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BYE: 201702

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0478

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111328). Claimant filed a timely request for hearing. On April 6, 2016, ALJ S. Lee conducted a hearing, and on April 8, 2016 issued Hearing Decision 16-UI-56939, affirming the Department's decision. On April 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a handwritten argument that was illegible and which he did not certify he provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). For these reasons, EAB did not consider claimant's argument.

FINDINGS OF FACT: (1) Salvation Army-ARC employed claimant in one of its stores from January 20, 2014 until January 22, 2016. Claimant's last position was as a keyholder, which was a sales associate with the additional responsibility of opening or closing the store.

(2) The employer expected claimant to report on time for his scheduled shifts and to notify the employer as soon as he was reasonably aware he would not be able to report as scheduled. The employer also expected claimant to arm the store security system when he was assigned to close the store. Claimant understood the employer's expectations, although he was not trained about the steps to take if the alarm system malfunctioned and it was not possible for him to set the system.

(3) On January 13, 2016, a Wednesday, claimant was assigned to close the store, and he worked until approximately 11:30 p.m. Wednesday was the store's busiest shopping day in the week because all of the store's merchandise was discounted fifty percent, and the store required a great deal of clean up after it was closed on Wednesdays. Since approximately early November 2015, claimant had not been scheduled to open the store if he closed it the previous day, and was scheduled to start work days at 1:30 p.m. the days after he closed the store. On January 13, 2016, claimant briefly looked at the posted work

schedule for the next day, January 14, 2016, but it did not register with him that it showed he was scheduled to open the store that day, and to report for work at 7:30 a.m. On January 14, 2016, claimant reported for work at 1:30 p.m. assuming that was his scheduled start time.

(4) On January 15, 2016, claimant was scheduled to close the store. Claimant locked all the doors to the store and attempted to activate the alarm system. The system malfunctioned and claimant was not able to set the alarm. Claimant checked all the doors to the store and determined that they were closed and locked. Claimant tried to troubleshoot the problem for at least a half hour before trying to reach another keyholder for instructions about what he should do. Claimant was unable to reach that keyholder. Not knowing the employer's protocols in the event of this problem, claimant made sure the store's doors were locked, left a note at the store stating he had not been able to activate the alarm system at the end of the shift, and went home.

(5) On January 18, 2016, claimant was scheduled to open the store at 7:30 a.m. The previous night, January 17, 2016, claimant set his alarm to awaken him in time to arrive at work on time. Claimant did not hear his alarm ring on the following morning and overslept, not awakening until 7:15 a.m. After he awakened on January 18, 2016, claimant rushed to ready himself for work and arrived at the store at approximately 8:30 a.m. Claimant did not call the employer to notify it that he was going to open the store late because no one would be in the store to answer the phone since he had not opened it, and he was trying to arrive at the store as quickly as possible.

(6) On January 18, 2016, the employer suspended claimant for opening the store late on January 14 and 18, 2016. On January 22, 2016, the employer discharged claimant for his lateness in opening the store on those two days and for his failure to set the alarm on January 15, 2016.

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).

In Hearing Decision 16-UI-56939, the ALJ concluded that claimant's failure to arrive on time for work on January 18, 2016 was misconduct. The ALJ reasoned that, while claimant's oversleeping his alarm was not willful or wantonly negligent behavior, his failure to call at least the store's acting manager to notify her he was going to be late that day constituted a willful or wantonly negligent violation of the employer's standards. Hearing Decision 16-UI-56939 at 4. The ALJ further concluded that claimant's failure to notify the acting manager that he was not able to set the alarm on January 15, 2016 was also wantonly negligent behavior, apparently reasoning that his efforts at troubleshooting the source of the

problem, calling another keyholder for advice and ensuring that the store was locked and secured before he left, were insufficient to show he did not act with indifference to the employer's interests. Hearing Decision 16-UI-56939 at 4-5. Finally, the ALJ concluded that claimant's late arrival for work on January 14, 2016 was not misconduct since his he made a mistake about the start time of his shift, and inadvertent errors generally do not have the accompanying mental state to constitute wantonly negligent behavior, or misconduct. Hearing Decision 16-UI-56939 at 4. However, we disagree that any of these alleged acts constituted misconduct.

At the outset, EAB generally considers only the final incident that culminated in claimant's discharge in determining whether claimant engaged in misconduct. However, all the incidents the employer cited in support of claimant's discharge occurred very close in time to each other, and it is plausible the employer did not have time to determine whether it was going to proceed to discharge claimant on any one of the incidents before the next occurred. Accordingly, all of the incidents will be addressed in this decision.

With respect to claimant's late arrival for work on January 14, 2016 at 1:30 p.m., rather than the 7:30 a.m. start time he was scheduled for, we agree with the ALJ that claimant's behavior was not willful or wantonly negligent. Claimant presented first-hand evidence that he was not aware the employer's schedule diverged from what it had been for the past two months, and he thought the start of his shift was 1:30 p.m. For the reasons stated in Hearing Decision 16-UI-56939 at 4, the employer did not persuasively rebut claimant's testimony that he looked at the schedule on January 13, 2016 and believed he was scheduled to begin work at 1:30 p.m. on January 14, 2016. Absent evidence showing that some aspect to claimant's behavior leading to this error was willful or wantonly negligent, of which there is none in the record, the employer did not meet its burden to show claimant had the requisite mental state to have engaged in misconduct.

With respect to claimant's failure to contact the acting manager on January 15, 2015 to notify her that he could not set the alarm, claimant contended the employer did not train him about what he should do if he was unable to set the alarm when he closed the store. Transcript at 28, 29, 35, 36. While the employer contended claimant was trained in setting the alarm, it did not contend he was ever informed about the steps he should take if the alarm malfunctioned and he was not able to activate it. Transcript at 16. Moreover, that claimant spent a significant amount of time unsuccessfully troubleshooting the problem with the alarm that evening, called another keyholder for advice, and before he left, checked the doors to the store to make sure they were secure and left a note at the store about the problem with the alarm demonstrates both that claimant was not indifferent to his inability to set the alarm and did not think his behavior would probably violate the employer's standards. *See* OAR 471-030-0038(1)(c). While claimant conceded at hearing that he probably should have tried to reach the acting manager, in light of claimant's efforts to fix the problems with the alarm system and the precautions he took before leaving the workplace that night, it cannot be concluded that his failure to make more efforts was wantonly negligent.

Similarly, the employer did not demonstrate that claimant's failure to call the acting manager to notify her that he was going to be late on January 18, 2016 was wantonly negligent. When claimant awakened late that morning he made serious efforts to arrive at work as quickly as he could in order to open it. It can be inferred that claimant was aware of the need for speed because other employees would arrive at the store and be unable to enter it to begin their work until he arrived. It is plausible that in his hurry,

claimant was distracted from appreciating that he could call the acting manager or some other employer representative to notify the employer, and was focused only on reaching the store. Transcript at 20. On these facts, without some additional evidence, it cannot be concluded that claimant was acting with indifference to the consequences of his late arrival when he did not call the acting manager, but made a decision to try to reach the store as soon as was practicable. Alternatively, that claimant might not have thought to call the acting manager in the midst of his hurry and distraction supports that he did not possess the conscious mental state needed to conclude his failure to contact the acting manager about his late arrival on January 18, 2016 was wantonly negligent.

Although the employer discharged claimant, it did not meet its burden to show that the behavior for which it discharged claimant was willful or wantonly negligent. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-56939 is set aside, as outlined above.

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

DATE of Service: May 27, 2016

NOTE: 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.

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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