

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1221

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144500). Claimant filed a timely request for hearing. On September 29, 2015, ALJ S. Lee conducted a hearing, and on October 2, 2015 issued Hearing Decision 15-UI-45304, affirming the Department's decision. On October 13, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sheridan Fruit Co. Inc. employed claimant as a data entry employee from March 16 to May 11, 2015.

(2) The employer expected employees to clock in to work within five minutes of their scheduled start time. The employer expected employees unable to clock in to work within five minutes of their scheduled start time to notify the employer as soon as they knew they were unable to do so. Claimant understood the employer's expectations.

(3) The employer required claimant to work a mix of day and night shifts, which interfered with her sleeping patterns, causing her to experience insomnia and become increasingly exhausted. After a few weeks, claimant began complaining to the employer that she could not continue working a mix of day and night shifts. The employer refused to change claimant's schedule.

(4) On May 10, 2015, claimant was scheduled to start work at 11:00 a.m. Prior to 11:00 a.m., claimant determined that she was too exhausted to report for work on time, and notified the employer she would be late. Shortly after 11:00 a.m., claimant determined that she was too exhausted to report for work at all, and notified the employer she would be absent.

(5) On May 11, 2015, claimant clocked in to work 15 minutes after her shift started. Claimant did not notify the employer she would be late because she did not know she was running late.

(6) The employer discharged claimant for her conduct on May 10 and 11, 2015.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-45304, the ALJ found as fact that the employer discharged claimant for failing to report for work on May 10, 2015 and being late for work on May 11, 2015.¹ The ALJ concluded that claimant's failure to report for work on May 10 because she was "too tired" was an "intentional" violation of the employer's attendance policy and expectations, noting that claimant did not allege she was ill, only "tired."² The ALJ further concluded that claimant's failure to clock in to work within five minutes of her scheduled start time on May 11 was at least wantonly negligent because, at hearing, claimant "offered no reason for being late, only stating that that she did not believe she was late."³

At hearing, however, claimant did not allege that she failed to report for work on May 10 merely because she was "tired." She testified that she was too exhausted to report for work that day because working a mix of day and night shifts as required interfered with her sleeping patterns, causing her to experience insomnia and become increasingly exhausted during the course of her employment. Audio Record at 24:10. Claimant's situation therefore was analogous to employee who is absent from work due to illness or other physical or mental disabilities. Thus, to the extent claimant was discharged for failing to report for work on May 10, her discharge was not for misconduct. With respect to claimant's failure to clock in to work within five minutes of her scheduled start time on May 11, the record fails to show claimant consciously failed to do so, or consciously engaged in other conduct she knew or should have known would probably result in her failure to do so. Thus, to the extent claimant was discharged for failing to clock in to work within five minutes of her scheduled start time on May 11, the record fails to establish that her conduct was willful or wantonly negligent.

¹ Hearing Decision 15-UI-45304 at 2.

² *Id.* at 3.

³ *Id.* at 3-4.

The employer also reasonably expected employees unable to clock in to work within five minutes of their scheduled start time to notify the employer as soon as they knew they were unable to do so. However, the record fails to show that claimant delayed notifying the employer she would be absent from work on May 10 after realizing that she was too exhausted to work that day. Claimant did not notify the employer she would be late for work on May 11 because she did not know she was running late. The record therefore fails to show that claimant violated the employer's expectation that she notify the employer as soon as she knew she was unable to work on May 10, or unable to clock in to work within five minutes of her scheduled start time on May 11.

We conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-45304 is set aside, as outlined above⁴.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 3, 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.

⁴ 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.