

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0018

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 14, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124228). Claimant filed a timely request for hearing. On November 12, 2013, ALJ Lohr conducted a hearing, and on December 18, 2013 issued Hearing Decision 13-UI-06833, reversing the Department's decision. On January 3, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Tuality Healthcare employed claimant as an off-site medical transcriptionist from February 1, 2004 until July 17, 2013.

(2) The employer expected claimant to work no more than eight hours each day and, during this time, to take no more than two fifteen minute breaks and one thirty minute break. If claimant needed more time away from work than allowed by these breaks, the employer expected her to communicate that need to a lead worker or a supervisor. Claimant understood the employer's expectations about breaks, but thought she could exceed an eight hour work day if the amount of the time by which she exceeded eight hours was minor and she adjusted her time on subsequent days to take account of working more than expected on a prior day.

(3) On July 11, 2013, the employer suspended claimant for suspected manipulation in reporting her work time. On July 15, 2013, the employer reinstated claimant and issued to her a final written warning. In that warning, the employer put into place an "action plan" in which the employer expected claimant to schedule her eight hours of work between 6:00 a.m. and 6:00 p.m.; the employer required claimant to communicate to a supervisor if she intended to take more than one thirty minute lunch break and two fifteen minute rest breaks in a work day and the employer required claimant to stay within her scheduled or "budgeted" work hours during each pay period. Transcript at 7, 8, 9, 42.

(4) On July 16, 2013, at the start of her work day, claimant asked her supervisor how many hours she was expected to work that day, and the supervisor told her eight hours. Later, on July 16th, claimant called in to give her supervisor her work schedule, but was unable to reach her and left a voice mail message detailing the hours she intended to work. The scheduled hours claimant described in the message were non-continuous and allowed her to take one hour off and another two hours off from work in addition to her regular breaks. Transcript at 36, 37, 41. Claimant took that time off and clocked out when she did so. Also on July 16, 2013, as claimant neared the scheduled 5:30 p.m. end of her shift, she completed transcribing one dictation and at 5:22 p.m. started transcribing a final ten minute dictation. Based on her experience in transcribing this physician's dictation, claimant thought she could complete the transcription by 5:37 p.m. which, given the rounding to quarter hours used in the employer's timekeeping system, would record her ending time as 5:30 p.m. However, claimant completed the final transcription at 5:43 p.m., which resulted in her ending time being recorded as 5:45 p.m. At 5:51 p.m., claimant emailed her supervisor, and informed her she had worked fifteen minutes past the end of her shift but she intended to adjust downward her hours on her next work day to ensure she stayed within the work hours budgeted for that pay period. Transcript at 43.

(5) On July 17, 2013, when claimant's supervisor arrived at work, she saw the email claimant sent on July 16, 2013. The supervisor investigated claimant's work activities on July 16, 2013 and determined that, in addition to working fifteen minutes over her scheduled work time, she also had taken one break of one hour and a second break of two hours also without communicating those breaks to her supervisor. On July 17, 2013, the employer discharged claimant for failing to comply with the July 15, 2013 warning by working more than eight hours on July 16, 2013 and for taking two lengthy breaks without telling her supervisor on July 16, 2013.

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. 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. The employer carries the burden to establish that claimant violated its expectations by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness first contended claimant violated the terms of the July 15, 2013 warning by working 8.25 hours on July 16, 2013. Transcript at 9, 10-11. Claimant contended that the warning did not state she was prohibited from working over eight hours in a day, but stated she was prohibited from working more hours than scheduled for her in a pay period, and she reasonably thought she was allowed to adjust for any days she worked slightly over her scheduled eight hours by working less than her scheduled hours on subsequent days in the pay period. Transcript at 42, 43. The employer did not submit the warning into evidence to allow us to review its terms. Since the evidence is equally balanced on the terms of the warning and there is no reason to disbelieve the testimony of either party, we must resolve the disputed issue against the employer, who is the party with the burden of persuasion in a discharge case. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, the employer did not expressly warn claimant she was prohibited from exceeding eight hours in any work day, and the July 15, 2013 warning was limited to prohibiting claimant from working

more than the hours budgeted for her in any given pay period. Given the terms of the warning, claimant's belief that the employer allowed her to adjust her time on subsequent days in the pay period for a work day in which she slightly exceeded eight hours was reasonable. On these facts, the employer did not meet its burden to establish that claimant violated its stated expectations by working 8.25 hours on July 16, 2013.

The employer's witness next contended claimant violated the terms of the July 15, 2013 warning by taking one and two hours off from work on July 16, 2013 without communicating that time off to a supervisor. Transcript at 11. Claimant testified that on July 16, 2013 she had communicated her schedule by voicemail to her supervisor, and the scheduled she described omitted from her work hours the time she intended to take off. Transcript at 36, 37, 41. In contrast, the employer's witness testified claimant did not leave such a voicemail for her supervisor. Transcript at 50. As discussed before, we are required in a discharge case to resolve disputed facts in favor of claimant when there is no reason to disbelieve either party's testimony. More likely than not, claimant informed her supervisor by providing her schedule that she intended to take off from work time in the amounts of one and two hours on July 16, 2013. On these facts, the employer did not meet its burden to establish that claimant violated its expectations by taking one and two hours away from work on July 16, 2013 without reasonably informing her supervisor she intended to do so.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 13-UI-06833 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: January 29, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.