

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

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0365

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113104). Claimant filed a timely request for hearing. On March 20, 2015, ALJ S. Lee conducted a hearing, and on March 26, 2015 issued Hearing Decision 15-UI-35793, reversing the Department's decision. On March 31, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it appeared to assert that the ALJ erroneously failed to admit into evidence certain documents that the employer had submitted to the Department before the hearing and when it was gathering information determine claimant's eligibility for benefits based on the work separation. Employer's Written Argument at 1. However, the notice of hearing prominently stated that no documents would be considered by the ALJ at the hearing other than those included with the notice, and further stated that any other documents the employer wanted to have considered needed to be provided to the ALJ and the other parties in advance of the hearing. Record Document, March 6, 2014 Notice of Hearing at 1. Because no evidentiary documents were included with the notice of hearing and the employer did not provide any documents to claimant and the ALJ in advance of the hearing, the ALJ correctly did not admit into the record any information provided to the Department and did not consider any such documents when reaching her decision. Since the employer's president testified in detail about the events leading to claimant's work separation, the documents in question should not have been necessary to a full consideration of the hearing issues.

In its written argument, the employer offered new information that was not considered at the hearing. Although the employer stated that it failed to offer the new information because it did not anticipate that claimant would fabricate her hearing testimony, a party reasonably should be aware that factual issues are likely to be disputed at the hearing and it reasonably should prepare its case to present all relevant information in support of its position at the hearing. For this reason, the employer failed to show that

factors or circumstances beyond its reasonable control prevented it from offering the new information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Myles O'Donnell & Company employed claimant as a janitor from June 23, 2014 until November 17, 2014. The employer provided cleaning services to various commercial establishments, and claimant performed cleaning duties on behalf of the employer.

(2) The employer expected that claimant would report for work as scheduled. The employer also expected that claimant would record on her timecard only time that she actually worked. Claimant understood the employer's expectations as a matter of common sense.

(3) Before approximately October 6, 2014, claimant was scheduled to clean a jewelry store on Mondays from 9:00 a.m. to 10:30 a.m. Claimant was also scheduled to clean a laundry facility on Mondays, Wednesdays and Fridays from 8:00 p.m. to 1:00 a.m.

(4) In October 2014, claimant's young son began attending school between the hours of 8:00 a.m. and 10:50 a.m. On Mondays, claimant was unable to arrange for a babysitter to meet her son when he returned home from school. The commute from the jewelry store job did not allow claimant to arrive at her home to meet her son when he got off the school at 10:55 a.m. On Monday, October 6, 2014, claimant contacted her work supervisor, stated she was having childcare issues, and asked to have the day she was scheduled to clean the jewelry store changed to Tuesdays. The supervisor agreed to this change. On October 6, 2014, the jewelry store owner called the employer's president to notify him that claimant had not cleaned the jewelry store that day. The president called claimant and claimant told him she thought she had arranged with her supervisor to clean the jewelry store on Tuesdays. The president called the jewelry store owner who agreed to have the store cleaned on Tuesdays. Claimant cleaned the jewelry store on Tuesday, October 7, 2014.

(5) On Tuesday, October 14, 2014, claimant notified her supervisor that she was not able to clean the jewelry store as scheduled because she had not been able to arrange for a babysitter to care for her son when he returned from school. The employer's president cleaned the jewelry store on October 15, 2014.

(6) On approximately October 15, 2014, claimant turned in her timecard to the employer's office manager, which included her time for October 14, 2014. On her way to her car after submitting the timecard, claimant realized that she had included a pre-written time entry for cleaning the jewelry store on October 14, 2014. Claimant returned to the office, told the office manager that the timecard was incorrect, and the office manager adjusted the time entries to eliminate cleaning the jewelry store on October 14, 2014.

(7) On October 20, 2014, the employer's president received an inquiry from the laundry facility about the hours that one of the claimant's coworkers assigned to work there with claimant was actually performing work. The president called claimant to ask when the coworker had left the laundry for home on October 17, 2014 and whether he had stayed until 1:00 a.m. Claimant stated that she did not know because she had left the laundry at 12:15 a.m. When the owner asked claimant why she had left early, claimant told him that she and the coworker had been told by another employee who worked at the laundry when they were assigned to the job that the supervisors allowed them to leave the laundry early

if they had completed all the required cleaning and they did not need to adjust the time reported on their timecards to reflect their early departure. The president told claimant that she was not allowed to leave the laundry early, even if the cleaning was completed, and she needed to find some other tasks to perform at the laundry until 1:00 a.m. Claimant's supervisor also later told her that she needed to stay on the laundry premises until the scheduled end of the job at 1:00 a.m. The employer later confirmed with claimant's coworker that claimant had correctly stated to the president what they were told about leaving early and that he had been doing so along with claimant. Transcript at 37. After October 20, 2014, claimant did not end her work at the laundry before 1:00 a.m. After claimant's cleaning duties were finished she went to a drive-in, picked up a cup of coffee, returned to the laundry and inspected her cleaning work, performed miscellaneous tasks and filled in the time remaining until 1:00 a.m.

(8) On Tuesday, October 21, 2014, claimant was again scheduled to work at the jewelry store. When claimant was travelling that day to the jewelry store, she blew out a tire on her car and was unable to report to the store to clean it. Claimant sent a text message to her supervisor advising the supervisor that she was unable to clean the store as scheduled because of car problems. Claimant asked her supervisor, and it was agreed that she would clean the store on Wednesday, October 22, 2014. On Wednesday, October 22, 2014, claimant again had unexpected difficulties in arranging for childcare and could not clean the jewelry store that day. Transcript at 23. On October 22, 2014, the jewelry store owner called the employer's president and told him that claimant had not appeared to work, as promised. The president then called claimant and told claimant that he was in danger of losing the jewelry store's business and he was removing the store from her cleaning assignments. The president did not ask why claimant had failed to report for work at the jewelry store on October 22, 2014.

(9) After October 22, 2014, the employer's president asked claimant's supervisor to arrive unannounced at the laundry facility sporadically, after midnight, to see if claimant was at work or whether she had left early. On three occasions, the supervisor went to the laundry facility as instructed and did not see claimant there, but noticed that the cleaning work appeared to have been competently performed. When claimant turned in her timecards showing her work between October 22, 2014 and November 17, 2014, she recorded that on all Mondays, Wednesdays and Fridays, she had worked five hours at the laundry facility. Since the supervisor had reported that she had not seen claimant when she went the three times to the laundry facility, the president concluded that claimant was over-reporting her work hours.

(10) On November 17, 2014, the employer discharged claimant for failing to report for work as scheduled at the jewelry store in October and for falsifying the time that she reported on her time card for October 14, 2014 and for her time cards after October 20, 2014 for her work at the laundry facility.

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).

The employer's president contended that the employer discharged claimant for both her failure to report for work at the jewelry store between October 6, 2014 and October 22, 2014 as well as the alleged falsification of certain hours shown on her timecards. Given that claimant's failures to show up for her work at the jewelry store was known to the employer when it occurred, well in advance of any decision to discharge claimant, it does not appear that the absences were the proximate cause of claimant's discharge. Even if they were, it was not disputed that claimant called the employer about her absence on October 6, 2014, arranged with the employer to perform the cleaning on October 7, 2014 and did that cleaning on October 7, 2014. With respect to claimant's absences on October 14, 2014 and October 21 and 22, 2014, the employer had a right to expect claimant to report for work as scheduled absent exigent circumstances. However, on all of these days, claimant had unexpected childcare difficulties or unanticipated problems with her car. The employer's president did not present any evidence that rebutted claimant's explanations about the reasons that she was unable to report for work on these days. Claimant's absences appear to have been caused by exigent and unanticipated circumstances. The employer did not meet its burden to show, more likely than not, that claimant's failure to report for work on October 6, October 14 and October 21 and 22, 2014 were the result of her willful or wantonly negligent behavior or that they constituted misconduct.

With respect to claimant's alleged entry on her timecard showing that she worked an hour and a half at the jewelry store on October 14, 2014, claimant presented first-hand testimony that she had the employer's office manager correct the entry she had written immediately after she submitted the timecard. The employer's owner did not dispute claimant's testimony at hearing about the office manager's correction of the time card at her request. Accordingly, the employer did not establish that the timecard that claimant submitted for October 14, 2014 was inaccurate.

With respect to the alleged falsification of claimant's timecards reflecting her time spent at the laundry, the employer conceded that it spoke to claimant's coworker shortly after October 20, 2014, and the coworker corroborated that both he and claimant had been told that they were allowed to leave early and not adjust their time cards to reflect the early departure. Transcript at 27, 37. Based on this evidence, we infer that claimant was not reasonably aware that she was incorrectly reporting her time at the laundry until October 20, 2014. As for reporting her time after October 20, 2014, the employer's contention that claimant misrepresented it hinges on whether claimant indeed left the job site earlier than the 1:00 a.m. end of her scheduled work. Claimant contended that she did not do so after the employer's president warned her on October 20, 2014, and she provided a plausible explanation of what she did at the job site between the time that she completed her cleaning duties and 1:00 a.m. Transcript at 28. Although the employer presented hearsay evidence that claimant's supervisor had come to the laundry facility on three occasions between October 21, 2014 and November 17, 2014, it is plausible that the supervisor arrived when claimant was picking up coffee at a nearby drive-in before she returned to the laundry to perform miscellaneous duties until the end of her shift. Absent evidence that the supervisor waited at the laundry after she arrived at approximately 12:00 a.m. until the end of claimant's shift at 1:00 a.m. and claimant did not report back to the laundry, the employer has not presented sufficient evidence to rule out claimant's explanation. Transcript at 19-20. The employer did not meet its burden to show that claimant inaccurately reported her work hours at the laundry between October 21, 2014 and the date that she was discharged. Although the employer argued in its written argument that the hearsay evidence from claimant's supervisor about claimant's absence from the laundry facility should be given more weight than claimant's testimony, that hearsay was insufficient to establish the employer's contentions for the reason that its evidence failed to rule out the accuracy of claimant's explanation.

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

DECISION: Hearing Decision 15-UI-35793 is affirmed.

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

DATE of Service: May 19, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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