

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0316

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151721). Claimant filed a timely request for hearing. On March 2, 2015, ALJ K. Monroe conducted a hearing, and on March 5, 2015 issued Hearing Decision 15-UI-34597, reversing the Department's decision. On March 20, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Bay Area Hospital employed claimant as a radiology aide from January 9, 20106 until January 7, 2015.

(2) The employer had an attendance policy that required an employee's discharge if the employee accrued thirteen attendance violations in a rolling twelve month period. After an employee accrued seven attendance violations, the employer's policy required the employee to clock in for work using his or her work badge, and a failure to do so would count as an attendance violation even if the employee had reported to work on time. Claimant was understood the employer's attendance policy.

(3) On December 15, 2014, claimant accrued a twelfth attendance violation in a rolling twelve month period. These prior eleven violations included both tardy arrivals at work and failing to clock in using her work badge. Claimant was aware that if she accrued another attendance violation in the rolling twelve month period, she was subject to discharge under the employer's attendance policy.

(4) As a result of claimant's attendance violations due to failing to clock with her work badge, claimant took steps as a precaution against forgetting to take her badge to work with her. Claimant located her work badge the night before she was scheduled to work a shift, and either attached the badge to the sun visor of her vehicle or placed the badge with the clothes and purse she intended to use the next day.

(5) December 28, 2014 at approximately 11:00 p.m., when claimant was organizing her belongings for the shift she was scheduled to work the next day, claimant could not find her work badge. Claimant searched her clothes, her purse and throughout her house. After claimant awakened on December 29, 2014, she continued to search for the badge without success. Claimant called a friend that morning to help her try to find the badge, and the friend looked with her. They could not locate the badge. Claimant was scheduled to work a shift starting at 8:00 a.m. and she left her home in sufficient time so that she would not arrive tardy for that shift. Because claimant had not found her work badge, she failed to clock in using her badge. Claimant reported for her shift two or three minutes before the 8:00 a.m. start-time for her shift.

(6) On January 7, 2015, the employer discharged claimant for the attendance violations she had accrued in the twelve months period ending on December 29, 2014.

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. 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 contended that it discharged claimant because of the number of attendance violations she had accrued in the rolling twelve month period and because the attendance policy required it. Transcript at 5, 8, 14-19. However, regardless of the employer's reasons, EAB is required to evaluate the final event, or the final attendance violation that claimant accrued, to determine whether claimant was discharged was for disqualifying misconduct. *See generally* 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 the employer did not contend that claimant violated the employer's policy on December 29, 2014 for any reason other than that she failed to clock in using her work badge, that event is the focus of the discharge analysis.

The employer's witnesses did not rebut claimant's explanation that she did not use her work badge to clock in on December 29, 2014 because she was unable to locate it after an apparently exhaustive search, and did not dispute the efforts that claimant and her friend made to find the badge before she reported for work without it. While the employer appeared to contend that a failure to clock in with the badge for any reason was a sufficient justification to disqualify claimant from benefits, the applicable regulation requires that claimant's violation of the employer's attendance policy must have been accompanied, at a minimum, with a wantonly negligent mental state. *See* OAR 471-030-0038(3)(a). Mere negligent or carelessness on claimant's part resulting in her inability to find the badge is not

sufficient to establish the consciously indifferent mental state needed to show wantonly negligent misconduct. *See* OAR 471-030-0038(1)(c). Although a wantonly negligent mental state may be shown, under certain circumstances, by a claimant's failure to take reasonable precautions when he or she was aware that a particular violation of an employer's standards was likely to occur, it appears that claimant took reasonable safeguards to ensure that she had her badge with her when she clocked in, such as locating it the night before and attaching it to the sun visor of her vehicle or placing it with the clothing that she intended to wear or the purse that she intended to use the next day. Transcript at 28, 29. That claimant was not able to find the badge the night of December 28, 2014, does not appear to have been a likely or foreseeable occurrence. That claimant did not proceed to the workplace late at night on December 28, 2014 to have a replacement badge made, as the employer contended was an option available to her, also does not appear to have been wantonly negligent, in view of the fact claimant had a young child to care for and it was not utterly unreasonable for claimant believe that she would be able to find the badge the next morning before work. Transcript at 37-41, 45-46. In light of the sustained efforts that claimant made to locate the badge on December 28 and 29, 2014, once she knew it was missing, claimant's failure to clock in using the badge on December 29, 2014 was not, in and of itself, willful or wantonly negligent behavior. Absent some evidence showing that claimant had the requisite conscious mental state, of which there was none, the employer did not meet its burden show, more likely than not, that claimant's failure to clock in using her work badge on December 29, 2014 was the result of misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-34597 is affirmed.

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

DATE of Service: May 11, 2015

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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