

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0619

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct and claimant's benefit rights based on wages earned prior to the date of discharge were not cancelled (decision # 12527). The employer filed a timely request for hearing. On April 3, 2014, ALJ Holmes-Swanson conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14422, concluding the employer discharged claimant for misconduct but claimant's benefit rights based on wages earned prior to the date of discharge were not cancelled. On April 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

Since no adversely affected party sought review of that portion of Hearing Decision 14-UI-14422 which concluded claimant's benefit rights were not cancelled, EAB confined its review to claimant's work separation.

FINDINGS OF FACT: (1) La Pointe Business Group, LLC employed claimant as a gas attendant at a gas station from October 8, 2010 until December 19, 2013.

(2) The employer expected claimant to remain clocked in for shifts only if he was working, and also to pay for any beverages that he consumed while at work. Claimant understood those expectations as a matter of common sense. The employer expected claimant to refrain from parking his vehicle in the

customer parking spots in front of the station unless he was working the graveyard shift. Claimant was not aware of this expectation. The employer also expected claimant to refrain from smoking within ten feet of the entrance to the station as required by state law. Claimant was aware of this expectation as a matter of common sense.

(3) On December 14, 2013, claimant's shift was scheduled to end at 11:00 p.m. when claimant and a coworker expected to be relieved by the employee assigned to work the graveyard shift. The graveyard shift employee did not report for work. At approximately 11:10 p.m., claimant entered the store located in the service station and asked the cashier to call the employee scheduled to work the graveyard shift. The cashier did so and that employee told the cashier that he was sick and was not going to work his scheduled shift. The cashier told claimant what the graveyard shift employee had said, and the cashier agreed to call the manager to determine what to do. The cashier later reported to claimant that the manager had told him to call other employees to see if any employee was willing to work the graveyard shift. Claimant thought he needed to remain at work until some employee arrived to work the graveyard shift.

(4) At 11:27 p.m., claimant entered the store and got a soda refill in a cup he had previously used. During the time that claimant was in the store, claimant had a conversation with the cashier about the employer's coffee cards and stamped several of those cards that were in his possession. Claimant left with store without paying the \$0.35 he owed for the refill of soda. The cashier did not tell claimant that he had not paid for the beverage or try to stop him.

(5) After 11:30 p.m., claimant went outside to wait on customers and the cashier continued to call other employees to try to locate one who was willing to work the graveyard shift. Claimant was angry that the manager was not taking affirmative steps to arrange for an employee to relieve him. At 11:41 p.m., claimant clocked out intending to go home. However, the cashier told claimant that he could not leave until someone arrived to cover the graveyard shift. Transcript at 23. Claimant immediately clocked back in to work. At this time, the cashier was still continuing to call other employees. Claimant went outside to wait on any customers that came into the station for gas. At this point, the employees remaining on shift at the station were claimant, a coworker also attending the gas pumps and the cashier.

(6) During the period between 11:41 p.m. until 12:40 a.m., claimant and the coworker stood outside the station in front of its plate glass windows waiting for customers. Claimant also stood next to his car, which was parked in the front of the entrance to the station. Business was slow at that time of day. Claimant and the coworker were "just hanging out, talking" and waiting for a relief employee to arrive. Transcript at 23. Claimant did not smoke during this period. At some point, claimant went into the store and asked the cashier to call the manager again. Transcript at 22. Shortly afterward, the cashier told claimant that the manager wanted him to continue calling employees to see if any were willing to work the graveyard shift.

(7) By approximately 12:30 a.m., claimant and his coworker concluded that no other employee was going to come to relieve them and one of them needed to stay to cover the graveyard shift. Claimant and the coworker drew straws, and the coworker lost. Claimant clocked out from his shift at 12:40 a.m.

(8) On December 19, 2013, the employer discharged claimant for his behavior on December 14-15, 2013, including remaining on the clock after the scheduled end of his shift, loitering, parking in an

unauthorized space, smoking within ten feet of the store entrance and theft for failing to pay for the soda refill.

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-14422, the ALJ found that, at some point between 11:00 p.m. and 12:40 a.m. on December 14-15, 2013, claimant smoked a cigarette within ten feet of the station's entrance. The ALJ determined that the testimony of the employer's general manager about what was depicted on the employer's surveillance video and hearsay testimony from two of claimant's coworkers and a customer were more persuasive than claimant's denials. Hearing Decision 14-UI-14422 at 4. The ALJ concluded that claimant had willfully violated the employer's expectations by smoking near the store entrance and had engaged in misconduct. Hearing Decision 14-UI-14422 at 4. We disagree. We also conclude that the employer did not establish claimant's misconduct based on the other of its allegations.

With respect to claimant's alleged smoking, the employer did not submit into evidence the videotape on which it based its conclusion that claimant had smoked within ten feet of the store's entrance. The employer's general manager stated that he had viewed the videotape and it showed two people smoking near the entrance of the station's store, but he did not testify that he could identify who was smoking from the video. *See* Transcript at 17. The general manager testified that he identified claimant by a "process of elimination" based on reports from two of claimant's coworkers, which both identified claimant as one person smoking but identified different people as the second person. Transcript at 16, 17. The customer did not apparently identify claimant as one of the people who was smoking. Transcript at 15. Based on the inconclusive nature of what the general manager saw on the videotape, and the inconsistent identifications in the statements of claimant's coworkers, the evidence that the employer presented to support the allegation that claimant was smoking is not strong. Claimant's first-hand testimony in which he denied that he was smoking is entitled to more evidentiary weight than the hearsay that the employer presented. Transcript at 26. We disagree with the ALJ, and conclude that, on this record, the employer did not meet its burden to establish, more likely than not, that claimant was smoking on December 14-15, 2013. Accordingly, the employer did not establish claimant's misconduct based on this allegation.

With respect to claimant's alleged failure to clock out when his shift ended, the employer's general manager did not dispute that the cashier had instructed claimant that he could not leave until his relief arrived. Transcript at 23, 25. The general manager also did not dispute that claimant was waiting

during the time he otherwise would have been off shift for the station manager to call back or the cashier to make other arrangements for a relief employee. Transcript at 24. The employer did not show that claimant's behavior in staying late showed a willful disregard or a wantonly negligent indifference to the employer's interests. Claimant's behavior was reasonably related to the employer's need not to leave the gas station without service attendants, and claimant only remained at the workplace a reasonable period before concluding that the station manager was not going to resolve the issue and that he or his coworker needed to take the graveyard shift for the employer. Under these circumstances, the employer did not demonstrate that claimant's failure to clock out until approximately one hour and forty minutes after the scheduled end of his shift was a willful or wantonly negligent disregard of the employer's interests.

With respect to claimant's alleged loitering, the employer did not present any evidence about the specific nature of its expectation and the sort of behavior that was prohibited. At the late hour when claimant was standing near the station windows, it is not disputed that the employer's business was slow. It is not clear what claimant could reasonably have done during this time other than to stand and wait for customers to arrive. Transcript at 13, 24. With respect to claimant's behavior in parking his car in front of the store, claimant stated he was never informed that parking in that location was prohibited. Transcript at 23. The employer did not present any evidence that it had ever made its parking prohibitions known to claimant. *See* Transcript at 13, 14. There is nothing about the employer's specific parking expectations from which it can be inferred that claimant should have been aware of them as a matter of common sense. Because a claimant cannot willfully or with wanton negligence violate an employer expectation of which he was not reasonably aware, the employer did not meet its burden to show that claimant's behavior in supposedly loitering or where he parked his car was misconduct.

The employer also contended that claimant engaged in misconduct when he did not pay for a refill of soda on December 14, 2013. Based on the facts as presented by the general manager, claimant was talking with the cashier when he left the store without paying. Under these circumstances, it is a plausible inference that claimant may have been merely inattentive and forgot to pay for the refill. Absent evidence that claimant was conscious of his behavior when he failed to pay for the soda, the employer has not met its burden to show that claimant willfully or with wanton negligence violated the employer's standards. *See* OAR 471-030-0038(1)(c); OAR 471-030-0038(3)(a); *see e.g. Guadalupe Villasenor* (Employment Appeal Board, 12-AB-0229, February 23, 2012) (absent evidence claimant was aware she was making a mistake at the time she made it, her conduct was not conscious and was not wantonly negligent).

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

DECISION: Hearing Decision 14-UI-14422 is set aside, as outlined above.

Tony Corcoran and J.S. Cromwell, pro tempore;
Susan Rossiter and D.E. Larson, not participating.

DATE of Service: May 20, 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.