

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1108

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 23, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 83604). The employer filed a timely request for hearing. On September 11, 2015, ALJ Triana conducted a hearing, and on September 15, 2015 issued Hearing Decision 15-UI-44321, affirming the Department's decision. On September 21, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer submitted written argument with its application for review, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) O'Reilly Auto Parts employed claimant from January 25, 2009 to July 1, 2015, last as an assistant manager.

(2) The employer expected employees to report for work on time. The employer expected managers scheduled to open the employer's store to do so on time. Claimant understood the employer's expectations.

(3) On July 2, 2014, claimant was scheduled to report for work at 7:00 a.m. and open the employer's store at 7:30 a.m. Claimant was a deep sleeper and therefore set several alarms on multiple devices to ensure he woke up in time to report for work and open the store as scheduled. However, claimant slept through his alarms, and therefore reported for work and opened the store late. The employer gave claimant a final written warning for failing to report for work and open the store on time.

(4) After July 2, 2014, claimant attempted to ensure that he did not report for work and open the store late by going to bed earlier, being more diligent about ensuring that his alarms were set, and setting even more alarms if he felt especially tired. Claimant did not report for work or open the store late from July 3, 2014 through June 29, 2015.

(5) On June 30, 2015, claimant again was scheduled to report for work at 7:00 a.m. and open the employer's store at 7:30 a.m. When going to bed on June 29, claimant set five alarms on his cell phone and clock radio to ensure he woke up in time to report for work and open the store as scheduled. However, claimant slept through all five alarms. Shortly after 7:30 a.m., claimant was awakened by a telephone call from another employee who was waiting for claimant to open the store. Claimant immediately went to work, where he arrived at approximately 8:00 a.m., and opened the store at approximately 8:15 a.m.

(6) The employer discharged claimant for failing to report for work and open the store on time on June 30, 2015.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for failing to report for work and open the store on time on June 30, 2015. Claimant violated the employer's expectations because he overslept, and therefore did not willfully violate the employer's expectations. Nor does the record show that claimant consciously engaged in conduct he knew or should have known would probably cause him to oversleep. Claimant had slept through his alarms on only one prior occasion within the last year and took steps to ensure that it did not happen again. On June 29, he set five alarms on two devices to ensure that he awoke in time to report for work and open the store as scheduled on June 30. Claimant was not indifferent to the consequences of his actions.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-44321 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 12, 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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