

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0919

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant but not for misconduct (decision # 80453). The employer filed a timely request for hearing. On April 29, 2014, ALJ Wyatt conducted a hearing, and on May 6, 2014 issued Hearing Decision 14-UI-16882, affirming the Department's decision. On May 27, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Frontier Communications Northwest, Inc. hired claimant on May 29, 1999 and suspended him from work on February 18, 2014. Claimant worked for the employer as a fiber network sale technician.

(2) The employer expected claimant to accurately record his work time. The employer expected claimant to input specified information into its ViryaNet software program about the services that he provided in the field as soon as reasonably possible after completing each call. The employer's preference was that claimant would make his entries in the ViryaNet system throughout the day, contemporaneously with the time that he completed each call. Claimant was aware of the employer's expectations and its preferences.

(3) Starting several months before February 18, 2014, claimant experienced difficulties keeping the battery charged on his laptop computer. Claimant customarily took that laptop with him into the field to make entries into the ViryaNet program. Although claimant initially had an inverter in his work van that enabled him to keep the laptop battery charged when he was in the field, the inverter had burned out. Without an inverter, the laptop computer died after claimant was in the field for one to two hours, and claimant was not able to make entries into the ViryaNet program. Claimant complained to his manager

about the problem with his laptop "every few weeks," and told his manager that he needed a functioning inverter to keep the laptop charged when he was in the field. Transcript at 31. The manager did nothing to address claimant's problems with the laptop or his lack of a functioning inverter. When the locations of claimant's service calls on any day did not allow him to return to the employer's office to plug in the laptop to recharge it, claimant stopped taking his laptop with him into the field and started keeping handwritten notes of his service calls. Claimant began entering the required information into the ViryaNet program about the service calls he had handled at the end of the work day, after he returned to the employer's office and not contemporaneously with the time he completed work on each call. Claimant was not aware that the ViryaNet program automatically time-coded his entries with the date and time he inputted the information into ViryaNet, and not with the time that claimant had indicated that he had completed the service call. Claimant did not know how to change the automatic time coding function in ViryaNet. Claimant did not push his manager to arrange to fix his laptop because he thought he had worked around his computer problems by making his entries into ViryaNet at the end of the workday.

(4) On February 14, 2014, claimant's work calls were scheduled at locations that did not allow him to conveniently recharge his laptop, between calls, in the employer's office so he did not take his laptop with him on these calls. Claimant logged in to ViryaNet at 7:34 a.m., but did not make his first service entries into ViryaNet until approximately 3:00 p.m., near the end of his work day. On that day, some of claimant's managers noticed that claimant was on the employer's premises at a time when, according to the time coding on the ViryaNet records, claimant was on a service call.

(5) On February 18, 2014, various of claimant's managers interviewed claimant because, based on the time coding shown on the ViryaNet records, it appeared that claimant had not worked on the morning of February 14, 2014, or performed any work services before mid-afternoon. Claimant told the managers that the times appearing in ViryaNet records for his work were a "ViryaNet problem." Exhibit 1 at 6. Claimant told the managers that, due to problems he had with his laptop battery and his inability to use his laptop to make ViryaNet entries from the field, he had inputted the information about all his services calls into the ViryaNet system at the end of the day. Transcript at 12, 16, 18. Claimant told the managers the locations of the service calls he had completed on February 14, 2014 and the approximate times he had actually performed the services on those calls. Exhibit 1 at 5, 6.

(6) On February 18, 2014, the employer suspended claimant from work for misrepresenting his work time on February 14, 2014 by not making contemporaneous entries into the ViryaNet software program as soon as he completed each particular service call.

CONCLUSIONS AND REASONS: The employer suspended claimant but not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's witness did not contend that claimant had not performed the work that he said he had on February 14, 2014, but that claimant's alleged misconduct was in not making the required entries into the ViryaNet program contemporaneously with completing each service call. Transcript at 14, 18. The employer's witness testified that the employer did not have any policy requiring that its technicians make contemporaneous entries of their activities in the ViryaNet program because "it's one of those things that's so well known that we don't have a policy." Transcript at 20. Claimant did not dispute that he understood that the employer preferred him to make contemporaneous entries into the ViryaNet program, but testified that he had not been able to do so on February 14, 2014 because the battery in his laptop would not hold a sufficient charge to allow him to make those entries in the field. Transcript at 26, 28. Although the employer's witness disputed claimant's explanation and contended that claimant should have, but did not, inform his manager of his computer problems, claimant testified that he told his manager of these problems several times before February 14, 2014 and had called the employer's IT department. Transcript at 24, 31, 32, 34, 38. Claimant further contended that, throughout the time his laptop was not holding its charge, his manager was aware that he was making all of his entries into ViryaNet at the end of the day and, apparently, did not disapprove of this practice. Transcript at 28. Claimant's first-hand testimony on the issue of his communications with his manager is entitled to greater weight than the employer's hearsay evidence about the manager's actions or knowledge. More likely than not, claimant communicated to his manager that problems with his computer prevented him from making contemporaneous entries of his work in the ViryaNet program. Because claimant had told his manager of his inability to make contemporaneous entries into ViryaNet before February 14, 2014 and his manager had not taken steps to rectify that problem and did not disapprove of claimant making the required ViryaNet entries at the end of his working day, claimant's failure to make such contemporaneous entries on February 14, 2014 was not a willful or wantonly negligent violation of the employer's standards. Since the employer's witness did not contend that the employer suspended claimant for any other aspects of his behavior on February 14, 2014, the employer failed to show that claimant it suspended claimant for misconduct.

The employer suspended claimant, but not for misconduct. Claimant is not disqualified from benefits based on his suspension from work.

DECISION: Hearing Decision 14-UI-16882 is affirmed.

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

DATE of Service: July 9, 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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