

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0467

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110032). The employer filed a timely request for hearing. On April 17, 2018, ALJ Scott conducted a hearing, at which claimant failed to appear, and issued Order No. 18-UI-107558, concluding claimant's discharge was for misconduct. On May 1, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted new information with her application for review. Her request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. Claimant argued that she did not attend the hearing because she did not have a phone. Claimant did not, however, explain why she did not contact the Office of Administrative Hearings (OAH) for advice, why she could not borrow a friend or relative's phone, why she could not have called into the hearing using a public phone at a WorkSource Oregon center, or why she did not contact anyone to ask that the hearing be rescheduled or held in person rather than over the phone. In the absence of such information, claimant did not establish that it was beyond her reasonable control to participate in the scheduled hearing and present evidence about her work separation.

FINDINGS OF FACT: (1) Oregon Veterans' Home employed claimant as a dietary aide from April 20, 2015 to February 9, 2018.

(2) The employer expected employees to report to work for their scheduled shifts, and assessed employees points for attendance infractions such as tardiness and absenteeism. The employer prohibited employees from being absent without notice, and assessed a dischargeable number of points for a single infraction. Claimant likely understood the employer's policy.

(3) Claimant had some attendance problems and, on February 1, 2018, received a written warning for attendance. On February 2, 2018 and February 3, 2018, claimant was unwell and unable to work, and accumulated more attendance points.

(4) On February 4, 2018, the employer scheduled claimant to work from 10:30 a.m. to 7:00 p.m. Claimant took medication that made her sleep and did not wake up until 6:00 p.m. Audio recording at ~ 16:10, 18:00. Because she was sleeping, claimant did not report to work for her shift that day or notify the employer that she would be absent from work. At approximately 6:00 p.m., after waking up, claimant called the employer about her absence.

(5) On February 9, 2018, the employer discharged claimant because of her attendance.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The ALJ concluded that claimant's discharge was for misconduct after she overslept on February 4, 2018. The ALJ reasoned that because claimant was aware of the employer's policy and had been warned about her attendance, "the evidence was persuasive that claimant's conduct was, at the very least, a wantonly negligent violation of the standards of behavior that her employer had the right to expect of her."¹ We disagree. The ALJ's findings of fact omitted that the evidence shows that claimant had been unwell and unable to work for several days when she overslept on February 4th because she took medication that made her sleep. Being unwell and taking medication that made claimant sleep and unable to wake up is not attributable to claimant as a willful violation of the employer's policies, nor does taking medication to treat an ailment and suffering the side effects of that medication suggest a conscious indifference to the consequences of violating the employer's expectations with respect to her attendance. That claimant was not behaving willfully or with wanton negligence is supported by the fact that claimant did, in fact, contact the employer about her missed shift upon waking from the medication. For those reasons, we conclude that claimant's February 4th absence and failure to notify the employer of her absence were not willful or wantonly negligent. The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

¹ Order No. 18-UI-107558 at 3.

DECISION: Order No. 18-UI-107558 is set aside, as outlined above.²

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

DATE of Service: June 1, 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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² This decision reverses an 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.