

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0873

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83457). Claimant filed a timely request for hearing. On May 6, 2016, ALJ Vincent conducted a hearing, and on May 9, 2016 issued Hearing Decision 16-UI-59121, affirming the Department's decision. On May 17, 2016, claimant filed an application for review with the Employment Appeals Board (EAB). On June 20, 2016, EAB issued Appeals Board Decision 2016-EAB-0582, which reversed Hearing Decision 16-UI-59121 and remanded the matter to the Office of Administrative Hearings for further proceedings. On July 7, 2016, ALJ Vincent conducted a hearing, and on July 15, 2016, issued Hearing Decision 16-UI-63877, concluding that the employer discharged claimant, but not for misconduct. On July 25, 2016, the employer filed an application for review of Hearing Decision 16-UI-63877 with EAB.

FINDINGS OF FACT: (1) Crown Market and Deli employed claimant as a cashier and market attendant from April 24, 2013 until March 22, 2016.

(2) The employer expected that employees would arrive on time for their scheduled shifts, and contact the appropriate manager as soon as possible if they were going to be late. Claimant knew about and understood this employer expectations as a matter of common sense.

(3) In 2012, claimant was diagnosed with the medical condition of insomnia. She was prescribed two medications, Xanax and Ambien, to help her sleep, but was instructed to take these medications only when she had 8 to 10 hours to devote to sleep. Claimant found it very difficult to manage these medications because the effects of Ambien were unpredictable. At times she would take the medication, sleep for 8 hours and awaken alert and refreshed. Other times she would take the medication, sleep for 14 hours, and awaken groggy and disoriented. Audio Recording (July 7, 2016) at 19:13. As a result of these unpredictable effects, claimant did not take Ambien and Xanax every night. Audio Recording (July 7, 2016) at 5:34.

(4) From 2013 through 2015, claimant was often late in reporting for her scheduled shifts. Her tardiness occurred because of her failure to wake up in time to get to work that was caused by her difficulties in getting to sleep due to her insomnia. On August 8, 2013 and May 3, 2015, the employer's district manager reprimanded claimant in writing for excessive tardiness. Audio Recording (May 6, 2016) at 13:43.

(5) In an effort to help herself wake up on time for work, claimant set two alarms on her cell phone. The second alarm sounded one-half hour after the first alarm. Claimant also tried using an alarm clock in addition to her cell phone, but found this to be ineffective; she concluded that the loud music her cell phone alarms played was the only effective method of waking herself up. Audio Recording (July 7, 2016) at 24:51, 25:12.

(6) On January 7, 2016, claimant was scheduled to work from 1 p.m. to 9 p.m. From approximately 1:30 a.m. to 5 a.m. on that day, claimant had been in the hospital emergency room receiving treatment for bronchitis. While at the emergency room, claimant was given an injection to relieve her pain; the injection caused her to sleep especially soundly when she returned home and claimant slept through the two alarms she had set on her cell phone for 12 p.m. and 12:30 p.m., respectively. As a result, claimant arrived at work at 1:30 p.m. Audio Recording (July 7, 2016) at 8:31-9:14.

(7) On January 29, 2016 claimant was one-half hour late for her scheduled shift, and on February 12, 2016, she was 15 minutes late for her scheduled shift. Claimant's tardiness occurred because she slept through her alarms; claimant had not taken Ambien and Xanax the nights before she was scheduled to work. On February 12, the employer's district manager orally reprimanded her for her tardiness, and warned her that continued tardiness could result in her discharge. Audio Recording (May 6, 2016) at 28:41.

(8) On February 28, 2016, claimant was 15 minutes late for her scheduled shift because she slept through her alarm. The district manager said nothing to claimant about her tardiness. Audio Recording (May 6, 2016) at 29:09.

(9) On March 22, 2016, claimant was scheduled to work from 2 p.m. to 9 p.m. In addition to relying on her cell phone alarms to wake her up on time for work, claimant was also relying on her fiancée, who would be returning home from work at 1 p.m., to wake her up. Claimant fell asleep at approximately 7 a.m.; while she was asleep, her fiancée sent her a text message informing claimant that the fiancée would be late in returning home. Claimant slept through her alarm, but woke up at approximately 2 p.m. when a coworker called her. Audio Recording (July 7, 2016) at 28:33. Claimant reported for her scheduled shift at 3:30 p.m. Audio Recording (July 7, 2016) at 23:14.

(10) On March 22, 2016, the employer discharged claimant for excessive tardiness.

CONCLUSION AND REASONS: We agree 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.

The employer discharged claimant for excessive tardiness. As a matter of common sense, claimant knew about and understood that the employer expected her to arrive on time for her scheduled shifts. Throughout her work for the employer, claimant was often late to work. The owner tolerated numerous incidents of tardiness, however, and only decided to discharge claimant on March 22, 2016, after she was one and one-half hours late to work on that date. The focus of our misconduct analysis is therefore on the final incident for which the employer discharged claimant.

The record shows that claimant has suffered from insomnia since 2012, and has had difficulties managing this condition through prescription medication. Claimant was often tardy to work because she experienced problems falling asleep at times that would allow her to get up in time for work. Claimant attempted, though not always successfully, to address her problem in waking up by setting two alarms on her cell phone that played loud music. On March 22, in addition to setting her cell phone alarms, claimant also arranged for her fiancée to wake her up when the fiancée returned home from her job. Claimant slept through her alarms, however, and her fiancée was late in coming home and unable to wake claimant up in time for her scheduled shift. As a result, claimant was one and one-half hours late for her shift on March 22. Based on this record, we conclude that claimant took reasonable precautions to prevent her late arrival for work on March 22; these precautions failed because of a situation claimant could not have foreseen -- her fiancée's unexpected late arrival home. Claimant's tardiness was not the result of her conscious or deliberate disregard of the employer's expectation that she report to work on time. Her actions were neither willful nor wantonly negligent and therefore did not constitute misconduct.

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

DECISION: Hearing Decision 16-UI-63877 is affirmed.

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

DATE of Service: August 16, 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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