EO: 200
BYE: 201533

703
DS 005.00

State of Oregon

Employment Appeals Board

875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1887

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91027). Claimant filed a timely request for hearing. On October 21, 2014, ALJ S. Lee conducted a hearing at which the employer did not appear, and on October 22, 2014 issued Hearing Decision 14-UI-27356, reversing decision # 91027. On October 30, 2014, the Office of Administrative Hearings (OAH) issued a letter ruling cancelling Hearing Decision 14-UI-27356 and setting this matter for a new hearing because the employer did not receive notice of the October 21, 2014 hearing. On November 18, 2014, ALJ S. Lee conducted another hearing, and on November 26, 2014 issued Hearing Decision 14-UI-29467, again reversing decision # 91027. On December 11, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that presented new facts it did not introduce into evidence at the hearing. The employer did not explain why it did not offer this new information at the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090(2) (October 29, 2006). Because the employer did not comply with the applicable regulation, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Sause Brothers, Inc., doing business as Southern Oregon Marine, employed claimant as a welder from October 2, 2013 until August 26, 2014.

(2) The employer's handbook required employees who were unable to report for scheduled shifts to notify their supervisor as soon as possible, but in no event later than 30 minutes after the scheduled starting time. As a matter of common sense, claimant understood he was required to notify the employer of an absence before his shift started. Claimant did not understand that he needed to communicate his absences to the employer at certain telephone numbers. The telephone numbers at

which employees were required to report absences were not listed in the employer's handbook. Exhibit 1 at 53.

(3) In February 2014, claimant was off from work for two weeks when he was ill with pneumonia. Exhibit 2 at 7. Claimant returned to work in late February 2014. On March 11, 2014, claimant injured his back at work and told his foreman that he needed to go home. The foreman gave claimant permission to leave and told claimant "we'll see you back when you feel better – when you get back to work." Audio of October 21, 2014 Hearing (Audio) at ~22:32. Claimant did not report for work on March 12 and 13, 2014 and did not notify the employer of these absences because he thought that his foreman already knew he was going to be absent. On March 13, 2014, the shipyard manager called claimant and told him that he needed to contact the employer every day that he was going to be absent from work or he might be discharged. Audio at ~23:00. On March 17, 2014, claimant's supervisor gave claimant a verbal warning for not calling to report his absences on March 12 and March 13, 2014. Exhibit 2 at 2. In neither of these warnings was claimant informed that he needed to report his absences to particular phone numbers or within a particular period of time after his shift was scheduled to start. Transcript of November 18, 2014 Hearing (Transcript) at 19; Exhibit 2 at 2.

(4) Beginning on March 25, 2014 and continuing through April 23, 2014, claimant was absent from work as a result of a workplace injury. Because claimant's absences on these days were under a worker's compensation claim, claimant was required to report his absences to the employer's human resources representatives who were located in its Market Street office at the telephone number 541-269-5841. Claimant did so.

(5) On the weekend of Saturday, August 23 and Sunday, August 24, 2014, claimant was not scheduled to work and participated in a softball tournament in another town. The weather was very hot during the softball games, nearing one hundred degrees, and claimant played in several games. Audio at ~17:58; Transcript at 21. When claimant arrived at home late in the evening on August 24, 2014, claimant was sick, dehydrated and vomiting from playing the games in extreme heat. Claimant set three alarms so that he would awaken in time to report for work on August 25, 2014. The alarms were set for 5:00, 5:15 and 5:30 a.m. Claimant had a difficult time falling asleep on August 24, 2014.

(6) Claimant was scheduled to work on Monday, August 25, 2014 beginning at 6:00 a.m. Claimant slept through the alarms he had set and did not awaken until sometime before 8:48 a.m. Immediately after awakening, at 8:48 a.m., claimant called the employer's Market Street office, at the telephone number 541-269-5841, to notify the employer that he was going to be absent from work due to illness. Claimant spoke to a female at that number who told him she would "let them know" of his absence. Audio at ~19:13.

(7) On August 26, 2014, claimant arrived for work before his scheduled shift started. At that time, claimant was told to report to the shipyard manager's office. The shipyard manager and the assistant manager asked claimant why he had not called in to report his absence on August 25, 2014. Claimant told them that he had called in and offered to show them the call history stored in his cell phone. They told claimant that they did not believe that he had called and that they did not want to see the information in the cell phone. They told claimant that he was discharged for a not reporting for work on August 25, 2014 and not notifying the employer that he was going to be absent on August 25, 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. The employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witness testified at hearing that the employer discharged claimant for "excessive absenteeism" and for failing to call in to report his absences on unspecified dates. Transcript at 5. However, the employer's witnesses did not present sufficient evidence about claimant's absences before August 25, 2014 to support any inference that they were "excessive" or that they were caused by claimant's willful or wantonly negligent violations of the employer's standards. With respect to claimant's failure to report for work on March 12 and March 13, 2014, or to notify the employer of his absences on those dates, those events were not the proximate cause of claimant's discharge because, although the employer was aware of those alleged transgressions, the employer did not discharge him as a result of them. The apparent proximate cause of claimant's discharge was claimant's alleged failure to report for work on August 23, 2014 and August 25, 2014 and his alleged failure to notify the employer of those absences.[1] Claimant's alleged violations of the employer's attendance policy on those days are the proper focus of the analysis of whether the employer discharged claimant for misconduct.

With respect to claimant's alleged absence on Saturday, August 23, 2014, the employer did not demonstrate that claimant was scheduled to work on that day. The employer's witness agreed that claimant was normally scheduled to work Mondays through Thursdays and further testified that whether he was scheduled to work on a Saturday depended on whether he had "elected" to work that overtime and committed to his foreman that he would do so. Transcript at 14. The witness had no information that claimant had made such a commitment to his foreman for August 23, 2014 and testified only that she believed claimant would have made such an election because "they were working a lot of overtime at that time had he is a welder." Transcript at 14. However, claimant testified with certainty that he told his foreman he was unable to work on Saturday, August 23, 2014 because he was participating in a softball tournament and his foreman agreed that he did not need to work that day. Transcript at 20. Claimant's first-hand testimony about whether his foreman required him to work on August 23, 2014 is entitled to greater weight than the speculations of the employer's witness. The employer did not meet its burden to establish that claimant was required to work on Saturday, August 24, 2014, and that his failure

[1] *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).

to report for work or to call in to report an absence on that day was a violation of the employer's standards.

With respect to claimant's behavior on August 25, 2014, the employer's witnesses did not establish that claimant was ever informed that he needed to call the employer's shipyard or the shipyard superintendent on his desk or cell phone to report an absence. The employer's handbook, although it required an employee to call a supervisor to report an absence, did not specify who was considered a supervisor or the correct phone numbers at which to report an absence. Exhibit 1 at 56. The one warning issued to claimant for failing to call in to report an absence referred to the obligation to call, but did not identify the acceptable phone numbers to call or provide information about which supervisors to notify. Exhibit 2 at 3. The employer's witness who testified about proper notice to the employer was not the employee who handled claimant's orientation, and her testimony was not relevant to what claimant was actually told at that orientation about the correct phone numbers to call to report his absences. Transcript at 9, 13, 26. Claimant's testimony that he did not know that he was expected to call particular phone numbers to report that he was going to be absent from work was not implausible, particularly since the employer's written materials did not contain this information. Transcript at 17. Although the employer's witness testified that the acceptable phone numbers were also posted in the break room that, without more, is insufficient to establish that claimant should reasonably have been aware of them or reasonably aware that he was prohibited from providing the required notification to the employer's Market Street office. In addition, because claimant had been required to call the Market Street office to report his worker's compensation-related absences, as the employer apparently required, it does not appear unreasonable that claimant thought that it was acceptable to call that number to report an absence for an illness Audio at ~17:23; ~19:43, Transcript at 17, 18. Absent specific evidence that claimant was ever reasonably informed that the employer did not consider a call to the Market Street office to constitute acceptable notice of an absence, the employer did not meet its burden to establish that claimant's call to that office to report his absence on August 25, 2014 was a willful or wantonly negligent violation of the employer's standards.

While the employer's witnesses vigorously disputed that claimant called the employer's Market Street office to report his absence on August 25, 2014, their testimony meant only that the employer had no record of that call. Transcript at 10. Since the employer's witness conceded that claimant's cell phone bills showed that at 8:48 a.m. on August 25, 2014 the number of the Market Street office was called and the duration of the call was one minute, it appears most likely that he did call that office and spoke to someone at that end of the phone. Transcript at 11; Exhibit 1 at 4. The employer's witness offered no other explanation for why this phone call might appear on claimant's phone records for the day of August 25, 2014 unless he called that office to report he was going to be absent. Moreover, claimant was firm in his testimony that he called the Market Street office that day, at that time and reported to the unidentified person who answered the phone that he was going to be absent because he was sick. Audio at ~18:38; Transcript at 23. The employer did not present sufficient evidence to overcome the weight of claimant's rebuttal evidence that he did call the Market Street office on August 25, 2014 to report his absence.

Claimant agreed that his call to the Market Street office to report his absence on August 25, 2014 did not occur within the thirty minute time period allowed under the employer's attendance policy. However, the employer's witnesses did not establish that claimant's failure to comply with that time limitation was willful or wantonly negligent. In spite of his illness, claimant took reasonable steps to ensure he

awakened in time to report for work as scheduled at 6:00 a.m. by setting three alarm clocks. There was no evidence in the record of any occurrences that should reasonably have put claimant on notice that the alarms he set might not awaken him and he needed to take additional precaution to ensure that he awakened in time to call the employer within thirty minutes of the scheduled start of his shift. EAB has consistently held that sleeping through the start of a shift does not satisfy the "consciousness" element needed to establish wantonly negligent behavior unless both the oversleeping was reasonably foreseeable and claimant failed to take reasonable steps in light of that foreseeability. *See Amanda J. Cordes* (Employment Appeals Board, 13-AB-0758, May 30, 2013) (claimant's oversleeping because her newly purchased clock had an alarm ring of short duration was not a conscious act and not wantonly negligent when claimant had no reason to foresee that occurrence); *Walter Steffensen* (Employment Appeals Board, 13-AB-0428, April 13, 2013) (absent evidence that claimant's act of oversleeping was reasonably foreseeable, his oversleeping was not wantonly negligent when he set multiple alarms and had no reason to conclude that the alarms would fail to awaken him); *Cicely A. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (absent evidence that claimant's act of oversleeping was reasonably foreseeable, claimant's oversleeping was not a conscious act and was not wantonly negligent); *Maureen E. Redfield* (Employment Appeals Board, 13-AB-0083, February 13, 2014) (absent evidence that claimant's oversleeping four alarms was reasonably foreseeable, it was not a conscious act and was not wantonly negligent); *Brook A. Barrett* (Employment Appeals Board, 12-AB-3061, January 3, 20130 (claimant's oversleeping his alarm was not a conscious act without evidence that his doing so was reasonable foreseeable and that he should reasonably have taken some precautions to awaken in time for his shift). Because claimant took the reasonable precaution of setting three alarms to timely arouse himself on August 25, 2014, and there was no reasonable basis for him to foresee that they would not awaken him in sufficient time to call the employer to report his absence within the period the employer's policy allowed, claimant's failure to comply with that policy was not a result of willful or wantonly negligent behavior.

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

DECISION: Hearing Decision 14-UI-29467 is affirmed.

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

DATE of Service: <u>February 2, 2015</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.