

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0363

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 2, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 115913). The employer filed a timely request for hearing. On March 21, 2018, ALJ W. Lewis conducted a hearing, and on March 22, 2018 issued Order No. 18-UI-105731, concluding that claimant's discharge was for misconduct. On April 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with her application for review, but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Lincare, Inc. employed claimant as a sales representative from January 17, 2017 to August 16, 2017. The employer is a home durable medical equipment (DME) and oxygen therapy company.

(2) As a sales representative, claimant was expected to sell the employer's equipment to doctor's offices and medical providers. Claimant's pay was based upon a salary and a sales commission.

(3) Claimant did not have any sales experience prior to working for the employer. She was hired to replace a former sales representative who had alienated the doctor's offices and medical providers in her sales area, making her job more difficult. Although she received classroom and monthly training sessions, the training did not include real-world sales calls. The employer expected claimant to meet her sales quotas. Claimant understood the expectation, but lacked experience making sales; claimant also understood that the employer expected her to report to work on time.

(4) On May 4, 2017, the claimant's supervisor gave her a documented verbal warning for tardiness after she was late for a training session with the regional manager on May 2nd, and late for work on May 4th. The warning stated that tardiness negatively impacted claimant's productivity and the goals and objectives of the employer, regardless of whether there was a "legitimate reason" for arriving late to work. Exhibit 1 at 8. The warning further stated that claimant was expected to report for work no later than 8:00 a.m. unless she had made "prearrangements" with the center manager. *Id.*

(5) In late May 2017, claimant and her live-in boyfriend fought a lot. In summer 2017, police were called to their home once or twice per week because of the fighting. No one was arrested, but claimant's outlook changed as a result, and she began to perceive things as being more hostile to her than she might otherwise have perceived them.

(6) In seven months working for the employer claimant had never met her sales quotas. On July 21, 2017, claimant's supervisor placed claimant on probation and a 30-day action plan for "serious, ongoing deficiencies" in claimant's performance, including her attendance and time management. Exhibit 1 at 3. The action plan required claimant to bring in at least 15 "Oxygen" accounts and 10 "Unit Dose" accounts over the following 30 days. *Id.* at 5. The plan noted that while claimant had not been absent from work since before the May 2017 verbal warning, she had left work early on June 21st, when she was ill. The action plan also required claimant to arrive at the employer's center by 8:00 a.m., and leave the office to see providers at their locations no later than 10:00 a.m.

(7) Thereafter, claimant did not meet her sales quotas. She felt her supervisor was "always angry" and "yelling at you and coming down and [*sic*] you." Transcript at 46. She felt the supervisor "belittled" her for wearing the same clothes, even though her clothes were clean and she did not see the same clients two days in a row. Transcript at 45. Claimant felt "frazzled" and "stressed" because of the work environment, which she perceived as hostile. Transcript at 44. Claimant began to struggle to get to work on time, even when she allowed herself a full hour to complete a 37-mile commute.

(8) Claimant had difficulty leaving for sales calls by 10:00 a.m. She had to be in the office to organize her binders, create forms to help her with her sales, get pamphlets and documentation together, submit her mileage and expenses, and could also enter information about her sales calls in the employer's sales call tracking system while at the office. She did not feel ready to leave by 10:00 a.m. She was also trying to rehabilitate the employer's reputation with medical offices in her sales areas, many of which had told claimant not to drop by and wait for the doctors to make time for her between appointments, but instead to call ahead and set appointments to speak with them.

(9) On August 1, 2017, claimant reported to work at 8:15 a.m. Her supervisor discussed her tardiness with her. On August 4, 2017, claimant arrived at work at 8:15 a.m. and did not leave for sales calls until 12:00 p.m. On August 7, 2017, claimant arrived at work on time but did not leave for sales calls until 12:15 p.m. On August 8, 2017, claimant arrived at work at 8:15 a.m. and did not leave for sales calls until 11:30 a.m. Claimant was usually late because she received doctors' phone calls while commuting, and did not want to ignore the call and lose a potential sale. She had to pull over to answer the calls, causing her delay. Claimant was also late when she forgot to get gas for her car, or due to unpredictable traffic.

(10) On August 15, 2017, claimant filed a grievance about her supervisor's behavior toward her with the employer's corporate offices in Florida. She believed her supervisor was going to find out about the grievance and felt apprehensive about her supervisor's reaction. The night of August 15, 2017, claimant and her boyfriend engaged in a fight, during which he "trashed" the house and the police were called. Transcript at 36, 49. Police took the boyfriend away from the house.

(11) On August 16, 2017, claimant sent her supervisor a text message stating that she was not going to report to work that day. Claimant felt too apprehensive and stressed about her supervisor's reaction to the grievance to work, and had to deal with urgent personal problems resulting from the damage her boyfriend caused to their home. The supervisor then notified claimant via text that she was discharged.

(12) That same day, the supervisor sent claimant a memo explaining that she was discharged for failing to pass probation, by bringing in only 3 Oxygen accounts and 3 "Unit Dose" accounts since July 21st, arriving late on July 26th, July 28th, August 1st, August 4th and August 8th, and for failing to leave for sales calls by 10:00 a.m. on July 26th, August 4th, August 7th, and August 8th.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, that 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 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). Good faith errors, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b) (August 3, 2011).

The ALJ concluded that claimant's discharge was for misconduct. The ALJ reasoned that despite the employer's "clearly articulated standards," claimant "continued to arrive at work late, and stay in the office well beyond 10:00 a.m. every work day," which was wantonly negligent because claimant had been put on a work plan. Order No. 18-UI-105731 at 5. The ALJ further reasoned that claimant's failure to leave the office at 10:00 a.m. every day, after warnings and advice and with "no ongoing effort to comply," was "insubordination," and was therefore willful misconduct. *Id.* We disagree that the record supports the ALJ's conclusions.

The employer's termination memo to claimant stated that the employer discharged claimant for tardiness after prior warnings, citing incidents of tardiness dating back to July 26th. The record shows, however, that the supervisor last spoke with claimant about her attendance on August 1st, suggesting that if the employer wanted to discharge claimant for tardiness that occurred on or before August 1st it would have done so at that time. The employer did not decide to discharge claimant until after the August 4th and

August 8th incidents upon which claimant reported to work 15 minutes late, and her August 16th absence, suggesting those are the incidents relevant to the employer's decision to discharge claimant.

There is no dispute in this record that claimant was late and absent from work on those three occasions. The reasons for claimant's tardy arrivals are unclear, as neither witness recalled the reasons for claimant's tardiness. Claimant testified, however, that most of the time she was tardy it was because she was answering calls from doctors' offices. Given that claimant's job was to make sales through contact with doctors' offices, and the risk ignoring such calls presented as far as closing sales, claimant's decision to take doctors' office calls under the circumstances was not a willful or wantonly negligent violation of the employer's interests. To any extent claimant was late for other reasons cited during the hearing, including forgetting to get gas and unpredictable traffic that extended her 37-mile commute to more than an hour, claimant's tardiness was, again, not misconduct. In order for conduct to be willful or wantonly negligent, it must involve a conscious act. If claimant was tardy because she forgot to get gas, forgetting is not a conscious act, and therefore is not misconduct. To any extent she was tardy because of unpredictable traffic patterns, the record shows that claimant was, in fact, making an effort to arrive on time after being placed on probation, for instance by leaving an hour early for work to allow extra time to arrive by 8:00 a.m. Given claimant's effort, her failure to achieve the desired result was not a willful or wantonly negligent disregard of the employer's expectations or interests. Therefore, to the extent the employer discharged claimant for tardiness, the discharge was not for misconduct.

Nor was claimant's absence on August 16th misconduct. Claimant's apprehension and stress over her grievance appear to have prevented claimant from being mentally capable of reporting to work that day. To the extent that caused her absence, absences due to illness or other physical or mental disabilities are not misconduct. Claimant also had to deal with the aftermath of the domestic disturbance in which her boyfriend had "trashed" their house and been taken away by police. To the extent that caused her absence, the absence appears to have been the result of extenuating circumstances, and not the sort of willful or indifferent behavior that is considered to be misconduct for purposes of unemployment insurance benefits. To the extent the employer discharged claimant because of her August 16th absence, the discharge was not for misconduct.

To the extent that the employer also discharged claimant for failing to leave for sales calls by 10:00 a.m. and failing to meet her sales quotas, the record also fails to show that claimant's discharge was for misconduct. As a preliminary matter, claimant's pay was based in part on commissions, giving claimant a financial incentive to close as many sales as possible. Despite having received adequate training, and having done well during trainings, claimant was never, over an eight-month period, capable of meeting the employer's sales quotas, suggesting that her inefficiency resulted from lack of job skills or experience, which is not misconduct. Claimant explained to the employer that she did not leave for sales calls by 10:00 a.m. because she was not ready for them, and the employer testified that claimant spent too much time organizing her binder, creating forms and doing "a lot of busy work but nothing ever actually getting done while she was" at the office, which again suggests that claimant's actions were likely motivated by her lack of skills and experience performing sales calls rather than conscious indifference to the employer's expectations. Transcript at 23. Although there is evidence suggesting claimant was repeatedly given clear directives to leave the office by 10:00 a.m. to make sales calls, the totality of the circumstances, including that the doctors' offices in claimant's areas had objected to the employer's practice of making drop-in sales calls in that manner, suggests that claimant's failure to comply was not the result of her insubordinate refusal to comply with instructions or an indifference to

the consequences of her conduct, but was instead the result of claimant's inability to achieve her desired result using that sales tactic, and a failure to understand how to effectively close sales by leaving the office to visit doctors' offices every morning by 10:00 a.m. Because claimant's conduct with respect to the 10:00 a.m. sales calls and quotas was, more likely than not, the result of inefficiency and her lack of experience as a sales representative, the discharge was not for misconduct.

For those reasons, we conclude that claimant's discharge was not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Order No. 18-UI-105731 is set aside, as outlined above.¹

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

DATE of Service: May 16, 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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¹ This decision reverses a hearing order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.