

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0212

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 9, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144331). Claimant filed a timely request for hearing. On December 27, 2013, ALJ Hoyer conducted a hearing, and on January 6, 2014 issued Hearing Decision 14-UI-07775, affirming the Department's decision. On February 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Medical Staffing Network Healthcare, LLC employed claimant as a medical staffing coordinator in its Portland office from November 19, 2012 until June 27, 2013. The employer was a national business that had local offices and its headquarters was located in Florida.

(2) The employer expected claimant to notify his supervisor at least two weeks in advance of any vacation that he wanted to schedule. The employer expected claimant to provide to his supervisor as much notice as possible of any absences due to illness or emergency. In the discretion of a supervisor, an absence could be approved that did not comply with the employer's notice requirements. If his supervisor was absent from work, the employer expected claimant to notify the person designated by his supervisor of his absences. Notwithstanding the employer's expectations, claimant was not aware that he was required to notify his supervisor's designee of any absences and was not aware that the employer required advance notice for certain absences.

(3) In 2010, claimant's elderly father was in an automobile accident that injured his brain stem. As a result of the accident, claimant's father experienced short term memory difficulties, problems with balance and vertigo and dizziness. Claimant's father divided his time between staying with claimant in Portland, Oregon and living with claimant's sister in Salt Lake City, Utah. Claimant's father had physicians with whom he regularly consulted in both the Portland area and in Salt Lake City. In June 2013, claimant's father was staying with claimant in Portland, and the father was scheduled to fly back

to Salt Lake City on Monday, June 17, 2013. Claimant's sister had made appointments for the father to see physicians after he returned to Salt Lake City, including one on June 19 or 20, 2013.

(4) Sometime before June 17, 2013, claimant's supervisor went on vacation from work. The supervisor told the staff at meeting that claimant attended that the employer's office manager was "in charge" during her absence. Transcript at 17.

(5) On approximately June 13, 2013, claimant took his father to an appointment with one of the father's physicians in Salem, Oregon. That physician was "not happy" with the condition of claimant's father. Transcript at 36. The physician told claimant that, in view of the father's condition, he recommended that claimant's father not fly to Salt Lake City on the flight scheduled for June 17, 2013, and not travel anywhere unaccompanied.

(6) On June 16, 2013, claimant spoke on the phone with his sister in Salt Lake City about how they would arrange for claimant's father to return to Salt Lake City since he could not take the airplane on June 17, 2013. Claimant was aware that his sister had anticipated his father would be back in Salt Lake City by June 17, 2013 and had scheduled physicians' appointments for their father in Salt Lake City during the upcoming week. Claimant's sister asked claimant to drive his father to Salt Lake City. Claimant's sister told him, "I need [you] to get dad here." Transcript at 37. Claimant told his sister that he would call the employer on June 17, 2013 to obtain the time off from work needed to drive his father from Portland to Salt Lake City. The distance between Portland and Salt Lake City was 767 miles¹

(7) On the morning of June 17, 2013, claimant telephoned the employer's human resources department to notify the employer that he needed time off from work to transport his father by car from Portland to Salt Lake City. Claimant called the human resources department to report this absence because he did not know to whom in the employer's Portland office he should report when his supervisor was away from work. A human resources representative told claimant she would notify the Portland office of his absence, and someone from the Portland office would contact him if there were any questions. After this call, claimant and his father started their trip to Salt Lake City.

(8) Later in the day on June 17, 2013, a representative from the employer's human resources department called the employer's office manager at the Portland office to report claimant's absence from work. The representative told the office manager that claimant anticipated he would be gone for eight to ten days. The representative also told the office manager the reason for claimant's absence was a "family emergency." Transcript at 7. Immediately after she received this call, the office manager called claimant. Claimant told the office manager that he had called the human resources department when he knew he needed to be absent because he could not remember whom to call when his supervisor was away from the office. Claimant told the office manager she had reached him when he was already on the road to take his father to Salt Lake City. Claimant told the office manager if she needed him back at work, he would turn the car around and return to Portland. Transcript at 28. The office manager told claimant he did not need to return and to continue on the trip. Claimant told the office manager, he

¹ <http://www.travelmath.com/drive-distance/from/Portland+OR/to/Salt+Lake+City+UT>. We take notice of this fact, which contained in a website commonly accepted as an authoritative source for distances of travel. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record at EAB.

should return to work by June 25, 2013 because he was going to come back to Portland immediately after dropping his father off at his sister's house in Salt Lake City. Claimant and his father continued to travel to Salt Lake City.

(9) Between June 17, 2013 and approximately June 20, 2013, while on the way to Salt Lake City, claimant and his father stopped to eat at several locations and to see some family members in Boise, Idaho. Beer was served at some of the restaurants at which claimant and his father ate. In Boise, claimant and his father accompanied some family members to a golf course to watch them play golf. Claimant made posts about the trip and uploaded some pictures from it to his Facebook page.

(10) On June 21, 2013 and June 24, 2013 the office manager called claimant to obtain updates on his trip. The office manager told claimant that when he returned to work he needed to bring a note from his father's doctor about his father's condition. The office manager also told claimant he needed to return to work by June 25, 2013.

(11) Sometime before June 25, 2013, the employer was notified of claimant's Facebook postings about the trip to Salt Lake City. Based on these postings, the employer suspected claimant's trip to Salt Lake City was not caused by a family emergency involving his father.

(12) On June 25, 2013, claimant returned to work. On approximately June 26, 2013, claimant brought in a note from his father's physician in Salt Lake City. The physician's note stated that claimant's father was diagnosed with "dizziness and vertigo" and that claimant had driven him from Portland to Salt Lake City between June 17, 2013 and June 20, 2013. Transcript at 13. Based on the failure of the note to refer to an "emergency," the employer also suspected claimant's trip to Salt Lake City with his father was not caused by emergency circumstances. Transcript at 13.

(13) On June 27, 2013, the office manager spoke with claimant about the circumstances under which he drove to Salt Lake City with his father. The office manager told claimant that, from his Facebook postings, it appeared he was having a "good time" and "road-tripping" during the time he traveled to Salt Lake City. Transcript at 29. Claimant explained that his father had been unable to return to Salt Lake City by airplane and the only way to take him was by a car with claimant driving.

(14) On June 27, 2013, the employer discharged claimant for calling the human resources department, rather than the office manager, on June 17, 2013 to notify the employer of his absence from work and for falsely representing to the employer that the trip to Salt Lake City was necessitated by emergency circumstances.

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 claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-0775, the ALJ concluded claimant had engaged in misconduct by “misrepresenting the basis for his requested time off.” Hearing Decision 14-UI-0775 at 5. The ALJ did not address the employer’s contention that claimant also engaged in misconduct by notifying the employer’s human resources department of his absence starting on June 17, 2013 rather than notifying the office manager as required by the employer’s policies. Transcript at 6, 12-13. On either basis, we conclude that the employer did not show misconduct.

With respect to notifying the office manager of his absence starting on June 17, 2013, it was not disputed that claimant did not call her because he could not remember whom to call about his absences when his direct supervisor was not in the office. Transcript at 11, 38. However, claimant was not indifferent to his responsibility to notify the employer of his absences from the office. *See* OAR 471-030-0038(1)(c). Claimant timely notified the employer’s human resources department of his absence when he did not know whom to alert, and the representative to whom he spoke told him she would report his absence to the appropriate person at the employer’s Portland office. While it would have been wantonly negligent for claimant to do nothing to report his absence, the steps that he took were reasonable under the circumstances to timely apprise the Portland office that he was going to be absent from work. The employer’s witness did not dispute that she received prompt notice from the human resources department that claimant was going to be absent from work starting on June 17, 2013. In view of claimant’s call to the employer’s human resources department and the assurance he received that the human resources office was going to notify the appropriate person in the Portland office of his absence, claimant’s failure to also contact the office manager to report the absence was not a willful or wantonly negligent disregard of the employer’s policies as is required to demonstrate misconduct under OAR 471-030-0038(3)(a). The employer did not meet its burden to show, more likely than not, that claimant engaged in misconduct by the manner in which he reported his absence on June 17, 2013.

To support the conclusion that claimant was dishonest in reporting the purpose of his trip to the employer, the ALJ stated that “[t]he persuasive evidence in the record shows that claimant initially characterized the above trip with his father as an emergency trip with the employer, when, by claimant’s own later admission, it was not.” Hearing Decision 14-UI-0775 at 5. In fact, the characterization of the trip as a “family emergency” came from the hearsay statement of the representative in the employer’s human resources department with whom claimant spoke. *See* Transcript at 7. Claimant testified he never told the human resources representative that his trip was occasioned by a “life to death emergency.” Transcript at 40, 41. It is possible that the human resources representative independently placed her own characterization on the purpose of claimant’s trip to Salt Lake City. In any event, claimant’s first-hand testimony about what he actually told the human resources representative is entitled to more weight than the employer’s hearsay evidence from that representative. We accept claimant’s testimony on what he told the representative when he reported his absence. The weight of the evidence does not show that claimant initially characterized his trip to Salt Lake City as necessitated by an emergency.

The employer’s office manager also testified that, in her telephone calls to claimant while he was travelling, claimant told her he was “on the road on a family emergency.” Transcript at 7, *see also* Transcript at 11, 15, 47. Claimant denied he made such characterizations. Transcript at 41. There is no reason in the record to believe the testimony of the office manager in preference to claimant’s testimony. Where, as here, the evidence on a disputed issue is evenly balanced, we are required to resolve the

uncertainty against the employer who is the party that carries the burden of proof in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to demonstrate that, more likely than not, claimant represented to the employer that his need to drive his father to Salt Lake City was an emergency. Based on the conclusions we have reached about claimant's statements to the human resources representative and the office manager, the weight of the evidence does not show that claimant knowingly misrepresented the purpose of his trip to the employer.

The employer's office manager also contended at hearing that claimant's activities while travelling to Salt Lake City did not show his time away from work was caused by an emergency and that, on the facts of claimant's absence, the employer's policy required that claimant have an emergency. Transcript at 13. However, on further questioning, the office manager could not identify any specific policies requiring that claimant have a bona fide emergency justifying his absence. Transcript at 14, 48. Any conclusion that claimant violated an employer's expectation by a non-emergency absence must rest on a firmer foundation than was presented in the testimony from the office manager. Moreover, even if claimant's absence needed to be justified by emergency circumstances and claimant was aware of that expectation, the employer failed to show his trip was not related to an emergency, as that term is reasonably interpreted. Claimant's postings to Facebook and the note from his father's physician do not necessarily rule out that claimant had an emergent need to transport his father to Salt Lake City. An urgent need to travel does not preclude taking some breaks from that travel to stop to eat or visit with family. Transcript at 13, 42. Simply because a physician's note fails to include the word "emergency" does not necessarily mean there were not pressing reasons for claimant to drive his father to Salt Lake City. Even if the employer's policy required an emergency for claimant's absence, the employer did not meet its burden to show that claimant did not have pressing, legitimate or urgent reasons to transport his father to Salt Lake City when he did.

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

DECISION: Hearing Decision 14-UI-07775 is set aside, as outlined above.

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

DATE of Service: March 6, 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.