EO: 200
BYE: 201732

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

765
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1321

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75923). Claimant filed a timely request for hearing. On November 1, 2016, ALJ Wyatt conducted a hearing, and on November 4, 2016 issued Hearing Decision 16-UI-70608, concluding claimant's discharge was not for misconduct. On November 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) New Seasons Market, LLC employed claimant as a prepared foods clerk from May 13, 2006 to August 19, 2016.

(2) The employer expected employees to report to work on time and when scheduled, and notified them of the expectation. Claimant understood and tried to report to work early for her scheduled shifts.

(3) In March 2016, the employer modified its attendance policy. Employees accumulated between one and three attendance points for each tardiness or absence unless the employer considered the tardiness or absence protected or the employee had sufficient accrued leave balances to cover the instance. The employer did not count a late arrival as a tardiness unless the employee was more than six minutes late. The employer discharged employees who accrued ten or more attendance points in a rolling six-month period. Although the employer provided employees with some training and posted several notices about the policy change, claimant did not understand the modified policy and did not understand when certain types of absences would be excused or result in the accumulation of attendance points.

(4) Claimant attended school in addition to working for the employer. Claimant had difficulty working nearly full time hours while attending school. In April 2016, claimant asked for a reduction in hours. The employer did not reduce her hours, and continued to schedule claimant to work almost 40 hours per

week while she attended school. Claimant's work schedule varied; she was scheduled to report to work at 12:00 p.m., 4:00 a.m., and other times.

(5) Prior to August 4, 2016, claimant had accumulated a sufficient number of attendance points that one more non-protected absence would result in her discharge. The employer warned claimant of her attendance situation. Claimant was confused and thought she should have had three fewer points based on her misunderstanding that a June 2016 absence due to illness had not resulted in the accrual of points.

(6) On August 4, 2016, claimant reported seven minutes late to work. While the employer investigated that incident, on August 8, 2016, claimant reported ninety minutes late to work because she had overslept.

(7) On August 19, 2016, the employer discharged claimant because of her attendance.

CONCLUSIONS AND REASONS: We agree with 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.

The employer planned to discharge claimant because of either the August 4th absence or the August 8th absence. Because either absence, considered individually, would have caused the discharge, we analyze both instances to determine whether claimant's discharge was for misconduct. The employer has the burden to prove misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

On August 4, 2016, claimant reported to work seven minutes late. Claimant did not specify to the employer the reason for her tardiness, and testified that she did not recall the incident but might have had car problems. Audio recording at ~ 17:35, ~ 24:30. Given the totality of circumstances present at that time, including that claimant generally tried to report to work early, worked a varied schedule, had asked for reduced hours, did not understand the attendance policy, might have had car trouble that day, knew she was to be discharged if she accrued another attendance point, and, had she arrived only one minute earlier, her arrival would not have been considered tardy or resulted in any attendance points, claimant's late arrival was not intentional, and, on this record, it does not appear to have been the result of her indifference to the consequences of arriving late. The August 4, 2016 incident was not, therefore, willful or wantonly negligent.

On August 8, 2016, claimant reported to work ninety minutes late because she overslept. Claimant testified, with respect to that incident, that she had set an alarm to wake up in time to work, but had been

"working such a hectic schedule, work and school, and was just tired" and when her alarm went off she "hit snooze and, you know, phone goes under pillow" and she did not hear her alarm sound again. Audio recording at ~ 18:25, 23:00. It appears that claimant set an alarm, and her failure to wake up in time to report to work after she "hit snooze" was the result of placing the phone under a pillow where she could not hear it when it sounded again. Claimant's placement of the cell phone in a place where she was unable to hear it sound was, more likely than not, the inadvertent or accidental result of her actions while overly tired, asleep, or, at a minimum, not fully awake, and, as such, it was not done willfully or with conscious indifference to the consequences of her conduct.

Having concluded that neither the August 4th or August 8th incident was the result of willful or wantonly negligent conduct on claimant's part, we conclude that her discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-70608 is affirmed.

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

DATE of Service: December 14, 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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