

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1370

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113155). Claimant filed a timely request for hearing. On November 2, 2017, ALJ Griffin conducted a hearing, and on November 6, 2017 issued Hearing Decision 17-UI-96212, reversing the Department's decision. On November 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Truck N Travel employed claimant as a cashier from April 20, 2011 until July 5, 2017.

(2) The employer expected claimant to report for work in time to begin her shift at its scheduled starting time and to return to work no later than 30 minutes after the start of a meal break. Claimant understood the employer's expectations.

(3) During most of her employment, claimant was frequently tardy in reporting for work and returning from meal breaks. On many occasions, the employer cautioned claimant against reporting late for work or returning late from meal breaks. Beginning in February 2017, claimant reported late to work six times and returned late from her meal break twelve times. None of the times claimant reported late to work after February 2017 was due to having slept through alarms she had set.

(4) As of the end of June 2017, claimant was setting multiple alarms on her phone with different tones to ensure that she would awaken on time to report for work at the scheduled start of her shift. Claimant also arranged for her husband, who usually left for his work before claimant awakened, to call her to make sure she was up in time to report for work by the scheduled start of her shift.

(5) Before claimant went to sleep on the night of June 29, 2017, she set the alarm on her phone to awaken her in time to report for work by the 7:00 a.m. scheduled start of her shift on June 30, 2017. Claimant was not awakened on the morning of June 30, 2017 by the alarm she had set on her phone. Although claimant's husband had called her during that morning to ensure she was up, claimant did not hear her phone ring. Claimant's phone had malfunctioned. Claimant continued to sleep until her father-in-law knocked at her door to take her children to school. It was after 7:00 a.m. when the father-in-law awakened claimant on June 30, 2017. Claimant immediately called the employer to notify it that she would be tardy for work. The employer received claimant's call at approximately 7:30 a.m. The employer told claimant not to report for work until it determined the action it would take in response to her failure to report for work that day.

(6) On July 5, 2017, the employer discharged claimant for not reporting to work on time on June 30, 2017.

CONCLUSIONS AND REASONS: 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 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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer did not dispute that, although claimant took reasonable steps to ensure that she would not report late for work on June 30, 2017, an apparent malfunction of her phone prevented the alarm she had set from awakening her and prevented her husband's calls from ringing through and awakening her. It appears likely that claimant's failure to report for work on time on June 30, 2017 was inadvertent and not the result of conscious behavior on her part. Although it might be considered wantonly negligent for a claimant to fail to take steps to protect against the occurrence of foreseeable factors that likely would interfere with her awakening in time to report for work as scheduled, the alarm on claimant's phone had not malfunctioned before June 30, 2017, nor had her phone failed to allow calls to ring through to her. Claimant's failure to report to work that day was therefore the result of inadvertent occurrences or events that arose from factors that were not reasonably foreseeable, and did not amount to willful or wantonly negligent misconduct. *See* OAR 471-030-0038(1)(e).

The employer argued in its written argument that claimant should have found a way to wake up "regardless of whether her alarm went off or not" and "if an employee failing to wake up on time is not an intentional act, then none is." However, it is the employer who needs to present evidence showing that claimant's behavior in violation of the employer's standards was, more likely than not, willful or wantonly negligent. As discussed above, the steps that claimant took to safeguard against oversleeping – setting alarms and having her husband also call her as a back-up to the alarms she set – were

reasonable precautions against the foreseeable causes of oversleeping and, as a result, her behavior was not shown to be willful or wantonly negligent. As well, in light of the precautions that claimant took to avoid oversleeping it was not shown that claimant wanted to oversleep on the morning of June 30, 2017, that she desired that result and that her failing to wake up in time was an “intentional act,” as the meaning of that word is generally understood. For the reasons explained, although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-96212 is affirmed.

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

DATE of Service: January 3, 2018

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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