

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0010

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 90742). Claimant filed a timely request for hearing. On December 19, 2017 ALJ Murdock conducted a hearing, and on December 27, 2017 issued Hearing Decision 17-UI-99759, reversing the Department's decision. On January 2, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) CJ Eateries, LLC employed claimant as a server and lottery cashier from June 16, 2016 until September 27, 2017.

(2) The employer expected claimant to report on time for shifts and to notify the employer if she was going to be absent or arrive late for work. Claimant understood the employer's expectations.

(3) In 2016, the employer issued four written warnings to claimant for reporting late to work. Before September 27, 2017, the employer issued five written warnings to claimant in 2017 for reporting late to work. On August 29, 2017, the employer issued a final warning to claimant for reporting late to work. That warning advised claimant that further failures to report on time for work would result in disciplinary action up to and including discharge.

(4) On September 27, 2017, claimant's shift was scheduled to start at 7:00 a.m. Claimant began her commute to work that day at 6:50 a.m., which should have allowed her to report on time for work. However, while on the highway driving to work, claimant was "not really aware" that her "foot got away from [her]" and that she was exceeding the posted speed limit by approximately 10 miles per hour. Audio at ~18:42. A police officer stopped claimant and issued a \$160 traffic ticket to her. The time it took for the officer to issue that ticket to claimant caused her to report late for work. Had claimant not been stopped, she would have arrived on time for work.

(5) On September 27, 2017, the employer discharged claimant for reporting late to work that day.

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).

While the employer had issued several disciplinary warnings to claimant over the two years that she was employed, claimant was discharged due to her failure to report for work on time on September 27, 2017. EAB customarily limits its misconduct analysis to the incident that was the proximate cause of claimant's discharge, which in this case was claimant's late arrival to work on September 27, 2017. It is appropriate to focus on the incident that precipitated claimant's discharge because, by not discharging claimant as a consequence of her prior tardiness, the employer presumably thought that the prior tardiness did not merit that sanction. Accordingly, the focus of the misconduct analysis is claimant's failure to report for work on time on September 27, 2017.

The employer did not dispute at hearing that claimant would have reported for work on time on September 27, 2017 had she not been stopped for speeding on her way to work. Claimant testified that she was not speeding in order to arrive on time for work on that day, and that she was "not really aware" and "didn't realize" that she was exceeding the speed limit before she was stopped. Audio at ~18:42. Without more, inadvertent behavior or behavior that is caused by a lapse in attention is not customarily accompanied by the sort of conscious awareness needed to establish that a claimant's behavior willfully or with wanton negligence violated the employer's standards, and that it constituted misconduct. Absent additional evidence, such as, for example, that claimant had grounds to foresee that she might exceed the speed limit on September 27, 2017 and failed to take reasonable precautions against doing so, the employer did not meet its burden to show that the circumstances of that day that resulted in claimant reporting late for work resulted from a willful or wantonly negligent violation of the employer's standards. On this record, the employer failed to show that it discharged claimant for behavior that constituted misconduct.

Although the employer discharged claimant, it did not do so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-99759 is affirmed.

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

DATE of Service: February 6, 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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