

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0629

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101128). Claimant filed a timely request for hearing. On May 12, 2016, ALJ Menegat conducted a hearing, and on May 25, 2016, issued Hearing Decision 16-UI-60423, affirming the administrative decision. On May 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Wildhorse Resort and Casino employed claimant as a valet attendant from August 6, 2007 until March 2, 2016.

(2) In approximately June 2014, claimant was diagnosed with diabetes. Claimant experienced difficulties successfully managing his diabetes, and often became ill because he was unable to control his blood sugar levels.

(3) The employer's policy defined a "tardy" as "clocking in after the scheduled start time and before the end of the first hour." The policy provided that each employee's tardies would be tracked on an attendance log, and an employee who accumulated 12 tardies within a rolling 12 month period would be terminated. Exhibit 1, p. 6. Claimant knew and understood the employer's policy regarding tardiness.

(4) From January 1, 2015 until January 31, 2016, claimant was tardy to work on 11 occasions. Each of these tardies was recorded on an attendance log, which claimant's supervisor reviewed with claimant; claimant initialed each incident of tardiness on this log. Claimant's supervisor also gave him written "Employee Performance Counseling Notices" regarding his tardiness on June 13, 2015; July 15, 2015; July 31, 2015; October 31, 2015; and January 12, 2016.

(5) On February 27, 2016, claimant reported to work one minute after his shift was scheduled to begin. Claimant was late to work because he was feeling ill due to his diabetes.

(6) On March 2, 2016, the employer discharged claimant for acquiring 12 tardies within a 12 month period.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that 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.

In Hearing Decision 16-UI-59867, the ALJ found that at the time he was discharged, claimant “was aware that he was at the end of the tardy limit and was also aware that his medical condition was not yet stabilized and caused him problems from time to time. Hearing Decision 16-UI-59867 at 3. The ALJ also found that “[c]laimant could have tried to make some accommodation arrangements with his supervisor or through the human resources department so that his tardies due to his medical condition could somehow be excused.” *Id.* The ALJ concluded that claimant’s failure to pursue “opportunities to address the tardiness problem” was a wantonly negligent disregard of the employer’s interests and therefore constituted misconduct. *Id.* We disagree.

The employer discharged claimant because, on February 27, 2016, he accrued a 12th incident of tardiness over a 12 month period in violation of the employer’s attendance policy. Claimant knew and understood the employer’s policy regarding tardiness because prior to his discharge, and received several written warnings about the number of tardies he was accumulating. When an employer discharges a claimant because of the total number of violations accrued under an attendance policy, EAB limits its evaluation to whether the circumstances of the final incident constituted disqualifying misconduct. *See generally* June 27, 2005 to the Employment Appeals Board from Tome Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a policy that assigns points for violations of an attendance policy, the last occurrence is considered the reason for the discharge). The proper focus of our misconduct analysis is therefore the reason why claimant was late on February 27.

Claimant did not report for work on time on February 27 because was ill due to his diabetes, a disease which he had difficulties successfully managing. The conduct which resulted in claimant’s discharge was therefore caused by illness, and not by a knowing and conscious indifference to the standards of behavior the employer expected of him. *See, e.g.*, OAR 471-030-0038(3)(b) (absences due to illness do not constitute misconduct).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

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.

DECISION: Hearing Decision 16-UI-59867 is set aside, as outlined above.

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

DATE of Service: June 29, 2016

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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