

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0894

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant not for misconduct (decision # 100206). The employer filed a timely request for hearing. On April 30, 2014, ALJ Lohr conducted a hearing in which the claimant did not participate, and on May 2, 2014, issued Hearing Decision 14-UI-16754, affirming the administrative decision. On May 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Airport Terminal Services employed claimant from August 27, 2007 to February 14, 2014, last as a ramp crew chief.

(2) The employer expected claimant to report for work when scheduled, and to work her entire shift. The employer had an attendance policy under which employees accumulated points for unapproved late arrivals at work, unapproved absences, and unapproved early departures from work. The policy provided that an employee who accumulated seven or more points within a rolling twelve month period would receive a written warning, and an employee who accumulated fifteen points within a rolling twelve month period would be subject to discharge. Claimant was aware of the employer's expectations and the attendance policy.

(3) On May 8, 2013, claimant received a written warning for accumulating eight attendance points within a rolling twelve month period. Claimant accumulated these points for unapproved absences on December 16, 2012 and May 5, 2013; and unapproved late arrivals at work on September 4 and 20, 2012, October 20, 2012 and December 10, 2012. The employer was unaware of the reasons for these absences and late arrivals. (Exhibit 1).

(3) On December 20, 2013, claimant received a written warning for accumulating additional attendance points within a rolling twelve month period. Claimant accumulated these points for

unapproved absences on September 22, 2013, and December 8 and 19, 2013; and unapproved early departures from work on August 1, 2013, September 30, 2013, and December 2 and 3, 2013. The employer was unaware of the reasons for these absences and early departures. (Exhibit 1).

(4) On January 28, 2014, claimant received two points under the employer's attendance policy for an unapproved absence. (Exhibit 2).

(5) On February 12, 2014, claimant was scheduled to work from 7 a.m. to 12 p.m. Claimant was driving a car that was not hers. Claimant arrived at work at 7 a.m., but was unable to get out of the car because it automatically locked. (Exhibit 1). After making efforts to get out of the car, claimant called for assistance at 7:09 a.m. Claimant's coworkers helped her unlock the car, and claimant clocked into work at 7:15 a.m. As a result of this incident, claimant received one point under the employer's attendance policy for an unapproved late arrival at work.

(6) On February 14, 2014, the employer discharged claimant for exceeding the maximum number of allowable attendance points within a rolling twelve month period.

CONCLUSION AND REASONS: The employer discharged claimant, 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 that 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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for exceeding the number of unapproved absences, unapproved late arrivals at work, and unapproved early departures from work allowed under the employer's attendance policy. When a claimant is discharged for the number of points accrued under the employer's attendance policy, the incident in which the final points were accrued is the proper focus of the inquiry to determine whether claimant is disqualified from benefits. *See generally* June 27, 2005 letter to the employment appeals board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based attendance policy, the last occurrence is considered the reason for the discharge). Accordingly, we look to the incident on February 12, 2014 claimant's to determine the reasons for claimant's discharge.

Claimant did not appear at the hearing, and the employer presented no witness with firsthand knowledge of the events of February 12. Instead, the employer offered claimant's written statement, in which she asserted that she arrived at work on time, at 7 a.m., and the written statement of claimant's supervisor, in which he asserted that claimant arrived at work six minutes late, at 7:06 a.m. The evidence regarding the time claimant arrived at work is, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant was late to work on February 12, 2014.

Because the employer did not establish that it discharged claimant for a violation of its expectations and attendance policy, it failed to establish that it discharged claimant for misconduct. Claimant is not

disqualified from receiving unemployment insurance benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-16754 is affirmed.

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

DATE of Service: July 2, 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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