

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0726

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75803). Claimant filed a timely request for hearing. On June 14, 2016, ALJ M. Davis conducted a hearing, and on June 17, 2016 issued Hearing Decision 16-UI-62006, concluding claimant's discharge was not for misconduct. On June 20, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' arguments when reaching this decision.

FINDINGS OF FACT: St. Charles Health System, Inc. employed claimant as a speech language pathologist from August 1, 2009 to March 31, 2016.

- (1) The employer expected claimant to report to work and his scheduled appointments on time. Claimant understood the employer's expectation, and understood he was expected to arrive within five minutes of each scheduled appointment time.
- (2) The employer had concerns about claimant's punctuality. On March 24, 2016 and March 25, 2016, claimant arrived late to scheduled appointments with patients requiring a swallowing study. Claimant tried to report to those appointments on time, but they were scheduled closely after other appointments, were performed in different building a five-minute walk from claimant's office, and claimant had to prepare food to use during the studies, all of which could delay his arrival at the appointments.
- (3) On March 24, 2016, claimant tried to arrive on time for the swallowing study, and arrived as soon as he was able in consideration of his other appointments and the things he had to do to prepare for the

appointment, but arrived late. On March 25, 2016, claimant again tried to report to the swallowing study as soon as possible. His arrival was delayed because the patient in his previous appointment arrived late and he was delayed further by preparing the food and walking to the other building.

(4) On March 31, 2016, the employer discharged claimant because he was tardy to those appointments. The employer had other concerns about claimant's punctuality, but did not decide to discharge claimant until after his tardy arrivals to the appointments on March 24, 2016 and March 25, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

The employer had the right to expect claimant to be punctual in arriving to work and his scheduled appointments, and claimant generally understood the employer's expectation. On March 24, 2016 and March 25, 2016, claimant violated that expectation. In order for claimant's violations to be considered misconduct, however, claimant must have either intentionally chosen to arrive late to those appointments, or been late because he was consciously indifferent to the employer's expectation that he arrive on time. In this case, though, the employer did not meet its burden to show that he was.¹

Although the employer might have wanted claimant to act differently with respect to the March 24 and March 25 appointments, for example, by rescheduling the 9:30 a.m. appointment on March 25th appointment after his patient arrived late, leaving earlier for both of the swallowing studies, or managing his time differently or better, the employer did not show that claimant was intentionally late to either appointment, or that he acted with conscious indifference to the employer's expectation that he perform his duties on schedule. Rather, it appears that a combination of circumstances, including the time claimant needed with other patients closely scheduled appointments, additional responsibilities to prepare food, and the distance between his office and the location of the appointments all resulted in claimant's unintentional tardy arrival to those two appointments. Absent a showing that claimant acted willfully or with wanton negligence with respect to the incidents that prompted the employer to discharge him, the employer has not established that claimant's discharge was for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

¹ See accord *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (the employer has the burden to prove the elements of misconduct by a preponderance of the evidence).

DECISION: Hearing Decision 16-UI-62006 is affirmed.

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

DATE of Service: July 26, 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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