

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1438

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 93120). Claimant filed a timely request for hearing. On December 7, 2016, ALJ Lohuis conducted a hearing, and on December 9, 2016 issued Hearing Decision 16-UI-72632, concluding claimant's discharge was not for misconduct. On December 28, 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.

FINDINGS OF FACT: (1) Asante employed claimant from January 11, 2016 to September 22, 2016.

(2) The employer expected claimant to be at his desk and ready to work at his scheduled start time, and upon returning from his scheduled breaks. Claimant had violated the employer's expectation on July 12, 2016, July 29, 2016, July 30, 2016 and September 9, 2016 when he reported to work late or returned late from rest breaks. In April and June 2016 the employer issued three "verbal coaching" warnings to claimant for reporting late to work and returning late from his lunch breaks. In July 2016, the employer issued claimant a written warning for tardiness. On September 2, 2016, the employer issued claimant a final written warning for being tardy to a training session and for reporting late to work. As a result, claimant understood the employer's expectations with respect to his attendance and punctuality.

(3) On September 15, 2016, claimant left his desk to perform some work-related tasks. When he finished his tasks, and without first returning to his desk, he began his rest break period. After being on his rest break for 8 minutes, he was approached with a question and returned to work without finishing his break. A coworker noticed claimant's extended absence from his desk and reported to the employer that claimant had returned at least 15 minutes late from his rest break. The employer questioned claimant about his actions. Claimant reported that he had been working during the relevant time period.

(4) The employer was unable to substantiate claimant's claim that he had been working while away from his desk on September 15th. On September 22, 2016, the employer discharged claimant on the belief that he had returned to work 15 minutes late from his September 15th rest break.¹

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 discharged claimant for returning 15 minutes late from his scheduled break on September 15, 2016. In a discharge case, the employer has the burden of proving that, more likely than not, claimant engaged in willful or wantonly negligent misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). To do so, the employer must necessarily prove that claimant engaged in the acts alleged to have been misconduct; the employer failed to meet that burden.

The employer alleged that claimant "was observed and witnessed" returning to work at least 15 minutes after his scheduled break ended on September 15, 2016. Audio recording at ~ 10:30. Neither of the employer's witnesses suggested, however, that they personally witnessed him returning late to work on that occasion, meaning that the evidence of claimant's tardy return from a break on that occasion was hearsay. Audio recording at ~ 20:40. Although claimant's history of attendance problems suggests it would not be out of character for claimant to have returned late from a break on September 15th, claimant provided a detailed description of his actions before, during, and after his break on that occasion, which included being away from his desk for an extended period of time while performing work, with only eight minutes of his absence being used as break time. Audio recording at ~ 21:45-25:00. We considered his description reliable because, although self-serving, it was based on notes he made about his actions close in time to the events, and was consistent with what he said to the employer when confronted about his actions that date. Audio recording at ~ 12:30, 25:05. It is notable that although claimant admitted he had a history of tardiness prior to the employer's final written warning, other than their dispute over September 15th, claimant's claim that he ceased being tardy after the final

¹ On September 19, 2016, the employer issued claimant a "verbal coaching" for poor attendance. The basis of the warning included approximately 16 instances when claimant was absent or left work early because he was sick. The employer did not assert that it factored those instances or the warning into consideration when discharging claimant, and, as such, we did not address it. To any extent the employer might have based its decision to discharge claimant on his absences or tardiness due to illness, however, the discharge was not for misconduct. Absences (or other attendance issues) due to illness are not misconduct, regardless whether they otherwise violate the employer's policies or expectations. OAR 471-030-0038(3)(b).

warning was consistent with the employer's evidence. Audio recording at ~ 27:00. It is also notable that one of the employer's witnesses provided inconsistent testimony about her conversation with claimant after the alleged September 15th incident, claiming at one point that claimant never told her that he had been working – including talking with therapists – while away from his desk on September 15th despite having previously testified that claimant had, in fact, told her that he had been talking with therapists while away from his desk that day. *Compare* Audio recording at ~ 13:30, 31:00.

Given that the employer's evidence about claimant's actions on September 15th lacked detail and context, was based solely on hearsay, and was primarily provided by a witness whose testimony on relevant matters was, ultimately, internally inconsistent, and despite the fact that returning late from the break in question was consistent with claimant's prior conduct, we cannot conclude that the employer established it was more likely than not that claimant returned late from his rest break on September 15th as it alleged. Because that incident is what caused the employer to discharge claimant, and the employer did not prove that the incident occurred, we conclude that claimant's discharge was not for misconduct. Claimant is, therefore, not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-72632 is affirmed.

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

DATE of Service: January 19, 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.

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