

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0851**

*Late Application for Review Allowed*  
*Reversed - No Disqualification*

**PROCEDURAL HISTORY:** On May 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100120). Claimant filed a timely request for hearing. On June 8, 2015, ALJ M. Davis conducted a hearing, and on June 9, 2015 issued Hearing Decision 15-UI-39763, affirming the Department's decision. On June 29, 2015, Hearing Decision 15-UI-39763 became final without an application for review having been filed. On July 14, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant presented a written statement regarding why she filed a late application for review. Claimant explained that she suffered from post-traumatic stress disorder and depression, had been hospitalized for treatment at the Portland Department of Veteran's Affairs Medical Center two times since 2014 in addition to her regular visits with a clinical psychologist, and did not pick up her mail, including Hearing Decision 15-UI-39763, due to panic attacks and depression that she experienced after her hearing. In addition to her own statement, claimant provided letters from her treatment providers confirming her medical conditions. We construe claimant's submissions as a request to have EAB consider as new information under OAR 471-041-0090(2) (October 29, 2006). The documents submitted by claimant are relevant and material to our determination, and are necessary to determine whether claimant had good cause for filing a late application for review, among other things. Therefore, claimant's written statement and supporting documentation have been marked EAB Exhibit 1 and are admitted into the record. Any party that objects to the admission of EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090. Unless such objection is received and sustained, the exhibit will remain in the record.

**FINDINGS OF FACT:** (1) Safeway Stores, Inc. employed claimant as a produce clerk from June 26, 2013 to April 29, 2015.

(2) The employer expected its employees to report for work as scheduled or notify a member of management if they were going to be absent. Claimant was aware of the employer's expectations.

(3) Claimant suffered from depression and post-traumatic stress disorder (PTSD) she first experienced while in the military service. She was hospitalized at the Portland VA Medical Center because of those conditions in April and November 2014 and began outpatient treatment with a psychologist in May 2014. EAB Exhibit 1.

(4) Claimant failed to report for work as scheduled or notify the employer she would be absent on June 17 and July 5, 2014. On July 10, 2014, claimant's psychologist sent the employer's Human Resources office a letter concerning her July 5, 2014 absence and explained that claimant often suffered from panic attacks "related to situation stress involving conflicts with coworkers", that she had experienced incidents of harassment at work, and requested the employer's assistance "to see if changes can be made to eliminate any harassment." EAB Exhibit 1.

(5) On or about January 8, 2015, claimant failed to report for work as scheduled or notify the employer she would be absent. That day, claimant's psychologist sent the claimant's manager a letter concerning her no call, no show and explained that claimant often resorted to that behavior when she experienced a panic attack relating to her fear of "entering a stressful environment" and that she was working in therapy to correct that behavior. EAB Exhibit 1. The employer suspended claimant from January 9-11, 2015 for her no call, no show on January 8.

(6) For two years, claimant experienced conflict with a male coworker who reportedly threatened her, threw things at her, ran over her feet with a cart, screamed profanities at her and blamed her for their conflict. EAB Exhibit 1. In February 2015, the employer confirmed the existence of the conflict on video and suspended both employees. Claimant remained fearful of the coworker.

(7) On March 14, 2015, claimant failed to report for work as scheduled or notify the employer she would be absent. On March 19, 2015 the employer suspended claimant for three days for her no call, no show.

(8) On April 12, 2015, claimant was scheduled to report to work around midnight. She became fearful of encountering the coworker with whom she had a conflict, experienced a panic attack, and did not report for work. After her panic attack subsided, she called to explain her absence. However, a management employee was not available. When claimant reported for work at her next scheduled shift on April 15, she was notified that she had been taken off the schedule. On April 29, 2015, the employer discharged claimant for her April 12<sup>th</sup> failure to report to work or notify the employer of her absence.

(9) Between June 9 and early July, 2015, claimant was out of town for a job interview and training as a truck driver. She experienced panic attacks during the course of her training and was denied potential employment for that reason. When claimant returned to her residence, she was overwhelmed by her depression and panic attacks and was unable to retrieve her mail. When she did so, she learned that she had been denied benefits by Hearing Decision 15-UI-39763. On July 14, 2015, claimant faxed an application for review of Hearing Decision 15-UI-39763 to the Employment Appeals Board. EAB Exhibit 1.

**CONCLUSIONS AND REASONS:** Claimant's late application for review is allowed. On the merits, we disagree with the ALJ. The employer discharged claimant, but not for misconduct.

**Late Application for Review; Evidentiary Matter.** Claimant's application for review was untimely, as it was not filed within 20 days after the mailing date of the hearing decision, June 29, 2015. See, OAR 471-041-070 (March 20, 2012); Hearing Decision 15-UI-39763. However, the deadline for filing an application for review may be extended a reasonable time upon a showing of good cause. ORS 657.875; OAR 471-041-0070(2).

EAB Exhibit 1 demonstrates that factors and circumstances beyond the claimant's reasonable control, specifically, her mental health, prevented timely filing of her application for review, and it is more likely than not that she filed it promptly after becoming capable of attending to the matter. Accordingly, claimant has demonstrated good cause and her late application for review is allowed.

**Discharge Analysis.** 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 is conscious of her (or his) conduct and knew or should have known that her conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. Under OAR 471-030-0038(3)(b), absence due to illness or other physical disabilities are not misconduct.

As a preliminary matter, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. See e.g. *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred). Here, the evidence shows the employer discharged claimant for "failure to show up for several shifts and several no call, no shows." Audio Record ~ 7:10 to 7:30. The last incident of a no call, no show preceding claimant's discharge was her absence and failure to call prior to her shift on April 12, 2015. Therefore, that incident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

The employer had the right to expect claimant to report for work as scheduled or notify the employer she would be absent. Claimant understood the employer's expectation, and on April 12, 2015, violated it when she failed to report for work as scheduled or notify the employer that she would be absent. However, to disqualify an individual from receiving benefits, an employer has the burden to establish by a preponderance of the evidence that a violation of a reasonable employer expectation for which the claimant was discharged was due to misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant explained at hearing that she failed to report for work as scheduled on April 12 because she had a panic attack over the possibility of encountering a coworker who reportedly antagonized her in the

past. Audio Record ~ 18:00 to 19:15. Claimant's assertion that she experienced a panic attack that day for that reason was plausible and credible given her medical history and January 8 and May 19, 2015 letters from her treating psychologist. EAB Exhibit 1. On this record, it is more likely than not that claimant's absence was the result of her mental health issues, and absence due to illness is not misconduct. OAR 471-030-0038(3)(b).

The employer also discharged claimant for failing to notify the employer she would be absent that day. In Hearing Decision 15-UI-39763, after finding that on April 29, 2015, the employer discharged claimant because in part because she failed to notify the employer she would be absent, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

Claimant confirmed that she was repeatedly absent from work and did not notify the employer of her absence[s]. She testified that she was unable to notify the employer of her absences because she had panic attacks. No evidence was presented to establish that claimant notified the employer that panic attacks were the reason she failed to report for work... At the very least, claimant demonstrated an indifference to the standards of behavior the employer had the right to expect from her [and] was wantonly negligent.

Hearing Decision 15-UI-39763 at 3. However, claimant testified that she repeatedly spoke to the employer about her panic attacks and related absences and claimant's psychologist sent a letter to the employer, at claimant's request, in January of 2015, explaining how claimant's "panic attacks" and PTSD resulted in "no call no shows" at work and requesting the employer's assistance in minimizing stressful conditions at work that led to her panic attacks. Audio Record ~ 21:15 to 22:15; EAB Exhibit 1. She also testified that after the start of her shift on April 12 when her panic attack was over, she left a message for the employer regarding the reason for her absence from work. Audio Record ~ 19:15 to 19:45. On this record, claimant's attempts to familiarize the employer with her complicated psychological history and to explain her "no call no shows" at work demonstrated that she was not indifferent to the employer's attendance policy and the consequences of her absences for the employer. Accordingly, neither claimant's absence nor failure to notify the employer in the final incident on April 12 constituted a willful or wantonly negligent violation of the employer's attendance policy.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

**DECISION:** Hearing Decision 15-UI-39763 is set aside, as outlined above.<sup>1</sup>

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

**DATE of Service:** August 25, 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

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<sup>1</sup> 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.

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](http://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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