

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0276

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 6, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92209). Claimant filed a timely request for hearing. On February 6, 2014, ALJ Hatfield conducted a hearing, and on February 12, 2014 issued Hearing Decision 14-UI-10238, affirming the Department's decision. On February 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Winco Foods employed claimant as a bookkeeper from March 6, 1992 until November 14, 2013.

(2) The employer expected claimant to refrain from performing work duties unless she had clocked in to work. The employer's policies stated, "Employees found working off the clock will be subject to disciplinary action up to and including termination." Transcript at 8. Claimant was aware of the employer's expectations.

(3) On October 15, 2012, the employer issued a warning to claimant when the employer discovered claimant was working through her lunch and rest breaks when at work. Exhibit 2 at 3. This warning advised claimant that, "Employees found working off the clock will be subject to disciplinary action up to and including termination." *Id.* After she received this warning, claimant never again worked through her breaks.

(4) On October 16 and 21, 2013 and on November 1, 2, 3 and 4, 2013, claimant entered her office ten to fifteen minutes before her shift was scheduled to start. To obtain entry to the office, claimant paged the assistant manager or a lead worker to unlock the office door. While in the office before her shift started, claimant turned on office machines, unlocked the safe, retrieved keys she needed for work and placed pens, pencils, paper and deposit slips out on her desk. Claimant intended to ready the office so she could start her work day promptly when her shift began and finish her work duties in the “time allotted.” Transcript at 27. It did not occur to claimant that the employer would consider these preparatory tasks to constitute “work.” Transcript at 32, 33.

(5) On November 5, 2013, the employer discovered claimant had been gaining entry to her office before her shift began and concluded claimant had been working off the clock. On November 14, 2013, the employer informed claimant she was discharged for working off the clock on October 16 and 21, 2013 and on November 1, 2, 3 and 4, 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. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to establish claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-10283, the ALJ concluded that claimant knew she was violating the employer's expectations against working off the clock when she entered her office early, and that her behavior was willful misconduct. Hearing Decision 14-UI-10238 at 3. The ALJ also concluded that claimant's behavior was not excused as a good faith error because the “[e]mployer's policies coupled with employer's prior disciplining of claimant undermine any inference that employer would find the conduct acceptable.” Hearing Decision 14-UI-10238. We disagree.

Claimant testified at hearing that it did not occur to her that making very brief and minor preparations to start her work day was “work” and that doing so when not clocked in would result in a violation of the employer's prohibition against working off the clock. Transcript at 32, 33, 37. The employer's witness did not dispute claimant's testimony of what she did in her office before her shift started. Although claimant had previously been warned against working through breaks, we disagree with the ALJ that such a warning would necessarily have alerted claimant to the employer's definition of what constituted “work,” and that entering her office early for purposes of set-up would violate the employer's expectations. Claimant's testimony about her understanding of the scope of the employer's prohibition against working off the clock, while not necessarily the most apparent inference given the language of the employer's policy and the prior warning, was not patently unreasonable or utterly implausible. See *Goin v. Employment Department*, 203 Or App 758, 126 P3d 734 (2006) (where claimant's mistaken belief that she was not required to provide certain medical information was sincere and “not entirely groundless,” her behavior in not complying with the employer's expectations was excusable as a good faith error); Transcript at 32, 33, 37.. Claimant's testimony that she believed that she was not engaged in “work” when she entered her office early to make her office ready to start her workday appeared

sincere. Transcript at 32, 33, 34, 37. The sincerity of claimant's belief is reinforced by the fact that she had to make her early arrival known either to the assistant manager or to the lead worker to obtain access to her office, and it is highly unlikely she would have openly continued this routine in the presence of supervisors if she thought she was violating the employer's policy. That these supervisory workers apparently condoned claimant's behavior without objection could only strengthen claimant's belief that entering her office early to set it up for the day was permissible. In sum, the record shows that claimant's behavior in coming into work a few minutes early to set up her office was taken in reliance on a sincere, albeit mistaken, belief she was not violating the employer's policy against working off the clock. Claimant's behavior on October 16 and 21, 2013 and on November 1, 2, 3 and 4, 2013 was excused from constituting misconduct as a good faith error under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 14-UI-10283 is set aside, as outlined above.

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

DATE of Service: March 12, 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.