EO: 300
BYE: 201530

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-1619

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 27, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121941). Claimant filed a timely request for hearing. On September 22, 2014, ALJ S. Lee conducted a hearing, and on September 29, 2014 issued Hearing Decision 14-UI-26046, reversing the Department's decision. On October 9, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) A-CTI Full Creative, Inc. employed claimant as a business support specialist from November 24, 2012 until August 7, 2014. Claimant worked in the employer's call-in center.

(2) The employer allowed employees to take a paid ten minute rest break only if the shift scheduled for the employee was longer than two hours and to take a second ten minute paid rest break only if the shift scheduled was longer than six hours long. The employer also expected employees to behave professionally and appropriately in the workplace and to treat coworkers, supervisors and customers with dignity and respect. Claimant understood the employer's expectations as he reasonably interpreted them.

(3) The employer allowed employees to "self-schedule" work shifts by submitting bids for the shifts that were available. Transcript at 9. The employer assigned employees to "tiers" to establish the order in which employees' bids for shifts were accepted. Transcript at 24. On many occasions, employees in the lower tiers were required to piece together several short shifts in a day to work more than only a very few hours in that day because employees in the upper tiers had taken the longer shifts. It was not unusual for the employees assigned to lower tiers to work several separate shifts of one or two hours on any given day.

(4) During his employment, more than one supervisor complained to the employer's operations manager that claimant was not "respectful" in conversations with them. Transcript at 6. The supervisors stated that claimant "raise[d] his voice" when he "ask[ed] questions." Transcript at 13. Claimant's direct supervisor told the operations manager that when she had criticized the grammar in a message that claimant had written, claimant had stated to her that "it's a stupid language difference" and that she "took the human out of" his communications. Transcript at 13.

(5) On April 7, 2014, the employer issued to claimant a final written warning for various attendance violations. The employer notified claimant that he would be discharged if he violated any of the employer's policies while the final warning remained effective.

(6) In June 2014, based on the warning he was issued, claimant was moved to a lower tier in the employees' process of bidding for work shifts. As a result, claimant's bids for shifts had a lower priority than those of many other employees, his bids were generally successful only on the less desirable shifts of shorter duration and he was required to cobble together several short shifts to secure more than only a few hours of work on a particular day. Claimant thought the employer's policy on rest breaks allowed him to add together the total number of hours he worked on any given day to determine the number of breaks to which he was entitled on that day, regardless of the length of the particular shifts. Claimant scheduled his breaks accordingly. Beginning in June 2014, as was his customary practice, claimant notified his work group when he was taking these rest breaks. Before July 26 or July 27, 2014, neither claimant's direct supervisor nor any other employer representative told claimant that his understanding of the employer's break policy as it applied separate shifts of short duration was incorrect.

(7) On approximately July 26, 2014, claimant was scheduled to work two shifts for the employer, one from 10:30 a.m. until 12:30 p.m. and one from 1:00 p.m. until 6:00 p.m. Claimant took two paid ten minute rest breaks during the latter shift because, although that shift did not exceed six hours, the total number of hours he was scheduled to work during the two shifts he had that day was seven hours, which would otherwise entitle him to two breaks. On July 26 or July 27, 2014, claimant's supervisor told him that he had taken too many rest breaks on July 26, 2014, and that he had been entitled only to one ten minute break during the second shift he had worked. Claimant explained to his supervisor that based on the total number of hours that he worked on that day, he believed that he was entitled to two breaks under language of the employer's policy. Claimant also told his supervisor that he believed his interpretation was supported by "Oregon labor laws." Transcript at 8. The supervisor told claimant that he was wrong and that he could only take the number of breaks during a shift that the length of that particular shift allowed. The supervisor suggested that claimant speak with the operations manager or the employer's human resources department. Claimant told her he did not want to do so. Claimant declined because he thought that the operations manager intended to discharge him for attendance violations if he scheduled a meeting with her. On July 27, 2014, claimant's supervisor sent an email to the operations manager telling the manager that she had just had an "interesting conversation" with claimant detailing his understanding of the employer's policy on rest breaks. Transcript at 8. The email further stated that claimant had told her that since he started working for the employer he had been taking breaks based not on the length of any particular shifts, but on the total number of hours worked in worked in a day. Transcript at 8. The email did not state that the supervisor or any of claimant's other supervisors had at any previous time warned him that the manner in which he was taking his breaks was not acceptable.

(8) On August 7, 2014, the employer discharged claimant for taking breaks to which he was not entitled under the employer's break policy and for communicating in an unprofessional and disrespectful manner with supervisors.

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).

Although the employer's witness contended that the employer discharged claimant for a "number of red flags," including prior attendance issues, disrespectful behavior toward his supervisors and misuse of work breaks, it appeared from the transcript that the employer decided to discharge claimant only after the manner in which he was taking his breaks was discovered on July 26 or 27, 2014. Transcript at 5, 7, 12. When, as here, the employer had knowledge of claimant's alleged acts of misconduct prior to the occurrence of the final incident, EAB customarily limits its discharge analysis to the final incident. *See 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, 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). EAB so confines its evaluation because, since the employer knew of the prior alleged acts of misconduct and did not discharge claimant at that time, the employer had presumably decided that these violations did not merit discharge. Accordingly, the manner in which claimant took his work breaks is the proper focus of our evaluation of whether claimant engaged in misconduct.

The employer's witness contended in essence that claimant should have known from the language of the employer's policy on work breaks that he was not allowed to base his work breaks on the total number of hours he worked in any day, but was expected to take a break only if a break was allowed in the particular shift during which it was taken. Transcript at 7. Although the employer's break policy is stated in terms of work "shifts," nowhere does it explicitly address how a "shift" is determined, discuss how to calculate the appropriate number of breaks in the context of several short "shifts" in one work day or state that "shifts" in a day may not be added together to calculate the breaks to which an

employee is entitled in that day. Transcript at 7. When applied under circumstances of several short shifts, the employer's policy is ambiguous. In addition, under the employer's own interpretation of its policy, it appears that if an employee worked eight one hour "shifts" in a day, for a total of eight consecutive hours, the employee would not be allowed to take any rest breaks during that day. This result appears contrary to the purpose of work breaks, which is to provide a respite from what is otherwise relatively uninterrupted work. *See* OAR 839-020-0050(6) (January 1, 2014) (setting out required breaks not by shifts but by work "periods" or "segments"); OAR 839-020-0050(10) (defining "work period" as the elapsed time between when an employee begins work and ends work and nowhere mentioning or distinguishing between ostensibly separate "shifts" in a work day). Claimant's interpretation of the employer's policy, that the total number of hours worked in a day, regardless of the length of each "shift" was an acceptable method to determine the number of breaks to which an employee was entitled, is at least as consistent with the language of the applicable regulations as the employer's interpretation. Given the lack of clarity in employer's policy, it cannot be concluded that claimant's interpretation of it to allow aggregating ostensibly separate "shifts" for purposes of calculating permitted breaks was plainly unreasonable, let alone wantonly negligent. Based strictly on the language of the employer's policy, the employer did not show that claimant's interpretation of it and the manner in which he took his breaks was misconduct.

Although the employer contended that claimant's former supervisor had rectified any ambiguity in the employer's policy by telling claimant sometime before the final incident that he was not allowed to aggregate shifts to calculate the breaks to which he was entitled, claimant denied that anyone told him this before July 26 or 27, 2014. Transcript at 34, 37. The language of the email that claimant's current supervisor sent to the operations manager on July 27, 2014 supports that claimant had not previously been told his interpretation was wrong. It suggests that claimant's supervisor was surprised by claimant's interpretation of the policy and previously unaware of it, and nowhere does the email state that claimant was continuing to take breaks contrary to express instructions that he had received in the past. Because there was nothing in the record to suggest that it was unreliable, claimant's first-hand testimony that the employer did not communicate to him that he was impermissibly calculating his breaks before July 26 or July 27, 2014, is entitled to greater weight than the employer's hearsay evidence that at some unspecified time, in some unspecified context claimant's former supervisor did so. In light of claimant's denial, the employer did not prove that claimant was told earlier than July 26 or July 27, 2014, that the manner in which he was determining his breaks was contrary to the employer's policy. Absent such evidence, the employer did not meet its burden to show, more likely than not, that the manner in which claimant calculated his breaks before July 27, 2014 was a wantonly negligent violation of the employer's expectations. Since the employer did not assert or present evidence showing that claimant impermissibly calculated his breaks after July 26, 2014, when he was clearly notified of the employer's expectations, the employer did not show that claimant engaged in misconduct when he scheduled and took the breaks for which he was discharged.

The employer's witness also contended that claimant violated the employer's standards by the manner in which he communicated with his supervisors. The one specific example the witness provided of claimant's disrespectful communications with a supervisor was when he disagreed with his supervisor's criticism of his grammar and called her critique "stupid." Notably, the witness did not contend that claimant called the supervisor "stupid," used foul language, engaged in a tirade or did anything else that might be construed as disproportionate or unprofessional under the circumstances. While claimant could have been less frank about his reaction to his supervisor's critique, the language in which he

expressed himself was not outside of any reasonable definition of a "professional" communication, and he reasonably would not have understood that his candid language was a violation of the employer's standards. Although the employer's witness also generally contended that claimant sometimes raised his voice when he asked his supervisor a question and expressed disagreement with her, the witness did not present any specific evidence about the extent to which claimant's voice was elevated or any other detail about his intonation or the manner in which he expressed his disagreement with her. There was insufficient specific and concrete information from which it can be inferred that claimant's other communications violated an employer standard for professionalism and respectfulness of which claimant reasonably was aware. The employer did not meet its burden to show that claimant engaged in misconduct by the manner in which he communicated with his supervisors.

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

DECISION: Hearing Decision 14-UI-26046 is affirmed.

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

DATE of Service: December 3, 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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