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BYE: 201704

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-0568

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71305). Claimant filed a timely request for hearing. On April 14, 2016, ALJ Ainsworth conducted a hearing, and on May 4, 2016, after reviewing the entire record, ALJ Buckley issued Hearing Decision 16-UI-58863, affirming the Department's decision. On May 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she sought to present information that she did not offer into evidence during the hearing. Claimant did not explain why she was unable to present this information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present by way of her written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Bay Area Hospital employed claimant as a food service aide 2 from October 2, 1991 until February 3, 2016. Claimant worked in the hospital delicatessen.

(2) Claimant's duties as a food service aide required her to assemble the cold food components of lunches ordered by patients onto trays, to load completely assembled trays on carts for delivery to patients' rooms and, as needed, to wheel those carts to the patients' rooms if runners were not available. During peak meal times, claimant and the other food service staff were extremely busy and the pace at which they operated was hectic. Claimant sometimes became overwhelmed by her duties when the hospital's patient population was high.

(3) The employer required claimant to set a timer as she put assembled lunch trays on the delivery carts to ensure that each cart began its trip to a patient's room within seven minutes. Beginning sometime in approximately 2014, the employer expected claimant to take and record the temperatures of exposed

food in the delicatessen at 10:00 a.m., noon and 2:00 p.m. to ensure the temperature did not exceed 40 F. If claimant was unable to complete all required tasks in a timely manner, the employer expected her to give priority to transporting carts of food to patient rooms. Claimant understood the employer's expectations.

(4) On October 16, 2015, claimant's supervisor counseled her for failing to record food temperatures in the food safety log on October 3, 5, 6, 7 and 10, 2015. Most of the temperature readings that claimant missed were those scheduled for 2:00 p.m. Exhibit 1 at 1. Claimant told her supervisor she had become busy with the tasks of loading the trays or transporting the carts and had forgotten to record the temperatures on those days.

(5) On November 12, 2015, claimant's supervisor counseled her for continuing to fail to record food temperatures in the food safety log on October 21, 26, 27 and 31, 2015 and on November 1, 2, 3, 4, 5, 10 and 11, 2015. With the exception of one of those days, the temperature readings that claimant missed were all scheduled for 2:00 p.m. Exhibit 1 at 1. Claimant again explained to her supervisor that she had forgotten to record the temperatures on the days that she missed.

(6) Sometime on or after November 12, 2015, claimant asked her supervisor if another employer could take the temperature readings or be assigned to remind her since she was forgetting to take the required readings. The supervisor told claimant that recording food temperatures was her job and another employee would not be assigned to assist her. Transcript at 49. Claimant asked her supervisor if she was allowed to use a timer that would sound an alarm when it was time to take a required temperature reading. The supervisor did not permit claimant to use the timer. Transcript at 49.

(7) Sometime before February 1, 2016, claimant's supervisor suspected she had continued to fail to take and record the food temperatures as scheduled in the food service log after the counseling on November 12, 2016. The employer investigated these concerns and determined that on December 16 and 17, 2016 and January 19, 23, 24 and 25, 2016, claimant failed to record food temperatures. Exhibit 1 at 1. On all of these dates, claimant did not record temperature readings for 2:00 p.m., and on two of these dates, claimant also failed to record the noon readings. Exhibit 1 at 1-2. On January 26, 2016, one of claimant's coworkers reported to management that claimant sometimes hid carts after the seven minute timers had sounded to avoid having transport them herself to patient rooms. Exhibit 1 at 2; Transcript at 25.

(8) On February 1, 2016, the employer suspended claimant for violating its food handling expectations, including failing to record food temperatures and for allegedly hiding food carts after the timer sounded to alert her that it was time to begin transporting the carts.

(9) On February 3, 2016, the employer met with claimant and her union representative and told them it intended to discharge claimant. The union representative asked if claimant could be allowed to resign instead of being discharged. The employer agreed. On February 3, 2016, claimant resigned from work since the employer was not willing to allow her to continue working.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

In Hearing Decision 16-UI-58863, the ALJ concluded the work separation was a discharge and that the employer discharged claimant for misconduct. Although the ALJ noted that claimant's forgetting to take the food temperatures would not generally be sufficient to show willful or wantonly negligent behavior, the ALJ reasoned that, since claimant had received numerous warnings about the task, "her failure to correct this issue was a wantonly negligent violation of a standard an employer had a right to expect of an employee." Hearing Decision 16-UI-58863 at 4. We agree with the ALJ that the separation was a discharge, but disagree that it was for misconduct.

As to the work separation, if claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although claimant technically resigned from employment, it was with the consent of the employer and after the employer stated its intention to discharge her. It is undisputed that the employer was unwilling to allow claimant to continue working, and took the first steps to initiate the work separation by notifying her of what it was going to do. While the employer may have allowed claimant to resign on February 3, 2016 in response its statement of intentions, applying OAR 471-030-0038(2), the work separation was a discharge.

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

We agree with the ALJ that mere forgetfulness, alone, is usually insufficient to show the willful or wantonly negligent state of mind required to establish misconduct. We also agree that the warnings claimant had previously received about her failure to record food temperatures had put her on reasonable notice that she needed to try to take steps to correct the forgetfulness she testified caused her to miss recording the temperatures. In the face of this notice, it likely would have been wantonly negligent for claimant not to take corrective steps. However, contrary to the ALJ's assertion, claimant did try to overcome the distractions that prevented her from remembering to take the temperatures by seeking permission from the employer for another employee to take the temperatures, for another employee to remind her to take them, or using a timer that would alert her when the temperatures needed to be taken. Transcript at 48, 49. The employer did not dispute claimant's testimony that she proposed these steps to the employer or that the employer refused to authorize any of them. Since the evidence shows that the employer refused to allow claimant to take reasonable precautions to avoid the foreseeable distractions and forgetfulness that interfered with her compliance with the employer's standards, the employer did

not establish that claimant's failure to take food temperatures after November 12, 2015 was wantonly negligent.

The employer also did not show that claimant's alleged behavior in connection with the food carts was wantonly negligent. While the employer contended that claimant's coworker reported she was hiding the carts to avoid transporting them to patients' rooms, claimant contended she merely repositioned the carts, perhaps two feet away from their original locations, so she could load the remaining carts without obstruction. Transcript at 56, 57. In view of claimant's rebuttal, the employer did not meet its burden to show that, by moving or repositioning the carts, claimant willfully or with wanton negligence violated the employer's standards.

Although the employer discharged claimant for misconduct, it did not show that it did so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-58863 is set aside, as outlined above.

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

DATE of Service: <u>June 20, 2016</u>

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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