

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0064

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 101533). The employer filed a timely request for hearing. On December 10, 2015, ALJ S. Lee conducted a hearing, and on December 29, 2015 issued Hearing Decision 15-UI-50126, affirming the Department's decision. On January 19, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Roseburg Forest Products Co employed claimant from July 3, 2013 until September 15, 2015, last as a band saw operator.

(2) The employer expected claimant to refrain from using a cell phone while on the shop floor. The employer also expected claimant to refrain from leaving the employer's premises after a sweep for drug testing had commenced. Notwithstanding these expectations, claimant thought her supervisor could exempt her from both policies and she was not aware of the prohibition against leaving the premises after she was selected for drug testing, but before the actual testing had begun.

(3) In November 2013, claimant admitted to the employer that she had used a controlled substance, which violated the employer's drug and alcohol policy. As a result, claimant entered into a last chance agreement with the employer on November 4, 2013. The last chance agreement required claimant to comply with all terms and conditions of the employer's drug and alcohol policy.

(4) Beginning in about July 2014, claimant's father began to experience serious heart problems and episodes of anxiety and depression. Claimant was the only family member in the area who was available to assist her father. After July 2014 and continuing until September 2, 2015, claimant

sometimes answered her cell phone when her father called her at work because she was concerned about his welfare. If her father called her at work, claimant's supervisor sometimes saw her answer her phone and she sometimes told him she "had to step off the [shop] floor to use [her cell phone] in a safe location." Transcript at 20.

(5) On September 2, 2015, sometime before 4:00 p.m., claimant's father called her at work. He was having a panic attack. Claimant approached her supervisor and asked him for permission to leave work so she could deal with her father's situation. The supervisor told claimant she could leave work. At the time, claimant was not aware that a sweep drug test had been scheduled for the shop and she had been selected to participate in the testing. Transcript at 21.

(6) Sometime shortly before 4:00 p.m., claimant went to the employee break room to pick up her bag before leaving work to attend to her father. When claimant entered the break room, the employer's statistician was in it, and stated to her, "Good timing . . . you're part of the sweep group." Transcript at 16. Claimant told the statistician, "I'm off the clock," retrieved her bag and left the workplace to travel to her father's residence. Transcript at 16. After claimant left, the statistician radioed claimant's supervisor. The supervisor told the statistician that he had allowed claimant to leave work when she did because she had received an "emergency call" from her father. Transcript at 16. When claimant arrived at her father's house, she was able to calm her father down herself without medical assistance and did not need to take him to a hospital, an urgent care facility or a doctor.

(7) On September 15, 2015, the employer's on-site human resources manager met with claimant to investigate the circumstances that led her to leave the workplace on September 2, 2015 and miss participating in the employer's planned sweep for a drug test. Claimant told the human resources manager that she left after she had received a call from her father and thought she might have to take him somewhere for medical care. The manager asked claimant if she had any corroboration of the reasons she left the workplace, including whether she had a note from a doctor. Claimant told the manager she did not have a medical note because, as it turned out, she had been able to handle her father's situation herself and had not needed to take him anywhere for medical treatment. The manager asked claimant if she would show him her cell phone to corroborate that her father had called her shortly before 4:00 p.m. on September 2, 2015. Claimant told him she had erased the log of calls made to her cell phone. The manager asked claimant if she had evidence from her cell phone company showing that her father had contacted her on September 2, 2015. Claimant stated she did not have such documentation from her cell phone company.

(8) On September 15, 2015, after claimant was interviewed by the human resources manager, the employer discharged her for leaving the workplace after a drug testing sweep had begun and for using her cell phone on the shop floor.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

At the outset, although the issues raised by claimant's work separation could conceivably been adjudicated under ORS 657.176(2)(h), the Department's drug and alcohol adjudication policy, the administrative decision and the notice of hearing framed the issue as involving the misconduct laws and rule, and neither involved commission of a disqualifying act under the drug and alcohol adjudication policy. Decision # 101533; December 4, 2015 Notice of Hearing at 1. Neither party suggested during

the hearing that the issues in this matter should be addressed under the provisions of the drug and alcohol adjudication policy, and neither party waived their right to notice if this case proceeded under those provisions. Given the history of this proceeding, principles of due process require that it be adjudicated as one involving issues of misconduct only under ORS 657.176(2)(a) and its implementing regulations.

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 preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

With respect to claimant's departure from the workplace on September 2, 2015, claimant testified she was not aware that the employer prohibited her from leaving the premises after a sweep for a drug test had been commenced, she left with her supervisor's permission and she did not know a sweep for testing had been started when she left the workplace, until she was "off the clock." Transcript at 16, 19, 20, 23. When asked how claimant might have been aware of the employer's prohibition against leaving the premises, the employer's witness who testified he "believed" that prohibition was stated in the employer's drug and alcohol policy. Transcript at 6. However, the part of the employer's exhibit that contained excerpts from the employer's drug and alcohol policy did not contain such a prohibition, nor did claimant's last chance agreement. Exhibit 1 at 6-7, 10. On these facts, the employer did not establish that it communicated to claimant a prohibition against leaving the premises after a "sweep" had started.

Although the employer's witnesses conceded that claimant had her supervisor's permission to leave the premises when she did, the employer's witnesses contended that the supervisor's permission was ineffective to allow claimant to leave after a sweep had begun. Transcript at 5, 15, 16. However, the employer's witnesses did not know if employees generally, or claimant in particular, understood that their supervisors did not have the authority to excuse them from the workplace premises after a drug sweep had been commenced. Transcript at 15. The employer's witnesses presented no evidence from which it can reasonably be inferred that claimant was aware that the commencement of a sweep drug test superseded her supervisor's authority to allow her to leave the workplace premises.

With respect whether claimant sought her supervisor's permission to leave the workplace for the purpose of evading the sweep, the employer did not appear to contend that claimant was aware of the sweep before she asked her supervisor for permission to leave. Transcript at 15. The employer's witnesses took the position that, after claimant had her supervisor's permission to leave and when she encountered the statistician in the break room, what the statistician told her and the supplies the statistician had set up on a table in the break room should have alerted claimant to the upcoming sweep and that she was a participant in it. Transcript at 6, 16, 29. Given the brevity of that encounter, the exigent circumstances causing claimant to leave work and the fact that she had permission to leave the workplace, her failure to comprehend from the statistician's statement as an instruction that she submit to testing or refrain from leaving does not appear to have been intentional or done with an indifference to the employer's expectation that she participate in the sweep. Nor was not wantonly negligent of

claimant to not have made a further inquiry of the statistician as to the reasons underlying the statistician's one short statement to her and to have exited the workplace.

The employer also appeared to contend at hearing that claimant was dishonest in the reasons she gave to her supervisor when asking to leave work on September 2, 2015, and her true reason for leaving work was to evade the drug test. Transcript at 7, 16, 31. The employer appeared to concede, however, that claimant was not, and reasonably should not have been aware of the sweep drug test when she obtained permission from her supervisor to leave the workplace. Transcript at 15. While claimant's inability to provide some form of evidence to document that she received a call from her father that day might raise some questions in the mind of the employer, it is not sufficient to establish that claimant was intentionally dishonest in the reasons she supplied to her supervisor for leaving work early. She might merely have failed to understand she would be called up to produce them or was careless in maintaining her personal records. Regardless, the evidence is insufficient to establish that claimant's failure to produce corroborating records can only be explained by dishonestly.

Finally, the employer contended that claimant violated its expectations when she accepted a call from her father while on duty on the shop floor on September 2, 2015. Transcript at 11, 12. However, it was not disputed that claimant regularly kept her cell phone with her to accept calls from her ill father, with her supervisor's knowledge, and without having been warned against doing so. Transcript at 20. Under these circumstances, it was not unreasonable for claimant to sincerely believe, even if mistaken, that she was allowed to accept cell phone calls from or regarding her father's health while on the shop floor. Good faith errors are not misconduct. OAR 471-030-0038(3)(b). That claimant accepted a cell phone call from her father while on the shop floor on September 2, 2015 was not misconduct.

Although the employer discharged claimant, that discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-50126 is affirmed.

Susan Rossiter and J. S. Cromwell, participating

DATE of Service: February 11, 2016

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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