

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1043

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 101640). The employer filed a timely request for hearing. On August 9, 2016, ALJ Triana conducted a hearing, and on August 12, 2016 issued Hearing Decision 16-UI-65526, affirming the Department's decision. On September 1, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Wackenhut employed claimant as a security officer from June 6, 2014 to April 29, 2016.

(2) The employer expected its security officers to be at their posts at their scheduled start times. Claimant understood that expectation.

(3) The employer scheduled claimant to start work at 6:30 a.m. on April 26, 2016. On April 25, 2016, claimant realized he had misplaced his security badge, which he needed to access his post. Claimant notified a supervisor, who told claimant that the employer would have a new security badge ready for claimant the next morning.

(4) It typically took approximately 10 minutes to be provided a new security badge. On April 26, 2016, claimant arrived at work at approximately 6:00 a.m. and asked for a new badge. It took the employer until approximately 6:35 to provide him one. Claimant immediately went to his post, but did not arrive until 12 minutes after his scheduled start time.

(5) The employer discharged claimant for not being at his post at his scheduled start time on April 26, 2016.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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 a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, the employer discharged claimant for not being at his post at his scheduled start time on April 26, 2016. Claimant was not at his post at his scheduled start time because he misplaced his security badge and did not arrive at work in time to obtain a new one and be at his post when his shift started. However, claimant did not willfully misplace his badge, and the record fails to show he consciously engaged in conduct he knew or should have known would probably result in him misplacing it. Nor was claimant indifferent to the consequences of misplacing his badge, as demonstrated by the fact that he notified the employer on April 25, arranged to obtain a new badge before the start of his shift on April 26, and arrived at work approximately 30 minutes early to obtain it. Claimant did not know, and had no reason to know, to arrive earlier, given that it typically took only 10 minutes to be provided a new security badge. Claimant's failure to be at his post at his scheduled start time therefore was not willful or wantonly negligent.

Claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 16-UI-65526 is affirmed.

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

DATE of Service: September 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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