EO: 200
BYE: 201415

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0995

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 29, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 72105). The employer filed a timely request for hearing. On June 2, 2014, ALJ Murdock conducted a hearing, and on June 5, 2014 issued Hearing Decision 14-UI-19018, affirming the Department's decision. On June 9, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to introduce pages from its employee handbook to demonstrate that claimant violated its prohibition against insubordination by the manner in which he allegedly spoke to an assistant manager on April 5, 2014. The handbook was not offered into evidence or discussed at the hearing. Although the employer contended that it did not know that evidence of how it communicated its expectation to claimant might be relevant at hearing, an employer preparing its case for a hearing involving a claimant's alleged insubordination would reasonably have been aware of its relevance. Because the employer's argument contained information that was not part of the hearing record, and its explanation for offering that information to EAB failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information into evidence during the hearing as required under OAR 471-041-0090 (October 29, 2006), EAB did not consider it. Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) American Beef Processors of Oregon employed claimant as a production worker from September 16, 2013 until April 9, 2014.

(2) The employer expected claimant to report for work on time. The employer had an attendance policy in which employees accrued points if they were absent, tardy or left work early regardless of the reason. If an employee accrued six attendance points during a rolling 12 month, the employer gave the employee a verbal warning. An employee accrued 1/2 of an attendance point each time he was tardy or left work early and one attendance point each time he was absent for a complete day. Claimant was aware of the employer's expectations and its point-based attendance policy.

(3) The employer also expected claimant to refrain from using foul language directed toward a manager and from refusing to perform tasks as reasonably instructed by a manager. Claimant was aware of this expectation as a matter of common sense.

(4) During claimant's employment, he was tardy on several occasions in clocking in to work. Generally, claimant clocked in within one minute of his scheduled start time. Throughout his employment, claimant and other employees complained to the employer's managers and IT department that the time clock was not accurate and showed a time at least three minutes ahead of the actual time, which made them appear late when they were not. Despite these complaints, the employer did not adjust the time clock. On January 30, 2014, the employer gave claimant a verbal warning under its attendance policy. On February 10, 2014, claimant accrued one attendance point when he was absent from work because his car would not start. On February 12, 2014, the employer issued to claimant a written warning for the number of points he had accrued under the employer's attendance policy.

(5) Sometime during claimant's employment, the assistant production manager asked claimant to enter a man-basket that was going to be lifted up on a forklift for the purpose of removing some electrical conduits and wires located throughout the warehouse ceiling. Many high voltage electrical wires were hanging from the conduits. The employer had recently remodeled the premises and its electrician was not there to handle the task of removing the wires or conduits. Although the manager assured claimant that the wires and conduits had been disconnected from an electrical source, claimant did not observe that the wires or conduits had been locked out from all electrical sources. Claimant told the manager that he was not an electrician and that he thought it was unsafe for any employees who were not electricians to remove the wires and conduits. After claimant objected, the manager had another employee remove the conduits and wires from the ceiling. At the end of February 2014, the production manager asked claimant and another employee to render fat from some meat products and then to perform clean up. The odor from the meat was strong and "stunk." Transcript at 16. Claimant objected to working around the smell but performed the tasks that the employer had requested

(6) On March 3, 2014, claimant injured his back at work. On March 5, 2014, claimant's doctor restricted claimant to light duty work. Sometime after March 5, 2014, claimant started physical therapy sessions involving laser massages. Claimant's foot and leg started tingling all the way up to his groin. Sometime before April 5, 2014, claimant saw his doctor for an evaluation of the tingling. The doctor gave claimant a note restricting him from all work until April 8, 2014 at the earliest, or until he had diagnostic x-rays and an MRI to allow the doctor to further evaluate his condition.

(7) On Saturday, April 5, 2014, claimant reported to the work premises sometime before his scheduled start time of 7:00 a.m., but did not clock in because he intended only to give the assistant production manager the doctor's note excusing him from work. Claimant gave the note to the manager. The

assistant manager asked claimant to wait until a particular manager arrived to discuss the note with that manager. Claimant told the assistant production manager that the manager could call him to discuss the note. Claimant then told the assistant manager he would wait in his pick-up truck for the other manager to arrive because claimant had brought his daughters with him to the workplace and they were waiting in the pick-up truck. Claimant left the workplace and went to his pick-up. While waiting, claimant became frustrated because he thought that the manager for whose arrival he was waiting was not likely to be at the workplace at all on a Saturday and, if he came, he was not likely to arrive earlier than 10:00 a.m. Some minutes later, the assistant manager sent claimant a text message requesting that he return to the workplace, clock in and wait for the other manager in the lunchroom. Claimant returned to the workplace, clocked in and told the assistant production manager that he was not going to work on that day. Claimant then turned around and commented "fuck this," not directing the comment to the production manager as he walked out the door. Transcript at 28. Claimant waited in his pick-up for a few minutes and then drove away from the workplace. By April 5, 2014, claimant had accrued a total of 20 attendance points under the employer's attendance policy.

(8) On April 9, 2014, the employer discharged claimant for insubordination by directing foul language at the assistant production manager and for his violations of the employer's attendance policy.

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. 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).

Although the employer contended that it discharged claimant, in part, for the total attendance points he had accrued by April 5, 2014, EAB does not consider the sum of the points a claimant has accumulated under a point-based attendance policy in assessing whether a claimant engaged in misconduct. Transcript at 5. Rather, EAB focuses only on the last attendance violation to determine whether claimant's conduct was willful or wantonly negligent. *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). In this case, the employer did not contend that claimant was tardy or absent from work after February 27, 2014. *See* Transcript at 21. Since the employer did not discharge claimant after he was late for work on this day, when it appears that the employer was aware of the attendance violation on or shortly after the day that it occurred, this tardy is not the proper focus of our misconduct analysis. It is implausible that a known incident happening over one month before claimant's discharge was the proximate cause of the discharge.[1] Although the employer's production

[1] It is the proximate cause of the discharge that is the proper subject of EAB's analysis to determine whether claimant engaged in disqualifying misconduct. *See e.g. Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board,

manager testified that claimant arrived late to work on April 5, 2014, which might be a proximate cause of claimant's discharge on April 9, 2014, claimant contended that he arrived before he was scheduled to start his shift on April 5, 2014, although did not clock in until the assistant production manager later insisted that he do so because he had the doctor's note excusing him from work. Transcript at 13, 29. Since the testimony of the assistant manager and claimant are in direct conflict, and there is no reason in the record to believe or disbelieve the testimony of either one, we are forced to resolve the uncertainty on this issue against the employer, who was the party who carried the burden to persuasion in this discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, claimant was not tardy on April 5, 2014, and the employer did not demonstrate that a violation of its attendance policy caused it to discharge claimant.

The employer also contended that it discharged claimant, in part, for alleged insubordination on April 5, 2014 when he supposedly directed foul language at the assistant production manager. Transcript at 5, 14. Although the employer did not establish the extent to which its policies defined insubordination, we infer claimant had a reasonable understanding that insubordination in the workplace was prohibited as a matter of common sense. While claimant agreed that he said the word "fuck" in the assistant manager's presence, he was quite clear that it was an expletive that he had used only to express his generalized frustration at being asked to wait for the arrival of the other manager. Claimant was clear in his testimony that the expletive was not directed at the production manager, but stated as he walked out the workplace door and his back was toward the manager. Transcript at 28. Although the assistant production manager also testified that claimant gestured with his middle finger, we reasonably infer from claimant's failure to expressly mention one way or the other whether he had made such a gesture, after agreeing that he had uttered the expletive, that his position was that he had not. Transcript at 14, 15, 28. As before, when the testimony of two witnesses is in direct conflict and there is no reason to prefer the testimony of one over the other, we resolve the uncertainty against the employer, who had the burden to persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Although claimant used the work "fuck" on April 5, 2014, he did not direct that word at the production manager or make the well-known gesture with his middle finger. The use of such an expletive in the workplace under circumstances of acute frustration, when the comment is not directed at a supervisor or a manager, does not violate all reasonable interpretations of a prohibition against insubordination. The employer did not meet its burden to establish that, the context in which claimant uttered the expletive, willfully or with wanton negligent violated the employer's standards of behavior. Although claimant also left the workplace on April 5, 2014, rather than continuing to wait for the arrival of the other manager, the employer did not present any evidence to establish that it had a reasonable right to expect claimant to remain in the workplace for an indefinite period of time to discuss his medical restriction after he had already given the doctor's note to the production manager and had stated he was available to discuss the medical restriction by telephone. Transcript at 14. The employer also did not meet its burden to establish that claimant willfully or with wanton negligent violated the employer's reasonable standards by leaving the workplace after presenting his medical excuse from working for that day.

12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

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

DECISION: Hearing Decision 14-UI-19018 is affirmed.

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

DATE of Service: July 16, 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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