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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1310

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 154658). Claimant filed a timely request for hearing. On October 13, 2015, ALJ Frank conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46088, affirming the Department's decision. On November 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Salem Hospital employed claimant from January 3, 2011 to May 21, 2015, last as a nurse care manager.

(2) The employer expected employees to clock in to work within seven minutes of their scheduled start times, and had a written time and attendance policy stating that employees were expected to accurately record their start times. The policy further stated, in relevant part, that employees were expected to use their hospital identification badges to clock in to work through the badge readers closest to their work areas, and immediately report in and begin working after clocking in.

(3) Claimant understood the employer expected her to clock in to work within seven minutes of her scheduled start time, and was aware of the employer's time and attendance policy. During the course of her employment, however, claimant observed that it was common practice for employees to clock in through the nearest badge reader after arriving at work, and purchase food at the employer's cafeteria, coffee at its coffee shop or items in its lobby before reporting in and starting work. Claimant therefore believed that the employer did not strictly enforce its time and attendance policy, and that the

employees' behavior complied with the employer's true expectations on recording start times and clocking in to work.

(4) On April 29, 2015, claimant did not arrive at work in time to park in the employee parking lot and clock in within seven minutes of her scheduled start time. She therefore parked her vehicle in a visitor parking space, clocked in to work through the nearest badge reader within seven minutes of her scheduled start time, and parked her vehicle in the employee parking lot before returning, reporting in and starting work. On May 13, 2015, claimant again did not arrive at work in time to park in the employee parking lot and clock in within seven minutes of her scheduled start time. She therefore again parked her vehicle in a visitor parking space, clocked in to work through the nearest badge reader within seven minutes of her scheduled start time, and parked her vehicle in the employee parking lot before returning, reporting in and starting work. Claimant believed, based on the common practice of employees clocking in through the nearest badge reader and attending to personal matters before starting work, that her conduct complied with the employer's expectations.

(5) The employer discharged claimant for violating its time and attendance policy on April 29 and May 13, 2015.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-46088, the ALJ found that although the employer's time and attendance policy specified that employees were expected to immediately start work after clocking in through the badge reader closest to their work area, claimant observed that some employees used badge readers that were not close to their work areas, and then proceeded to obtain food or coffee on paid time before actually starting work.[1] The ALJ further found that after having been counseled on "how to clock in and out for work properly" on multiple occasions, claimant violated the employer's time and attendance policy on April 29 and May 13, 2015 to prevent recorded late arrivals to work.[2] Based on those findings, the ALJ concluded that on claimant willfully violated the employer's expectations, asserting that claimant acknowledged that she had done so to avoid the "appearance" of having violated the

[1] Hearing Decision 15-UI-46088 at 1.

[2] *Id*.

employer's time and attendance policy, or to "deceive" the employer.[3] The ALJ further asserted that "while claimant referred to the casual approach towards timekeeping policy taken by other staff, this (potential) argument is inherently contradictory," because it was "claimant's very concern about abiding by what was a strict, and not casual, policy that led her to commit the infractions."[4] Finally, the ALJ concluded that claimant's conduct cannot be excused as a good faith error because claimant "should" not have believed in good faith that the employer would condone her actions.[5]

However, neither the ALJ's findings nor the record support his analysis and conclusions that claimant violated the employer's expectations willfully, and that her conduct was not a good faith error. At hearing, claimant did not acknowledge violating the employer's expectations to avoid the "appearance" of violating the employer's time and attendance policy, or to "deceive" the employer. She testified that although her conduct violated the time and attendance policy, she merely was acting to ensure she complied with the employer's expectation that she clock in to work within seven minutes of her scheduled start time. Audio Record at 10:00-13:30. The common practice of employees clocking in through the nearest badge reader and attending to personal matters before starting work supports claimant's testimony that she did not realize that clocking in through the nearest badge reader and moving her vehicle before starting work violated the employer's expectations. Audio Record at 12:30, 28:00. That testimony is not inconsistent with claimant's concern about complying with the known expectation that she clock in to work within seven minutes of her scheduled start time. Nor does the fact that claimant had been counseled on "how to clock in and out for work properly" show that she knew her conduct violated the employer's expectations, given her undisputed testimony that none of the counselings addressed such behavior. Audio Record at 30:00.

Thus, although the record arguably shows that claimant should have known her conduct probably violated the employer's expectations, and was wantonly negligent, it also shows that claimant sincerely believed, and had a rational basis for believing, she was complying with those expectations. Claimant's conduct therefore was, at worst, the result of a good faith error. Whether claimant "should" have believed that the employer would condone her actions is not material to that issue.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-46088 is set aside, as outlined above.[6]

Susan Rossiter and J. S. Cromwell.

DATE of Service: <u>December 9, 2015</u>

[3] *Id*. at 4.

[4] *Id*.

[5] *Id*.

[6] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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