

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1408

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135055). Claimant filed a timely request for hearing. On December 6, 2016, ALJ Murdock conducted a hearing, and on December 9, 2016 issued Hearing Decision 16-UI-72680, concluding claimant's discharge was not for misconduct. On December 14, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had the outcome of this decision would remain the same for the reasons explained herein.

FINDINGS OF FACT: (1) Deschutes Brewery employed claimant as a cook from April 13, 2012 to September 14, 2016.

(2) The employer expected claimant to report to work on time. Claimant understood the expectation.

(3) Claimant had excessive attendance problems. The employer issued him warnings for attendance and poor work performance in August 2015, January 2016 and February 2016. Claimant knew based on the warnings that additional instances could result in his discharge and he worked to improve. In April 2016 he received a performance review that included positive comments about his attendance and work performance.

(4) On September 14, 2016 at 8:00 a.m., the employer scheduled claimant to attend a mandatory staff meeting. Claimant knew he was scheduled to attend the meeting and intended to attend it. He also knew he was scheduled to work that day at 11:00 a.m. Claimant set an alarm to wake up in time to attend the meeting but it did not wake him up and he overslept. Claimant missed the meeting and did not notify the employer that he was going to be absent from it.

(5) Claimant woke up and realized that he missed the meeting. He reported to work for his scheduled shift and worked most of the shift, and the employer discharged claimant before the end of his shift for failing to attend the mandatory meeting.

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.

Claimant had a history of excessive attendance violations, but the final instance that caused the employer to discharge him on September 14th was his failure to attend the mandatory staff meeting that morning. That conduct is therefore the proximate cause of the discharge, and the initial focus of the misconduct analysis. Only if that conduct is found to be willful or wantonly negligent would claimant's other attendance and performance problems be analyzed. The employer has the burden of proving that, more likely than not, claimant's conduct in the September 14th incident was willful or wantonly negligent. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is no dispute that claimant violated the employer's expectations by failing to attend the mandatory meeting on September 14th. For his violation to be considered misconduct for the purpose of disqualifying him from receiving unemployment insurance, however, the violation must have been done willfully or with wanton negligence. Claimant's violation was not willful; he intended to attend the meeting and did not intentionally miss it. Claimant's violation was also not wantonly negligent because wanton negligence requires an exercise conscious indifference to the consequences of his conduct. The fact that claimant was aware of his attendance problems, had worked to improve them, was aware of the mandatory meeting on September 14th, intended to attend it, and set an alarm to ensure that he woke up on time to attend the meeting all demonstrate that claimant was not indifferent to either the employer's expectation that he attend the meeting or the consequences he could face if he missed it.

Because claimant's September 14th violation of the employer's attendance expectation was not willful or wantonly negligent, the conduct that caused his discharge was not misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-72680 is affirmed.

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

DATE of Service: January 12, 2017

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.