

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1044

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 2, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85559). Claimant filed a timely request for hearing. On August 12, 2015 ALJ Frank conducted a hearing, and on August 14, 2015 issued Hearing Decision 15-UI-43029, reversing the Department's decision. On August 31, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Walgreen Company employed claimant as a customer service associate from April 2, 2005 until June 2, 2015.

(2) The employer expected claimant to return on time from his 15 minute rest breaks. Claimant understood the employer's expectation.

(3) Claimant worked the graveyard shift, from 11:30 p.m. until 8:00 a.m. Claimant had two 15 minute rest breaks during this shift as well as a lunch break.

(4) In 2015, claimant began to experience difficulties in sleeping during the day as a result of personal issues. When he arrived for work after having not a restful sleep, claimant was very tired and it was hard for him to stay awake. Claimant asked the employer to assign him to a day shift because of his sleepiness during the graveyard shift, but the employer told him it did not have anyone else to take over his shift.

(5) On February 12, 2015, the lead worker observed claimant sleeping at his work station, a check stand with a cash register, when he was on duty and not on break. The lead gave claimant a verbal warning about sleeping on duty. After he received the warning, claimant took various steps to eliminate the

conditions that he thought might have caused him to involuntarily fall asleep at his cash register. Since claimant had been working in a seated position due to swollen feet, he saw his physician for treatment to reduce that swelling. Claimant was then able to and did remove the chair from his cash register area. Claimant thought that if he no longer sat while at the cash register, but stood on his feet throughout his shift, he would not fall asleep while on duty. Claimant also took steps to have the lights at his cash register turned on brightly to inhibit falling asleep.

(6) On February 28, 2015, claimant took an intended a nap during his 15 minute break. Claimant overslept the end of his break time, did timely return to work and the lead worker had to wake him up. The lead worker gave claimant a written warning for not returning to work on time after the 15 minutes scheduled for the break. Claimant had been handling his sleepiness by taking “power naps” during his 15 minute rest breaks, which refreshed him and which he thought allowed him to remain awake during the remainder of his shift. Audio at ~ 22:25, ~25:18. After claimant received this written warning, he began to take an alarm clock with him on his breaks and to set it to awaken him from his nap in sufficient time to allow him to return to work on time after his break was over.

(7) On April 28, 2015, at 1:30 a.m., claimant began a 15 minute rest break from which he was expected to return to work at 1:45 a.m. In the break room, claimant set his alarm clock to awaken him at the end of his break and began a “power nap.” Audio at ~25:18. When claimant did not return from his break by 2:00 a.m., the lead worker went to the break room, found that claimant was asleep and awakened him at that time. Although claimant thought he had set his alarm clock to signal him the end of his break, he had mistakenly set it to ring at 1:45 *p.m.* and not at the 1:45 *a.m.* that he had intended. Claimant told the lead worker of his error. The lead worker issued a final written warning to claimant for exceeding not returning to work on time after his scheduled break on April 28, 2015. The warning advised claimant he would be subject to discharge if in the future he did not return to work by the time a break was scheduled to end.

(8) On May 21, 2015, at 1:53 a.m., claimant began a 15 minute rest break from which he was expected to return to work at 2:08 a.m. Claimant took his alarm clock with him to the break room, but he was so tired that he fell asleep as soon as he sat down in the break room and before he was able to set the alarm on his clock to alert him, as he customarily did, when his break was over. At 2:18 a.m., the lead worker went to the break room and awakened claimant. Claimant had exceeded the time scheduled for the break by ten minutes.

(9) On June 2, 2015, the employer discharged claimant for taking an excessively long break on May 21, 2015.

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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing and in its written argument, the employer and its witness contended that the employer discharged claimant for several incidents of falling asleep while on duty and not returning to work on time from scheduled breaks because he was asleep. Audio at ~ 6:53; Employer's Written Argument at 1. However, EAB customarily limits its review of a claimant's discharge to the final incident of alleged misconduct because that is usually the proximate cause of the discharge.¹ This is because, as here, when the employer was aware of the alleged misconduct that preceded the final incident and did not discharge claimant, it was the final incident that prompted the employer to proceed with the discharge. Accordingly, EAB has limited its review to the incident occurring on May 21, 2015.

As claimant recounted the cause of his failure to return on time from his break on May 21, 2015, it appears that claimant involuntarily fell asleep before he was able to set the alarm clock that, under normal circumstances, would have awakened him in sufficient time for a timely return to work. The employer did not dispute claimant's testimony that he customarily set an alarm clock to allow him to take a "power nap" during his breaks, and until May 21, 2015, he had not failed to set it. Audio at ~28:29, ~31:05, ~33:00. While it might have been negligent for claimant not to have set his alarm clock before falling fell asleep, on these undisputed facts, it was not wantonly negligent behavior. Rather, it was an involuntary occurrence, an inadvertent lapse, and a non-volitional oversight.² Absent evidence

¹ See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

² See *Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent); *Marina V. Berlachenko* (Employment Appeals Board, 11-AB-0810, March 24, 2011) (absent evidence claimant was conscious that she was failing to be careful, her failure was not wantonly negligent); *Paul A. Klinko* (Employment Appeals Board, 11-AB-0777, March 17, 2011) (absent evidence claimant was conscious of his failure to perform a task, the failure was not wantonly negligent); *Lisa D. Silveira* (Employment Appeals Board, 10-AB-1426, June 14, 2010) (absent evidence claimant was aware of her failure to perform a routine task, her failure was not wantonly negligent); *Debra L. Rutschman* (Employment Appeals Board, 10-AB-1155, May 14, 2010) (absent evidence claimant was conscious she was making an error, her error in dispensing medication was not wantonly negligent); *Deborah A. Munhollon* (Employment Appeals Board, 10-AB-1949, May 14, 2012) (absent evidence claimant's failure to read a restricted delivery label was conscious, her failure was not wantonly negligent); *Eli A. Justman* (Employment Appeals Board, 10-AB-1022, May 13, 2010) (absent evidence claimant's failure to review his calendar was conscious, his missing an appointment was not wantonly negligent); *Joshua A. Osborn* (Employment Appeals Board, 10-AB-1979, May 13, 2010) (absent evidence claimant's failure to be careful and accurate in cash handling was conscious, his failure was not wantonly negligent); *Sean N. Wiggins* (Employment Appeals Board, 10-AB-0840, May 4, 2012) (absent evidence claimant's failure to document a test was conscious, her failure was not wantonly negligent); *Salvador Ramirez* (Employment Appeals Board, 10-AB-1924, April 29, 2010) (absent evidence claimant's failure to fill a vehicle with the correct fuel was conscious, his failure was not wantonly negligent).

that claimant's behavior on May 21, 2015 involved some element of conscious awareness, the employer has not met its burden to demonstrate that claimant's behavior was willful or wantonly negligent, which is necessary to conclude that it was disqualifying misconduct under OAR 471-030-0038(1)(c).

While claimant was aware well before May 21, 2015 that he had a tendency to fall asleep during his breaks, this foreseeability did not, as the employer contended in its written argument, necessarily make claimant's behavior falling asleep during his break that day willful or wantonly negligent. Employer's Written Argument at 1. In light of what claimant reasonably could foresee about falling asleep and not returning on time from his break, he took reasonable precautions by obtaining and regularly using an alarm clock to awaken him from his "power naps" in sufficient time to return to work by the scheduled end of his break. Had claimant not taken this precaution, his behavior on May 21, 2015 might have been wantonly negligent. However, he did, and it does not appear that it was reasonably foreseeable to him that he might one day fall asleep on his break too quickly to set the alarm clock. The employer also did not demonstrate that it was willful or wantonly negligent of claimant to have fallen asleep during his break on May 21, 2015.

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

DECISION: Hearing Decision 15-UI-43024 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 30, 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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