

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0694

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135650). Claimant filed a timely request for hearing. On May 14, 2015, ALJ Triana conducted a hearing, and on May 15, 2015 issued Hearing Decision 15-UI-38600, affirming the Department's decision. On June 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that included a letter from a mental health professional evaluating the impact of attention-deficit/hyperactivity disorder on her ability to comply with the employer's expectations about reporting on time for work. The letter was not offered into evidence at the hearing. Because of the EAB's disposition on review, EAB need not, and does not, consider whether it is appropriate to enter the letter into the evidence under OAR 471-041-0090(2) (October 29, 2006). EAB otherwise considered claimant's written argument to the extent it was based on evidence in the hearing record.

FINDINGS OF FACT: (1) Drink Tanks Corporation employed claimant as an operations administrative assistant from September 8, 2014 until February 9, 2015.

(2) The employer expected employees to report for work at the scheduled time and to notify a supervisor if they were going to arrive late. Claimant understood the employer's expectation about timely arrival, but thought that it was permissible not to contact the employer if she expected to arrive to work only a few minutes late.

(3) In 2004, claimant was diagnosed with attention-deficit/hyperactivity disorder (ADHD). Claimant was prescribed and started taking medication for this condition after she received the diagnosis in 2004, then stopped and resumed taking medication in 2006. Since 2006, claimant has consistently taken prescription medication to assist in controlling the symptoms of ADHD.

(4) All of her adult life, claimant has chronically arrived late for work at all jobs she has had. Claimant attributed her tardiness to ADHD. In 2009, claimant saw a mental health counselor to treat her ADHD and to control its dysfunctional effects. Claimant worked with the counselor to assist her in arriving on time for work and she was largely able to control the symptoms that caused the tardiness. Claimant stopped treatment with the counselor when the counselor moved out of state. Claimant then lost her health insurance and could not afford treatment with another counselor. In January or February 2014, claimant enrolled in the Oregon Health Plan (OHP) and was then able to afford further mental health treatment to control the symptoms of ADHD.

(5) Throughout her employment, claimant often arrived late for work. Most often, there was no particular exigent circumstance for claimant's tardiness other than ADHD. Audio at ~12:14, ~13:00, ~24:32. While claimant regularly rose from bed with ample time to prepare for work and arrive on time, when she made her morning preparations for work, she was "all over the place." Audio ~25:44. Claimant would find that she was often side-tracked from a timely arrival by a perceived need to find items she thought she had lost, to double-check that she had locked the doors to her house, to confirm that she had remembered to turn off appliances she had used or to perform some housekeeping tasks that seemed urgent to her. Audio at ~25:44, ~27:18. Claimant tried to arrive on time for work by laying out her clothes and other items she would need the night before and rising early in the morning, but her work arrival was still delayed by perceived needs and tasks that she could not stop herself from performing before she left for work. Audio at ~ 25:18.

(6) By December 8, 2014, the employer had spoken to claimant several times about her tardiness. On December 8, 2014, the employer issued a warning letter to claimant telling her that she needed to strictly adhere to her work schedule of 8:30 a.m. to 5:00 p.m. The warning letter advised claimant that if she continued to arrive late for work, her work hours would be reduced by one-half and her work schedule would become 12:00 p.m. to 5:00 p.m. Exhibit 1 at 4. When claimant received the warning letter, she told the employer's representatives that she had "no reason" for being late and that she "had a hard time managing time." Audio at ~44:50. The work representative(s) who spoke with claimant advised her to rise earlier in the morning to add time to her morning routine so she could report for work on time. Audio at ~ 45:21. Claimant told the representative(s) that she had tried doing so and it had not worked, but she would try again. Audio at ~ 45:38.

(7) After December 8, 2014, claimant tried to control her behavior so she would be on time for work. Claimant tried to closely monitor the time in the mornings and not to allow herself to become distracted by performing tasks other than readying herself for work. Audio at ~ 34:12. After December 8, 2014, the employer monitored the time that claimant arrived for work. The work week of December 15 through 19, 2014, claimant was late to work every work day. The work week of December 22 through 29, 2014, claimant was late to work three work days. The work week of December 29, 2014 through January 2, 2015, claimant was late every work day. The work week of January 12 through 16, 2015, claimant was late three out of five work days. The work week of February 2 through 6, 2015, claimant was late every day of the work week.

(8) Sometime between February 2 and 5, 2015, claimant recognized that she had been unable to control her tardiness and thought her employment might be in jeopardy. Claimant called OHP to arrange for counseling to assist her in controlling the ADHD symptoms that made her unable to arrive on time for work. When the OHP representative told claimant it would take some time to refer her to a mental

health counselor, claimant told the representative that her need for assistance was an “urgent thing.” Audio at ~ 27:43. The earliest OHP was able to schedule an evaluation to determine if it was appropriate to refer claimant to a mental health professional was March 19, 2015.

(9) On February 6, 2015, the employer issued another written warning to claimant for her tardiness in reporting for work, encompassing her tardiness since the December 8, 2014 warning. Exhibit 1 at 3. As punishment for claimant’s tardiness, the warning notified her that her hours were reduced from forty hours per week to twenty-five hours per week, and her schedule was going to become 8:30 a.m. until 2:00 p.m. *Id.* When she was issued this warning, claimant told the employer’s chief executive officer (CEO) that she had ADHD which interfered with her ability to arrive on time for work despite her best efforts. Claimant said, “I have a hard time managing time because I have ADHD.” Audio at ~ 45:11.

(10) On Sunday, February 8, 2015, claimant went to an urgent care clinic because she had a migraine headache. Claimant spent nearly the whole day at the clinic and received an injection to control the pain. Claimant was prescribed pain medication to take after the effects of the injection wore off. Claimant intended to pick up the prescription on Monday, February 9, 2015 before the scheduled start of her work.

(11) On February 9, 2015, claimant left for work and proceeded to a pharmacy to obtain the pain medication. After claimant had the medicine, she realized she was likely to arrive a few minutes late to work. Claimant did not call the employer to notify it that she was probably going to be tardy in arriving because she was thought she would only be a very few minutes late, she was “just trying to get there [to work] on time,” and she would have to use her cell phone when driving to give the employer notice, which was against the law in Oregon. Audio at ~11:47. Claimant arrived at approximately 8:37 a.m., or seven minutes late.

(12) On February 9, 2015, the employer discharged claimant for her tardy arrival to work that day.

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. Unavoidable accidents and absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-38600, the ALJ found as fact that claimant had ADHD which might have contributed to her tardiness in reporting to work, but still concluded her failure to report on time for work as a wantonly negligent violation of the employer’s standards. The ALJ reasoned that since claimant was able to report for work on time on some days, and since claimant had stated at hearing that she was able to generally arrive on time when she was in treatment with a counselor in 2009, she was “persuaded that claimant had the ability to report to work in a timely fashion barring emergency circumstances.” Hearing Decision 15-UI-38600 at 4. We disagree.

That claimant was able in 2015 and in 2009 to report for work on time on some days does not mean that on other days she was unable to do so due to her ADHD. The salient issue is whether on the days on which claimant was actually tardy, particularly on February 9, 2015, the day for which her tardiness caused the employer to discharge her, her tardiness was attributable to symptoms of ADHD. OAR 471-030-0038(1)(c) and OAR 471-030-0038(3)(b) make clear that if the reason a claimant was not able to comply with an employer's otherwise reasonable expectation was due to a condition or other involuntary factors beyond claimant's reasonable control, the non-compliance was not willful or wantonly negligent and does not constitute misconduct.

Here, it was not disputed that claimant had ADHD, and that claimant told the employer on February 6, 2015 that her chronic tardiness was attributable to and a symptom of that ADHD. ADHD is generally recognized as an intractable chronic neurobiological disorder which causes those who are subject to it a great deal of difficulty in controlling its behavioral impacts even when they are receiving medication or counseling interventions. <http://www.ninds.nih.gov/disorders/adhd/adhd.htm> (National Institute of Health, National Institute of Neurological Disorders and Stroke); <http://www.bbrfoundation.org/frequentlyaskedquestions-attention-deficit-hyperactivity-disorder-adhd> (Brain and Behavior Research Foundation); <http://www.sciencedaily.com/term-attention-deficit-hyperactivity-disorder.htm>. The symptoms of this disorder may include an inability to organize oneself, manage time and set appropriate priorities to accomplish goals. *Id.* As with claimant, a commonly recognized symptom of adults with ADHD is chronic, habitual tardiness in reporting for work that occurs despite the best efforts of the adult to avoid it. http://www.nimh.nih.gov/healthtopics-attention-deficit-disorder-adhd/index.shtml#part_145450 (National Institute of Mental Health); <http://gbr.pepperdine.edu/2010/08-attention-deficit-hyperactivity-disorder-adhd-in-the-workplace>; <http://healthcentral.com/adhd/adult-adhd-190457-5.html>. The account that claimant provided at hearing of the types of involuntary morning distractions that prevented her from leaving her house with sufficient time to report for work on time are consistent with those reported in the literature about the challenges that face employees with ADHD in regularly reporting for work in a timely manner. *Id.* The literature also notes that arriving on time for work is "especially challenging" for those with adult ADHD and that many of those adults will first try "quick fixes" that attempt to use self-control before realizing that it is not likely that they can control their ADHD symptoms without counseling and other behavioral interventions. http://www.nimh.nih.gov/healthtopics-attention-deficit-hyperactivity-disorder-adhd/index.shtml#part_245450. From these authorities, it can be inferred that it was not a conscious choice on claimant's part to report tardy for work, but that it was a matter beyond her ability to control.

It appears from claimant's testimony at hearing that she was not able to use techniques of personal self-control to alleviate the impediments from ADHD on her ability to report on time for work despite her best efforts. *See* Audio at ~12:14, ~13:00, ~23:40, ~24:51, ~32:25, ~34:12, ~49:23. The ALJ was incorrect in her conclusion that claimant had a conscious ability to control this symptom of ADHD. While claimant had sufficient insight into the manner in which ADHD affected her ability to arrive on time for work that it might have been wantonly negligent for her not to have pursued counseling or other mental health treatment to attempt control that ADHD symptom, she did that just before the employer discharged her, but was not able to enter into the counseling she sought before she was discharged. Because the employer did not show that claimant's late arrival to work on February 9, 2015 was caused by something other than ADHD and did not show that claimant failed to pursue counseling or other

treatment to alleviate the symptoms of ADHD, the employer did not meet its burden to show that claimant's tardiness was misconduct.

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

DECISION: Hearing Decision 15-UI-38600 is set aside, as outlined above.¹

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating

DATE of Service: July 29, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

¹ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.