

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-0794

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #85006). Claimant filed a timely request for hearing. On April 22, 2014, ALJ Logan conducted a hearing, and on April 23, 2014 issued Hearing Decision 14-UI-15797, affirming the Department's decision. On May 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer and claimant submitted written argument to EAB. Because the employer's argument was not received by EAB within the time period allowed under OAR 471-041-0080(1) (October 29, 2006), the argument was not considered by EAB when reaching this decision.

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090, we considered only information received into evidence at the hearing, and claimant's argument to the extent it was based on such information, when reaching this decision.

Because the ALJ did not swear in claimant's witness, Mishal Al-Rajhi, we did not consider his testimony when reaching this decision. Even if we had considered his testimony, our decision would remain the same for the reasons discussed below, and because his testimony was repetitious of claimant's testimony.

FINDINGS OF FACT: (1) Linktech Worldwide Inc. employed claimant from April 21, 2011 to February 25, 2014 as a customer service representative.

(2) The employer expected claimant to report accurate information on her time card. Claimant understood the employer's expectations.

(3) On February 4, 2014, claimant was suspended without pay in the middle of her shift due to attendance violations. Claimant left work early and failed to clock out, resulting in an inaccurate time card record for her for that day.

(4) On February 10, 2014, claimant reviewed her time card and asked a human resources assistant to correct her time card record for February 4, 2014. The assistant sent claimant an instant message notifying her that it had corrected claimant's time card. The human resources assistant who assisted claimant processed as many as ten time card changes per day.

(5) The employer required employees to approve their time cards for each pay period before they received payment. On February 11, 2014, claimant approved her time card for the period including February 4, 2014 without verifying that the hours were accurate. The time card was not accurate for February 4, and showed claimant worked eight hours that day.

(6) On February 24, 2014, the employer discovered claimant's time card included hours for February 4, 2014 that claimant did not work.

(7) On February 25, 2014, the employer discharged claimant for allegedly falsifying her time card.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ and conclude 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because it concluded claimant falsified her time card. Transcript at 8. The employer had a right to expect claimant to record the time she worked accurately. Claimant understood that expectation. Claimant's time card contained hours for February 4, 2014 that claimant did not work. The employer's human resources assistant testified that claimant asked her to correct her time card for February 4 to show the hours she had worked that day, and gave her lunch and quitting times to record for her time card. Transcript at 46 to 47. The changes resulted in a time card record showing claimant worked eight hours that day. Claimant testified that she told the human resources assistant that she left work early on February 4, and asked the assistant to correct her time card record for February 4 by reducing the number of work hours she believed were on her time card for that day. Transcript at 27 and 28.

In Hearing Decision UI-14-15797, the ALJ implicitly relied on the human resources assistant's testimony, and found that claimant must have given the human resources assistant false times to record because "no mechanism or feature of the time system could have entered the hours for February 4, 2014, unless claimant had provided the times to be entered."¹ However, claimant denied having given the employer false time card information. Absent a reason to disbelieve either witness, we find the evidence regarding what claimant told the human resources assistant to be, at best, equally balanced. It is equally plausible that claimant gave the employer correct information and that the inaccurate time card record resulted from a miscommunication or human error in processing claimant's request. The employer therefore failed to show by a preponderance of the evidence that claimant acted with willful or wanton negligence to violate its time reporting expectations.

After claimant asked human resources to correct her time card, human resources sent claimant an instant message saying it had completed the correction. The record does not show that human resources informed claimant what specific changes it had made to her time card. The next day, when asked to approve her time card, claimant relied on human resources' message, and approved her time card without reviewing the hours. Transcript at 30 to 31. Claimant testified that her supervisor came into her department "in a rush," asking employees to approve their time so the employer could meet its payroll deadline. Transcript at 31 to 32, 40, 73. The weight of the evidence at hearing was insufficient to show that claimant knew or should have known that failing to check her time card when she reasonably believed it was accurate would probably result in a violation of the employer's expectation that she submit accurate time card records. Absent such a showing, the record fails to establish that claimant violated the employer's expectations willfully or with wanton negligence.

Considering claimant's testimony, the large number of payroll changes the human resources assistant processed per day, and the lack of records regarding those changes, we find claimant's explanations for the time card error plausible. The employer has not met its burden to show by a preponderance of the evidence that claimant consciously falsified her time card for February 4, 2014. We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-15797 is set aside, as outlined above.

¹ Hearing Decision 14-UI-15797 at 4.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 18, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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