

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1119

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 24, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 104032). The employer filed a timely request for hearing. On September 15, 2016, ALJ M. Davis conducted a hearing, and on September 16, 2016 issued Hearing Decision 16-UI-67616, affirming the Department's decision. On September 29, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cascadian Fabrication, Inc. employed claimant as a craftsperson from December 3, 2013 until July 21, 2016.

(2) The employer expected claimant to notify it at least an hour before the scheduled start of his shift if he was going to be absent or late to work. Claimant understood the employer's expectations.

(3) On March 13, 2015 and April 24, 2015, the employer issued disciplinary reports to claimant for multiple absences and occurrences of tardiness. On March 30, 2016, the employer issued a disciplinary report to claimant for multiple unscheduled absences. After March 30, 2016 through July 20, 2016, claimant was absent or tardy from work on several occasions.

(4) Sometime after March 30, 2016, claimant experienced an injury to his lower back. On occasion, the injury was painful. On approximately July 14, 2016, claimant's physician prescribed cyclobenzaprine to treat his pain. The warnings for cyclobenzaprine that claimant read stated that it could cause sedation and it could be hazardous to operate machinery while taking it. Claimant usually avoided taking the medicine if he was going to be working. When he did take the medicine, it caused him to feel drowsy and dizzy.

(5) On the evening of Wednesday, July 20, 2016, claimant was experiencing severe back pain. At approximately 8:00 p.m., claimant took a prescribed dose of cyclobenzaprine to ease his pain. Since the instructions for the cyclobenzaprine were to take the recommended dose once every eight hours, claimant thought its effects would be largely dissipated by the time he needed to awaken to report for work as scheduled on July 21, 2016 at 8:00 a.m. Around 10:00 p.m., as he usually did, claimant set six alarms to awaken him the next morning in time for work. The first alarm was set to activate at 6:50 a.m. and the remaining alarms were set to activate at five to ten minute intervals, with the final alarm to sound at around 7:20 a.m. Claimant needed to leave his home by 7:30 a.m. to arrive at work by 8:00 a.m.

(6) On July 21, 2016, claimant did not hear any of the alarms when they activated. Sometime between approximately 11:32 a.m. and 12:00 noon, claimant awakened to the sounds of all six alarms and saw her had received a text message from his manager at 11:31 a.m. Claimant responded to the text message and told his manager that he had overslept that morning despite the alarms he had set and attributed it to the dose of cyclobenzaprine he had taken the night before. At around noon that day, claimant called the employer's office to explain his absence. At 12:26 p.m., claimant sent a text message to the employer's office manager and told her he had just awakened and that he was not at work because he had slept through the alarms he had set due to the medication he had taken back pain the evening before.

(7) On July 21, 2016, the employer discharged claimant for failing to notify the employer before his shift began earlier that day that he was going to be absent.

CONCLUSIONS AND REASONS: 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 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer testified at hearing about the many times claimant was absent or tardy before July 21, 2016, it knew of all of these alleged violations before the final incident on July 21, 2016. Since none of the prior incidents resulted in a discharge, it appears the employer discharged claimant for his alleged violation of its attendance policy on July 21, 2016. The July 21, 2016 incident is the proper focus of the discharge analysis.

Claimant attributed sleeping through his alarms to an unforeseen effect of taking cyclobenzaprine for his back pain approximately eleven hours before he needed to leave his house to arrive on time for work. Claimant testified that one of the labelled warnings to the cyclobenzaprine was "sedation." Audio at

~23:10. Available information on cyclobenzaprine states that one of its side effects can be “severe drowsiness.” <http://www.mayoclinic.org/drugs-supplements/cyclobenzaprine-oral-route/description/drg-200632>; <http://drugs.com/cyclobenzaprine.htm>. While these warnings might suggest claimant should have foreseen that he would oversleep the start of his scheduled shift if he took cyclobenzaprine the evening before, he took reasonable precautions against doing so. First, claimant took only the recommended dose and the prescription instructions recommended that the cyclobenzaprine be taken every eight hours. It was not unreasonable for claimant to think that significant effects from the drug would largely have dissipated after eight hours and that since he took the drug approximately eleven hours before he needed to awaken to arrive for work on time, it would not significantly interfere with his awakening to report for work on time. As well, claimant took reasonable precautions to avoid oversleeping by setting six alarms to awaken him on time. Because claimant employed these safeguards, it was not reasonably foreseeable that the cyclobenzaprine would cause him to oversleep, and it was not wantonly negligent for him to take that drug at 8:00 p.m. on July 20, 2016. Since the circumstances that resulted in claimant’s failure to arrive for work on time and in his failure to call the employer to report he was going to be absent from or tardy to work were unforeseeable, his behavior in violating the employer’s attendance standards were not wantonly negligent.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-67616 is affirmed.

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

DATE of Service: October 25, 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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