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

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# EMPLOYMENT APPEALS BOARD DECISION
# 2017-EAB-1294

*Reversed*
*No Disqualification*

**PROCEDURAL HISTORY:** On September 18, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91208). Claimant filed a timely request for hearing. On October 23, 2017, ALJ Lewis conducted a hearing at which the employer failed to appear, and on October 24, 2017 issued Hearing Decision 17-UI-95193, affirming the Department's decision. On November 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Both parties submitted written argument that contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond that party's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing, and the parties' arguments to the extent they were based on the record, in reaching this decision.

**FINDINGS OF FACT:** (1) CVE Technologies Group, Inc. employed claimant from May 28, 2015 to August 28, 2017 as an inside account manager.

(2) The employer is a reseller of technology-related products. Claimant's role was to provide administrative support to one account manager, who generally began work each day at 10:30 a.m. Claimant did not have work that she performed independent of the partner she supported.

(3) The employer supported and encouraged its employees to have flexible work schedules. Claimant had a flexible work schedule that mirrored the schedule of the account manager she worked with. During the first two years of her employment, she generally worked from 10:00 a.m. to 6:00 p.m., but her schedule varied according to the demands of the account manager she supported. Claimant

sometimes worked later than 6:00 p.m. if necessary for the employer's business needs. The employer did not use a timekeeping system to record its employees' work time.

(4) During the spring 2016, April 2017, and again in June 2017, the employer's division manager engaged in sexually harassing behavior toward claimant. Claimant reported the incidents to the employer's chief operating officer (COO), who was a close friend of the division manager. He stated that human resources would contact claimant. Human resources contacted claimant and eventually told claimant the division manager would no longer supervise claimant's office, and that a sales manager would take over the division manager's role. Over the next month, other than no longer supervising claimant's office, claimant noted that the division manager's role remained the same.

(5) On July 23, 2017, the sales manager who had become claimant's supervisor emailed claimant that she was "getting paid a lot of money to not be here on time." Exhibit 1 at 8. On July 26, 2017, claimant's new supervisor emailed claimant a warning about "coming to work on time." *Id.* The employer did not establish a regular work schedule for any other employee or discipline another employee for failing to adhere to a regular schedule.

(6) On August 7, 2017, claimant's supervisor told claimant during a telephone conversation that he wanted her to work from 9:00 a.m. to 5:00 p.m., but that there was flexibility in the schedule, and that claimant should communicate with the partner she generally worked with and assisted if she was going to deviate from the 9:00 a.m. to 5:00 p.m. schedule.

(7) After August 7, 2017, claimant continued to communicate with the partner she supported and coordinated her schedule with him so they were in the office at the same time. After August 7, 2017, claimant arrived at work after 9:00 a.m. about six times. Two of the six times, claimant had a dentist or doctor appointment and advised the partner that she had modified her schedule those days or was taking paid time off from work. On approximately three or four occasions between August 7 and August 28, claimant arrived at work ten to fifteen minutes after 9:00 a.m. due to traffic or because her work for those days did not require her to be in the office before 9:15 a.m. Claimant continued to work after 5:00 p.m. to support her work partner when necessary.

(8) On August 28, 2017, claimant's supervisor discharged claimant stating, "You have been given too many opportunities to get to work on time." Exhibit 1 at 8.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude 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. In a 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).

The employer discharged claimant because it had "given [claimant] too many opportunities to get to work on time." The record does not show what day claimant allegedly failed to report to work on time that caused the employer to discharge claimant, or how late claimant was that day. The ALJ apparently presumed the employer discharged claimant for tardiness that was not attributable to prearranged absences from work, but rather for tardiness on the "three to four" other days between August 7 and August 28. *See* Hearing Decision 17-UI-95193 at 4. Included in those three or four incidents were delays attributable to traffic, which the ALJ reasoned were within claimant's power to avoid by leaving work earlier. *Id.* However, without knowing which days the employer considered in making its decision to discharge claimant, the record fails to establish that, on that day or those days, claimant was conscious of her conduct and knew or should have known that her conduct would probably result in a violation of the standards of behavior which the employer had the right to expect of an employee. The employer had the burden to show that claimant failure to report to work by 9:00 a.m. so was the result of indifference to the consequences of her actions and not exigent circumstances. The employer failed to meet that burden.

Nor does the record show, in general, for all the days claimant reported to work after 9:00 a.m. between August 7 and August 28, that claimant knew or should have known she was *required* to report for work at 9:00 a.m., and could not report for work between 9:00 a.m. and 9:15 a.m., given that her start time often was flexible based on when the account manager she supported was at work. Despite the warnings given to claimant during 2017, given the flexibility incorporated into claimant's schedule to accommodate the account manager she supported, the record does not show that the employer clearly established that it had an expectation that claimant arrive at work by 9:00 a.m. every morning. Moreover, claimant was regularly expected to work past 5:00 p.m., and the record does not show the employer's expectation as far as claimant's start time when that occurred.

We also note that the ALJ concluded, "[T]here is no evidence in this record to suggest the discharge was a pretext." Hearing Decision 17-UI-95193 at 4. We disagree. Claimant was the only witness and source of evidence and provided unrefuted evidence that claimant was the only employee told to follow a regular schedule and to be disciplined for tardiness after she repeatedly complained about a supervisor's harassing conduct. Although the record does not establish by a preponderance of evidence that claimant's discharge was a pretext, nor is the record devoid of evidence to support that contention.

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-95193 is set aside, as outlined above.

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

**DATE of Service: <u>December 12, 2017</u>**

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if owed, may take from several days to two weeks for the Department to complete.

**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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