date on which the employer discharged claimant, claimant was late arriving at her work station on at least 31 occasions.

Claimant contends, however, that her failure to arrive at her work station by 9 a.m. was a good faith error. According to claimant, she understood that the employer's expectation was only that she clock in by 9 a.m., not that she report to her work station by that time. Claimant asserts that after she received the October 14, 2013 warning, she never failed to clock in by 9 a.m. The October 14 written warning claimant received, however, listed numerous occasions on which claimant arrived at her work station after 9 a.m., but noted that it did "not include the times you are clocking in upstairs a minute before your scheduled start time. It is not possible to be ready to work with one minute to get downstairs and put your personal items away.," (Exhibit 1). Accordingly, we are not persuaded that claimant believed, in good faith, that the employer expected only that she clock in by 9 a.m., and permitted her later arrival at her work station.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-18303 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: July 9, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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