

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1036

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 114740). The employer filed a timely request for hearing. On August 14, 2015, ALJ Murdock conducted a hearing, and on August 19, 2015 issued Hearing Decision 15-UI-43176, affirming the Department’s decision. On August 28, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant from September 26, 2000 until May 28, 2015, last as a clerk at its customer service desk.

(2) The employer expected claimant to perform work-related duties at all times during her shift and, if she did not, it would consider her to have engaged in “theft of time.” Audio at ~4:44. Notwithstanding this expectation, claimant thought that she did not need to perform work-related duties if there was no work to perform.

(3) On November 11, 2014, the employer issued a written warning to claimant for taking a lunch break that was 11 minutes longer than scheduled on a specific date and for taking multiple extended breaks on other unspecified dates. When claimant received this warning, she told the store manager that she had an auto-immune disorder that affected her brain function and cognition, including memory and attending to the passage of time. After she received the warning, claimant consulted with her neurologist about keeping track of time. Claimant obtained a notebook so she could record, among other things, the times at which she started her breaks to ensure she knew when her breaks ended. After November 11, 2014, the employer considered that claimant abided with its expectations about limiting her breaks to the time allowed.

(4) On May 11, 2015, after claimant reported for work at the customer service desk, business in the employer’s store was slow and there were periodic lulls between customers needing assistance. To fill the time throughout the day when there were no customers, claimant cleaned the counter and other parts

of the customer service area, swept the floor behind the counter, updated the sweeping log and assisted the head clerk in keeping her log. During the time between customers, claimant also sorted perishable from non-perishable items on the “go-back” cart, cleaned up litter at some of the check stands, determined that the other cashiers did not need any office supplies that she could provide, determined that no bottles needed to be sorted and determined that the lead clerk was handling the other tasks that she could have performed. Audio at ~26:30 *et seq.* Claimant did not rotate the cigarette inventory in the down time because the employer had recently had issues about packs of cigarettes that remained on shelves in inventory beyond their expiration dates. Lacking any more work to do, claimant asked her immediate supervisor if there were any additional tasks she could perform and the supervisor told claimant that there were none. Audio at ~29:30. Claimant did not look beyond the customer service area for tasks to perform because she understood that she had to remain close enough to the desk to observe the approach of any customers and to hear if the telephone rang.

(5) On May 11, 2015, after claimant completed the additional tasks that she could find and the supervisor had told her she had no other tasks to give her, claimant had nothing to do during the breaks between customers. Having been unable to locate any remaining work tasks, claimant began to cut fabric for a tutu she was making and to tie the fabric pieces together at the customer service desk when there were no customers at the desk. Claimant did not make any customers who arrived at the counter wait while she worked on the tutu. Claimant’s work on the tutu was interspersed throughout the day and limited to the approximately ten to fifteen minute intervals between customers.

(6) Sometime before May 28, 2015, a store employee complained that claimant had been working on a personal craft project while on duty at the customer service desk. After he was informed of this complaint, the store manager asked a security officer to check the validity of the complaint. The security officer viewed the store’s surveillance videos and reported that, summing up all the time that claimant worked on the tutu in several short and discreet hiatuses between customers on May 11, 2015, it totaled 47 minutes.

(7) On May 28, 2015, the employer discharged claimant, contending that the time she spent working on the tutu on May 11, 2015 constituted a theft of time from the employer.

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 show by a preponderance of the evidence that claimant engaged in misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer appeared to take the position that claimant should have found something work-related to occupy all of her time during her shift on May 11, 2015, and it was wantonly negligent when she was unable to find any such tasks. Audio at ~6:58, ~15:09, ~32:41, ~35:32, ~35:36, ~37:57. While the employer suggested that there were tasks that claimant could hypothetically have undertaken to keep busy on May 11, 2015, the issue is not only whether such tasks possibly existed but whether they were available on that day and whether, if they were, it was wantonly negligent of claimant not to have found them and performed them. Audio at ~35:32, ~36:38, ~37:23, ~37:57. The employer did not rebut claimant's testimony that she was aware of ten additional tasks that were potentially available to fill her time and either performed them or ruled them out because they were already being done by other employees on that day. Audio at ~26:30 *et seq.* These tasks constituted the vast majority of additional tasks that the store manager identified that claimant could have done. Audio at ~6:58, ~15:09. Even if claimant did not consider every single additional task the store manager identified, she asked her immediate supervisor if there were additional tasks she could perform and she was told that there were none. Audio at ~29:30. Where the immediate supervisor could not think of any additional tasks, it appears reasonable that claimant also could not think of such tasks, and also reasonable for claimant to conclude that none existed. On these facts, claimant was not indifferent to the employer's expectation that, on slow days, she would perform tasks in addition to waiting on customers since she made sustained efforts to find additional tasks to occupy her time on that day in the intervals between customers and performed the additional tasks that were available. Having done what she could, and having asked her supervisor for additional tasks, claimant's belief that the employer would allow her to work on a personal project in ten to fifteen minute increments of time between customers, and would not consider such activities as a theft of time, was plausible. Even if the employer had stricter standards for claimant's activities at the customer service desk, claimant had grounds for her belief. Good faith errors in understanding the employer's requirements are not misconduct. 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 15-UI-43176 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: September 30, 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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