

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0290

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143012). Claimant filed a timely request for hearing. On February 13, 2017, ALJ Wymer conducted a hearing, and on February 15, 2017 issued Hearing Decision 17-UI-77024, concluding the employer discharged claimant, but not for misconduct. On March 7, 2017, 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.

FINDINGS OF FACT: (1) ColumbiaCare Services Inc. employed claimant from October 30, 2012 to November 18, 2016.

(2) The employer expected employees to report for work on time. The employer expected employees unable to report for work on time to notify the employer they were going to be late. Claimant understood those expectations.

(3) Claimant suffered from depression and anxiety, which caused her to experience anxiety attacks and insomnia. Claimant therefore often slept through her cell phone alarm. In response, claimant developed a night time routine with her doctor to prevent her from experiencing anxiety attacks and insomnia at night. Claimant also purchased a louder alarm clock which allowed her to set multiple alarms. Claimant still experienced anxiety attacks and insomnia, and slept through the alarms approximately half of the time. Claimant therefore typically had friends telephone her in the mornings in to wake her up. Finally, claimant had roommates who, when they heard claimant's alarms, would attempt to wake her up.

(4) The employer scheduled claimant to work the evening shift on November 17, 2016, and to report for work at 9:00 a.m. on November 18, 2016. Claimant asked to leave work 30 minutes early on November 17 to help ensure that she had time to perform her night time routine before going to bed. That evening,

she set her clock to alarm at 7:00 a.m., and again at 8:00 a.m. to ensure that she woke up in time to report for work on time. However, claimant was unable to find a friend to telephone her in the morning.

(5) Unfortunately, claimant experienced an anxiety attack and, as of 3:00 a.m. had not fallen asleep. Claimant took melatonin to help her fall asleep, and fell asleep sometime between 3:00 a.m. and 7:00 a.m. Claimant slept through her 7:00 a.m. alarm. A roommate attempted to wake claimant up but was unable to do so, and turned off the alarm. Claimant also slept through her 8:00 a.m. alarm. The roommate again attempted to wake claimant up but was unable to do so, and again turned off the alarm.

(6) Claimant did not wake up until almost noon, immediately contacted the employer, explained that she had just woken up, and offered to come in to work.

(7) The employer discharged for failing to report for on time on November 18, 2016 or notify the employer that she was going to be late.

CONCLUSIONS AND REASONS: 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 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). Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 17-UI-77024, the ALJ concluded that claimant's failure to ensure she woke up in time on November 18, 2016 to report for work on time was wantonly negligent because she understood her employment was in jeopardy and was aware that that her method for ensuring that she woke up in time was not entirely reliable.¹ However, claimant's failure to report for work on time was due to depression and anxiety, which caused her to experience an anxiety attack and insomnia. Absences due to illness or other physical or mental disabilities are not misconduct. In addition, the record fails to show claimant knew or should have known through prior experience that she probably would sleep through both her alarms and her roommate's attempts to wake her up, that her roommate would turn off her alarms, and that she would sleep past 9:00 a.m. Nor does the record show claimant was indifferent to the consequences of her actions, given her efforts to ensure she woke up in time, both generally and on November 18, 2016 in particular, and the fact that she contacted the employer immediately after she woke up, explained the reason for her absence, and offered to come in to work. The record therefore fails to establish that claimant's failure to report for work on time or notify the employer she was going to be absent was willful or wantonly negligent.

¹ Hearing Decision 17-UI-77024 at 2-4.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-77024 is affirmed.

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

DATE of Service: March 30, 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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