

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1204

Late Application For Review Allowed
Hearing Decision 15-UI-36962 Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct and claimant's benefit rights based on earnings prior to the discharge were not cancelled (decision # 115323). The employer filed a timely request for hearing. On April 14, 2015, ALJ Triana conducted a hearing, and on April 16, 2015 issued Hearing Decision 15-UI-36982, affirming the Department's decision. On May 6, 2015, the hearing decision became final without an application for review having been filed. On October 9, 2015, the employer filed an application for review with the Employment Appeals Board.

The hearing decision stated that, to be timely, an application for review needed to be filed on or before May 6, 2015. On May 5, 2015, the employer attempted to file an application for review with the Employment Appeals Board (EAB), although EAB did not process it as having been received. On October 9, 2015, the employer re-filed the application for review it had earlier sent to EAB.

Since no party filed an objection within the time period set out in Hearing Decision 15-UI-36982, Exhibit 2 will remain in the hearing record

LATE APPLICATION FOR REVIEW. On May 4, 2015, at 7:19 p.m., the employer faxed an application for review form to EAB. The employer received a fax confirmation notice that the fax was successfully transmitted to EAB. However, EAB did not receive the employer's May 4th faxed application. OAR 471-041-0065(1)(c) provides that the filing date of an application for review that is faxed "is the receipt date stamped or written on the fax transmission by the public employee who receives the document," and that documents faxed after 5:00 p.m. are "marked as received the following business day." Because the employer's faxed application was never received, it was never stamped, and, accordingly, it was not "filed" pursuant to OAR 471-041-0065 before the period for filing a timely application for review expired.

On October 9, 2015, the employer submitted a new, late application for review that included evidence of its confirmed timely fax transmission of an application for review on May 4th. OAR 471-041-0070 (October 29, 2006) states that the twenty day period of time within which an application for review must be filed with EAB may be extended for a reasonable time provided the applicant shows good cause, which is defined as showing that factors or circumstances beyond the applicant's control prevented a timely filing. The employer proved that it successfully transmitted a faxed application for review form to EAB after hours on May 4, 2015. Had EAB received and processed the document in the regular course of business, it would have been filed timely, on May 5, 2015. We conclude that EAB's failure to receive or process the employer's faxed application for review constitutes a factor or circumstance beyond the employer's reasonable control that caused its late filing. The employer showed good cause for its late filing and its late application for review is allowed.

FINDINGS OF FACT: (1) Winco foods, Inc. employed claimant as a lead clerk from September 15, 2005 until January 22, 2015.

(2) The employer expected that claimant would not spend an excessive amount of work time in unproductive and non-work related activities. The employer considered an employee who engaged in extended periods of non-productive paid time to have misappropriated that time from the employer. Claimant understood the employer's expectations.

(3) On August 4, 2014, the employer issued to claimant a verbal warning for being unproductive at work. The basis for the warning was observations of claimant speaking to vendors and coworkers and speaking two times to a customer service representative. Exhibit 2 at 2. The employer believed that claimant was not performing work-related duties during these encounters.

(4) On October 30, 2014, claimant was given a warning for attendance violations based on the number of times she was absent from or tardy in arriving to work and the number of times she left work early. At that time, claimant had accrued 26 attendance points during a rolling year period which, under the employer's attendance policy, was considered "excessive." Exhibit 2 at 3.

(5) By January 2015, claimant was approximately four months pregnant. During her pregnancy, claimant experienced nausea and sometimes vomited. Claimant spoke to the assistant manager about her need to try to control her nausea at work by eating crackers and told the manager that occasionally she was required to vomit. The assistant manager cautioned claimant, "Just make sure it [involuntary vomiting] doesn't happen on the sales floor or where customers can see." Transcript at 25.

(6) On January 12, 2015, claimant worked from 1:30 p.m. until 10:00 p.m. That day, claimant felt very nauseous and dizzy throughout her shift. Despite her discomfort, claimant worked through her shift until its end. Claimant did not want to leave work early because she would accrue attendance points if she did and she thought she could "push through [the nausea and dizziness]." Transcript at 24, 26.

(7) On January 13, 2015, another lead clerk told the assistant store manager that it had been reported to him that claimant had been observed on January 12, 2015 spending a great deal of time sitting in a chair behind the customer service counter and not performing any work duties. The assistant manager viewed video recordings from January 12, 2015 and observed claimant sitting in a chair behind the customer

service counter for only two minutes. Transcript at 9. Upon further reviewing the video, however, the assistant manager concluded that claimant was behind the customer service counter “not doing anything productive” on approximately nine separate occasions during her shift on January 12, 2015. Transcript at 9, 10. The total time he concluded that claimant was not being productive on January 12, 2015 was 117 minutes, or approximately two hours. Transcript at 10.

(8) On January 22, 2015, the employer discharged claimant for spending an excessive amount of work time in non-productive activities on January 12, 2015, thereby misappropriating time from the employer.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct. Claimant’s benefit rights based on wages earned prior to her discharge are not canceled.

The Discharge. 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 prove 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 contended that the video observations of claimant’s activities on January 12, 2015 demonstrated that claimant was behind the customer service counter engaged in non-productive activities on several separate occasions for a total of 117 minutes. Claimant did not recall everything she did on that day, but vigorously disputed that she could have spent 117 minutes in non-work-related activities behind the customer service counter. Transcript at 23, 24, 26. The employer did not dispute that claimant was legitimately required to go behind the customer service counter to authorize overrides, to approve customers’ checks, to obtain money for the check stands, answer questions and for miscellaneous other reasons. Transcript at 10. While it appears that the assistant manager determined that for particular increments of time on January 12, 2015, claimant was engaged in unproductive activities, the standards that he used to make this determination are not clear from the record. The employer’s testifying witness had not viewed the video and had no knowledge of what claimant might have been doing during the 117 minutes at issue. Transcript at 20. With respect to what the testifying witness was told by the assistant manager, it was only that claimant was “just standing there and talking.” Transcript at 20; *see* Transcript at 9-10. From the conclusory, hearsay nature of the employer’s evidence, particularly in light of claimant’s rebuttal, it is difficult to conclude that the employer established, more likely than not, that claimant spent an excessive amount of time in non-productive activities during her shift on January 12, 2015.

Even assuming claimant spent some uncertain amount of paid time not being productive during her January 12, 2015 shift, the employer did not demonstrate that she was conscious of the amount of that time or conscious that it was “excessive.” Claimant’s testimony was not rebutted that she was pregnant, subject to nausea during that pregnancy, and was feeling especially nauseous and dizzy on January 12,

2015. Accepting that she was subject to these conditions, it is quite possible that she was not aware of the lapsed time when she tried to “catch [her] composure for a moment” to allow her to continue working. Transcript at 22. Because the employer did not rule out that claimant was not conscious of the amount of time she was spending to try to control the physical effects of her symptoms and not directly engaged in work-related activities, the employer did not demonstrate that claimant had the consciously aware state of mind needed to show that her behavior was willful or wantonly negligent. *See* OAR 471-030-0038(1)(c). Nor did the employer show that claimant’s remaining at work on January 12, 2015 when she was feeling as she did was willful or wantonly negligent. The employer did not provide any grounds to support the conclusion that claimant should have foreseen that she was going to spend the amount of time that she did that day trying to abate her symptoms or that it was unreasonable for her to have been concerned about accruing attendance points if she left work early on January 12, 2015. Absent such proof, the employer did not meet its burden to show that it discharged claimant for misconduct.

Benefit Rights. ORS 657.176(3) states, among other things, that an individual who was discharged for misconduct because of a theft shall have all benefits rights based on wages earned prior to the discharge cancelled if the individual’s employer notifies the Department of the discharge within ten or thirty days following issuance of specified notices and the individual has admitted the theft to an authorized Department representative, has signed a written admission of the theft that has been presented to the an authorized representative or has been convicted of theft by a court. As discussed above, the employer did not meet its burden to show that claimant engaged in theft by misappropriating work time from it. Nor was it demonstrated that claimant ever admitted to theft, signed a written admission, or was convicted of theft by a court. Accordingly, claimant benefit rights based on wages earned prior to her discharge are not canceled.

DECISION: Hearing Decision 15-UI-36982 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 3, 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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