

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0448

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 19, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132853). Claimant filed a timely request for hearing. On February 21, 2014, ALJ Hatfield conducted a hearing, and on March 3, 2014 issued Hearing Decision 14-UI-11544, affirming the Department's decision. On March 21, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Gamestop, Inc. employed claimant as a store manager from August 31, 2008 until December 4, 2013.

(2) The employer expected claimant to properly punch in and out of the time system, including punching out for required lunch periods and at the end of his work shift. The employer also expected claimant to refrain from clocking out for breaks if there was no other employee on duty who was a "keyholder." Claimant was aware of the employer's expectations.

(3) On October 23, 2013, the employer issued a development action plan to claimant that advised him, among other things, that he was expected to punch out for his scheduled lunch breaks. Exhibit 1 at 31. On October 30, 2013, the employer formally counseled claimant about its expectations.

(4) On at least a few occasions after October 20, 2013, claimant told the district manager that he had been unable to clock out for lunch breaks because there had been no other keyholders on duty. Claimant told the manager that, because there were only two other keyholders on the staff at his store and one of them attended school, he had not been able to create an acceptable schedule that had one other keyholder present for his lunch breaks. The district manager told claimant that he needed to "figure it out" himself how to address this problem. Transcript at 23.

(5) On November 20, 2013, the employer issued a final coaching plan to claimant. That plan advised claimant that he was not scheduling himself in a manner that met the employer's expectations and that his future compliance with those expectations would be monitored. Exhibit 1 at 35.

(6) On December 3, 2013, the employer reviewed claimant's adherence to its expectations after it issued the final coaching plan on November 20, 2013. The employer determined, among other things, that claimant failed to clock out at the end of the day on November 23, 2013, and failed to clock out for lunch breaks on November 22, 23, 24, 26, 28 and 29, 2013.

(7) On December 4, 2013, the employer discharged claimant for violating its timekeeping policies on November 22, 23, 24, 26, 28 and 29, 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. 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 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-11544, the ALJ concluded that claimant had willfully or with wanton negligence violated the employer's expectations by failing to clock out for lunch on November 22, 23, 24, 26, 28 and 29, 2013. The ALJ reasoned that the employer had explicitly informed claimant of its expectations and claimant's excuse that he had been unable to clock out on those days due to a lack of keyholders on his staff was insufficient to rebut a finding of wanton negligence since the scheduling of staff was in claimant's reasonable control. Hearing Decision 14-UI-11544 at 3. We disagree.

During the hearing, the employer's witness initially testified that the employer discharged claimant for a multitude of alleged policy violations that claimant engaged in after the employer issued the November 20, 2013 final coaching plan. Transcript at 8. The employer's witness then narrowed her focus to claimant's failure to clock out at the end of his work day on November 23, 2013 and claimant's failure to clock out for lunch on November 22, 23, 24, 26, 28 and 29, 2013. Transcript at 9, 14, 16. Given the testimony of the employer's witness, the proper focus of the discharge analysis is whether claimant's failure to comply with the employer's timekeeping expectations on those days was willful or wantonly negligent behavior.

No evidence was presented at hearing about claimant's failure to clock out at the end of his shift on November 23, 2013 other than that he had failed to do so. Transcript at 10, 14. It appears that claimant's failure to clock out at the end of that day might plausibly be attributable an oversight or forgetfulness. Such lapses do not customarily constitute misconduct because they are generally not

conscious conduct. *See Debra L. Dye* (Employment Appeals Board, 2014-EAB-0412, April 14, 2014) (and cases cited therein). Because the employer did not present any evidence ruling out that claimant's failure to clock out on November 23, 2013 was a result behavior that was not conscious within the meaning of OAR 471-030-0038(1)(c), the employer did not meet its burden to establish that claimant's behavior on that day was misconduct.

Claimant did not dispute at hearing that he was aware of the employer's expectations that he clock out for lunch and did not dispute that he failed to do so on November 22, 23, 24, 26, 28 and 29, 2013. However, claimant contended that the employer's other standards did not allow him to clock out unless another keyholder was present in the store and there were no other keyholders in the store on those days to allow him to take a lunch break. Transcript at 22, 23. The employer's witness did not dispute claimant's testimony about the employer's requirements in connection with keyholders and did not dispute that claimant had on prior occasions told the district manager that, given that there were only two other keyholders on his staff, he was unable to implement a schedule that guaranteed the presence of another keyholder during his scheduled lunch breaks. Transcript at 27. Although the ALJ was correct that scheduling store employees was within claimant's control, the employer did not present any evidence that, in spite of the limited number of keyholders available on claimant's staff, claimant reasonably could have scheduled those employees in a way that would have allowed him to take his lunch breaks. Hearing Decision 14-UI-11548 at 3. Since the explanation claimant provided at hearing for his failure to clock out for lunch was to meet the separate expectation of the employer to have at least one keyholder on the store floor at all times, claimant's behavior, on its face, did not show indifference to the employer's interests, particularly after claimant had brought this problem to the attention of the district manager and that manager did not help him resolve it. Absent evidence showing that, more likely than not, claimant reasonably could have created a schedule that allowed him to take a lunch break with only two other keyholders on staff, claimant's behavior in not taking a lunch break on November 22, 23, 24, 26, 28 and 29, 2013 was not wantonly negligent. Because the employer did not present any such evidence, the employer did not meet its burden to establish that claimant's behavior on those days was willful or wantonly negligent

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

DECISION: Hearing Decision 14-UI-11544 is set aside, as outlined above.

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

DATE of Service: April 22, 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>.

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