

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0712

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 140613). Claimant filed a timely request for hearing. On June 28, 2018, ALJ Shoemake conducted a hearing, and on June 29, 2018 issued Order No. 18-UI-112350, reversing the Department's decision. On July 18, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

Both the employer and claimant submitted written argument to EAB. EAB considered the employer's written argument when reaching this decision. The written argument that claimant submitted to EAB presented new information not contained in the hearing record, but he did not show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing. For that reason, EAB considered claimant's argument only to the extent it was based on information in the hearing record.

FINDINGS OF FACT: (1) Cascadia Behavioral Healthcare, Inc. employed claimant from October 7, 2014 until March 28, 2018, last as a counselor 3.

(2) The employer expected claimant to call in at least an hour before his shift started to notify the employer if he was going to be absent from work or tardy in reporting to work. Claimant understood the employer's expectations.

(3) Sometime before June 6, 2017, the employer authorized a leave for claimant under the Family Medical Leave Act (FMLA) due to major depressive disorder. As of approximately February 2, 2018, the employer re-authorized claimant's leave under FMLA as an intermittent leave.

(4) Among the symptoms claimant experienced from depression were insomnia, hypersomnia or excessive sleeping, and lethargy. Claimant took a prescription medication for the insomnia, which sometimes caused him to oversleep. If claimant experienced hypersomnia, the hypersomnia might also

cause him to oversleep. On any given night, claimant was unable to predict whether he would experience insomnia or hypersomnia or neither.

(5) On January 17, 2018, the employer issued a written warning to claimant for failing on several occasions to call in at least an hour before his shift was scheduled to notify the employer either that he was going to be absent from work or tardy in reporting to work. On March 12, 2018, the employer issued another written warning to claimant for failing on several occasions to call in at least an hour before his shift was scheduled to notify the employer either that he was going to be absent from work or tardy in reporting to work.

(6) After claimant received the warnings, he took precautions to ensure that he would wake up in time to report for work as scheduled. Claimant would set multiple alarms to avoid oversleeping a single alarm. Claimant's wife would also try to rouse him if she was available to do so. Audio at ~36:50.

(7) On the night of March 22-23, 2018, claimant took his prescription sleep medication before going to bed and set multiple alarms to awaken himself in sufficient time to report for work as scheduled on March 23, 2018. Claimant's shift on March 23, 2018 was scheduled to start sometime before 9:45 a.m. Claimant slept through the multiple alarms he had set and did not awaken until approximately 10:35 or 10:40 a.m. At approximately 10:45 a.m., claimant called the employer to notify it that he had not reported for work because he had slept through the alarms he had set. Very shortly after, claimant reported for work.

(8) On March 28, 2018, the employer discharged claimant for failing to call in at least an hour before the scheduled start of his shift on March 23, 2018 to notify the employer that he was going to report late for his shift 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) (January 11, 2018) 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).

Claimant failed to timely call in to notify the employer that he was going to be late for his shift on March 23, 2018 because he slept through the alarms he had set. The employer did not suggest that claimant intentionally or willfully overslept or failed to provide timely notice to the employer that he was going to be late arriving to work on March 23, 2018, and the record does not support that claimant had the objective of not giving the required notice. The issue that remains is whether claimant's failure to provide timely notice to the employer was the result of wantonly negligent behavior on his part.

Behavior that is non-volitional, inadvertent, the result of a lapse, an accident, an oversight or the like is generally not considered to be accompanied by the consciously aware mental state needed to establish wantonly negligent behavior within the meaning of OAR 471-030-0038(1)(c). Claimant's behavior in sleeping through his alarm, either because doing so was the result of hypersomnia or a side effect of prescribed medication to treat insomnia, would appear on its face to be behavior that is not accompanied by a consciously aware mental state. However, based on the prior warnings the employer had issued to claimant under circumstances similar to those on March 23, 2018 for failing to give timely notice of absences or tardy arrivals to work, claimant was on notice that he foreseeably could oversleep as a result of his condition or medication that he was prescribed. Should claimant not have taken reasonable precautions against that foreseeable result, his failure to do so likely would constitute wanton negligence since it would show that he was indifferent to the consequences of his behavior. However, because of his past failures to awaken in sufficient time to provide timely notice to the employer, claimant had set multiple alarms and had his wife, when she was able, available to rouse him if his alarms failed to awaken him.¹ The precautions claimant had put into place to avoid oversleeping appear to have been reasonable under the circumstances, and the employer did not present evidence showing or tending to show what other steps claimant reasonably should have taken.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-112350 is affirmed.

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

DATE of Service: August 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 At hearing, while claimant stated in response to a question from the employer's representative that he had arranged for his wife to "check in" with him to make sure that he awakened in response to the multiple alarms he had set, we note that neither the employer's representative nor the ALJ followed up and specifically asked claimant why his wife did not, or was not available to rouse him on March 23, 2018 after he failed to awaken in response to his alarms. Audio at ~ 36:50.