

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1063**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On July 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121743). Claimant filed a timely request for hearing. On August 1, 2017, ALJ Sgroi conducted a hearing, and on August 18, 2017, ALJ M. Davis<sup>1</sup> issued Hearing Decision 17-UI-90752, affirming the Department's decision. On September 5, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Fred Meyer Inc. employed claimant as a quality assurance technician from April 13, 2016 to May 28, 2017.

(2) The employer expected its employees to report for work as scheduled. The employer had a points-based attendance policy, under which the employer assessed partial points for tardiness based on the number of minutes late, one point for an unplanned absence, three points for a no call, no show. The employer imposed progressive discipline, up to and including discharge, based on the number of points assessed. If an employee accrued five points during a twelve month rolling period, he was subject to discharge. Claimant was aware of and understood the employer's expectations.

(3) By 2017, claimant had "long standing" diagnoses of Generalized Anxiety Disorder, Major Depression and Attention Deficit Disorder, for which he received treatment. Exhibit 1. His conditions compromised his energy level and made it difficult for him to go to bed at night, get out of bed in the morning and get to destinations and appointments on time. Transcript at 19.

(4) On August 11, 2016, the employer issued claimant a verbal warning because he had accrued two points under the attendance policy, following multiple instances of tardiness and absenteeism.

<sup>1</sup> ALJ Sgroi was unavailable to write Hearing Decision 17-UI-90752 after conducting the hearing on August 1, 2017. ALJ M. Davis reviewed the record, which included the official recording of the hearing, the record documents and admitted exhibits, and composed the hearing decision on behalf of the Office of Administrative Hearings (OAH). Hearing Decision 17-UI-90752 at 4.

(5) On May 3, 2017, the employer suspended claimant because he had accrued four points under the attendance policy following additional instances of tardiness and absenteeism.

(6) On both May 10 and May 11, 2017, claimant reported late for work and accrued partial points under the attendance policy.

(7) On May 23, 2017, claimant reported one hour late for work and accrued a partial point under the attendance policy.

(8) On May 24, 2017, claimant reported 15 minutes late for work and accrued a partial point under the attendance policy. That day, claimant spoke with his mental health provider after which it was concluded that his chronic mental health conditions had impacted his ability to report for work on time and, potentially, his continued employment.

(9) On May 25, 2017, based on the conclusion reached on May 24, claimant spoke to the employer's human resources supervisor and disclosed his depression and its effect on his ability to report for work on time. The supervisor responded that she would "consider this" before making any decision on claimant's continued employment. Transcript at 28.

(10) On May 28, 2017, the employer discharged claimant for excessive absenteeism and tardiness after he accrued five total points under the employer's attendance policy.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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. 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. Absences from work due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011). In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-90752, the ALJ concluded that the employer discharged claimant for misconduct, reasoning,

The employer's representative testified that the final occurrences that led to claimant's discharge occurred on May 23 and 24, 2017, when claimant reported to work late. While claimant testified that he suffers from generalized anxiety disorder, major depression, and attention deficit disorder and this causes him to have difficulty reporting for work on time, he

also testified that he did not believe his reporting to work late had any impact on the employer's business. If claimant was unable to report to work on time for a 7:00 am shift, he should have informed the employer of his condition or requested to change his work schedule. Claimant's testimony was not persuasive to establish that his conduct was not, at the very least, wantonly negligent.

Hearing Decision 17-UI-90752 at 3. While we agree that some of claimant's testimony at hearing suggested that he was indifferent to the consequences of being late for work, we disagree that claimant did not inform the employer of his depression and the effect it had on his ability to report for work on time. *See*, Transcript at 25, 28. In fact, the employer's witness agreed that claimant notified her of his depression in relation to his tardiness on May 25, 2017, three days prior to his discharge, and did not dispute that she agreed she would consider it before a decision on his continued employment was made.<sup>2</sup> *See*, Transcript at 28 and 31.

Barring illness or other exigent circumstances, the employer had the right to expect claimant to report to work as scheduled. Although the employer discharged claimant for excessive absenteeism and tardiness, the immediate or "but-for" cause of the discharge was claimant's tardiness on May 23 and May 24, 2017, which apparently resulted in the accrual of points to a total of five. Accordingly, the proper focus of the misconduct analysis is those two incidents of tardiness. *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge).

On May 23 and May 24, 2017, claimant did not report to work on time for his scheduled shift. On May 24, claimant consulted with his mental health provider regarding his circumstances and learned that his mental health conditions likely contributed to his continued inability to report for work on time. That realization motivated claimant to contact the human resources supervisor on May 25 and disclose his depression and its suspected relationship to his incidents of tardiness, which she apparently agreed to consider. The evidence in the record, consisting of claimant's provider's explanation of his conditions, suggests that it was those conditions that likely caused, or at least contributed to, the incidences of tardiness in question. Exhibit 1. Accordingly, the evidence regarding the reason for claimant's tardiness on May 23 and 24, 2017, was no more than equally balanced between the suspected indifference described by the ALJ and his chronic mental disabilities, which were not in dispute. Where the evidence on an issue is equally balanced, the party with the burden of proof, here the employer, has failed to satisfy its evidentiary burden. Accordingly, we conclude that claimant's tardiness on May 23 and 24, 2017, was caused by his mental disabilities of major depression, anxiety disorder and attention deficit disorder, and under OAR 471-030-0038(3)(b), absences due to such disabilities are not misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

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<sup>2</sup> Under the Americans with Disabilities Act (ADA), claimant's statement was arguably a request for an accommodation. *See* <https://www.eeoc.gov/policy/docs/accommodation.html#requesting>. ("Example A: An employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of medical treatments I'm undergoing." This is a request for a reasonable accommodation.")

**DECISION:** Hearing Decision 17-UI-90752 is set aside, as outlined above.<sup>3</sup>

J. S. Cromwell and D. P. Hettle.

**DATE of Service: October 2, 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](http://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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<sup>3</sup> This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.