

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1793

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 23447). Claimant filed a timely request for hearing. On October 28, 2014, ALJ Dorr conducted a hearing, and on October 30, 2014 issued Hearing Decision 14-UI-27894, reversing the Department's decision. On November 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument but failed to certify that it provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, EAB did not consider the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) Microchip Technology, Inc. employed claimant as a production specialist from April 19, 2010 until August 26, 2014.

(2) During each 12 hour shift worked, the employer provided two 30 minute rest breaks and one 50 minute meal break to its employees. The employer's written policies required employees to take breaks no longer than the time allotted for them. Notwithstanding the employer's policy, claimant took his breaks at the same time as other employees and returned to work when they did. Claimant did not keep close track of the time that he was on break and assumed that he was complying with the employer's expectations by taking breaks of the same length as the other employees whom he accompanied. Unless an employee had been issued a disciplinary notice or a performance improvement plan or the employer had grounds to suspect that an employee was violating its attendance policies, the employer did not generate a "turnstile report" to determine the length of time that a particular employee actually spent on his or her breaks. Transcript at 24.

(3) On July 12, 2014, claimant returned to work after a leave that the employer had only authorized until July 9, 2014. Claimant had erroneously thought that his leave was approved until July 12, 2014. On

July 17, 2014, the employer issued an attendance notice II (AN2) to claimant based on his failure to return to work after his leave when expected. Exhibit 1 at 13. The AN2 stated that claimant was expected in the future to avoid any recurrence of patterned absenteeism or tardiness and, if he did not do so, he was subject to further discipline up to and including discharge. Exhibit 1 at 13.

(4) On August 13, 2014, claimant's supervisor told him that the employer intended to generate a turnstile report to determine if he had returned late from any breaks while the AN2 warning was in place. Sometime after August 13, 2014, the employer produced a turnstile report showing when claimant left on all breaks and when he returned from them beginning on July 16, 2014. The turnstile report revealed that between July 16, 2014 and August 10, 2014, claimant returned late from rest or meal breaks a total of 36 times. Exhibit 1 at 1-6. Claimant's tardiness in returning from these breaks varied between one and 20 minutes. *Id.* The turnstile report did not show that claimant was tardy in returning from any breaks after his supervisor notified him on August 13, 2014 that a turnstile report was going to be generated. The employer did not generate turnstile reports for any of its other employees to determine if they took breaks of the same length as claimant during the period July 16, 2014 through August 10, 2014.

(5) On August 26, 2014, the employer discharged claimant for tardiness in returning from breaks during the period of July 16, 2014 through August 10, 2014.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b), 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).

Claimant contended that he thought he was complying with the employer's expectations about the duration of breaks because he always left for breaks at the same time as his coworkers and returned when they did. Transcript at 18, 19, 32. While claimant conceded that the length of the breaks that he and his coworkers actually took between July 16, 2014 and August 10, 2014 might have exceeded the duration specified under the employer's written policies, he nevertheless did not think about the strict terms of that policy because the employer had not, to his knowledge, ever taken any actions to enforce it before his discharge on August 26, 2014. Transcript at 18, 32. Neither of the employer's witnesses specifically denied that the breaks claimant took between July 16, 2014 and August 10, 2014 were of the same duration as his coworkers. The employer's witnesses candidly admitted that they did not monitor the duration of employees' breaks if they were not on an AN2 warning, and that they were not able to determine the accuracy of claimant's contention that his breaks were of the same duration as his coworkers. Transcript at 24, 25, 34, 35. Although one of the employer's witnesses argued that the AN2 warning claimant received on July 17, 2014, was sufficient to put him on notice that the employer did not condone tardiness in returning from breaks, we disagree. Transcript at 27, 28. That witness testified that claimant was not told when he received the AN2 warning that the employer was going to rigorously

enforce its break policy against him and there was nothing in the written language of the AN2 warning that would have notified claimant that he was mistaken about the employer's tolerance of technically tardy returns under its break policy. Transcript at 28; Exhibit 1 at 13..

In *Goin v. Employment Department*, 293 Or App 758, 126 P3d 734 (2006), the Court of Appeals held that a claimant's failure to comply with an employer's policy is excused from constituting misconduct under OAR 471-030-0038(3)(b) if claimant sincerely believed that the employer would excuse, condone or overlook his policy violation and claimant had at least some factual basis for this belief without further investigation. Here, there is no evidence in the record on which to base a conclusion that claimant's belief that the employer was willing to overlook minor deviations from its break policy was not sincerely or honestly held. Based on claimant's testimony that he took his breaks at the same time as other employees, returned at the same time as they did, and the employer had not disciplined any of these employees for taking breaks that were too long, there were no known circumstances to alert claimant that his belief about the employer's tolerance might be mistaken. Although the employer's witnesses speculated that claimant's contention about the other employees' breaks might have been overstated, this speculation alone was not sufficient to undercut the force of certainty in claimant's testimony. Transcript at 18, 24, 25, 35. Based on the employer's failure to enforce the strict terms of its break policy on employees other than claimant, and the employer's failure to rebut claimant's testimony that he was patterning his breaks on those taken by his coworkers, the employer did not demonstrate that claimant's technical violation of its break policy by returning late from breaks between July 16, 2014 and August 10, 2014, was other than a good faith error. As such, claimant's violation of the employer's break policy was excused from constituting misconduct under OAR 471-030-0038(3)(b).

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

DECISION: Hearing Decision 14-UI-27894 is affirmed.

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

DATE of Service: January 12, 2015

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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