EO: 200
BYE: 201640

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

043
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0085

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114158). Claimant filed a timely request for hearing. On January 14, 2016, ALJ S. Hall conducted a hearing, and on January 15, 2016 issued Hearing Decision 16-UI-51189, reversing the Department's decision. On January 22, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Jackson County employed claimant as a road maintenance worker from June 8, 2001 until October 12, 2015.

(2) The employer expected claimant to refrain from spending excessive amounts of paid time not working. The employer also expected claimant to accurately report on his time cards only the time actually worked. Claimant understood the employer's expectations.

(3) On September 23, 2015, claimant reported at 3:00 a.m. for work in the employer's sign shop. Claimant worked until approximately 7:00 a.m. When claimant completed his work, he told his lead worker he was leaving to start his regular work for the employer. The lead worker told claimant to report on his timecard that he had worked five hours, rather than the four hours he had actually worked in the sign shop.

(4) On September 23, 2015, at 7:00 a.m., claimant reported for his regular shift of work. Claimant and another worker were assigned to paint lines in a road. They completed this work. Sometime before approximately 2:00 p.m., claimant and his partner drove to Shady Cove to work with a crew on a second job. As claimant was driving, he received a call on his cell phone but did not answer it. Claimant's partner wanted to use a restroom so claimant stopped at a county park to allow her to do so. While his partner was in the restroom, at 2:13 p.m., claimant returned the cell phone call he had received earlier. Claimant learned that his child had been arrested and remained on the phone for approximately ten

minutes. Claimant made a second call on his cell phone about his child's situation and spoke for approximately fifteen minutes. Claimant then called his wife, and briefly spoke with her to inform her of the child's arrest.

(5) On September 23, 2015, after claimant completed his phone calls in the county park, he and his partner prepared to leave the park. Two managers drove up to claimant and his partner before they could leave. One of the managers told claimant he had received a call informing them that claimant had been observed not performing any work while he was in the park. Claimant told the manager that he was on his cell phone for approximately twenty minutes in the park dealing with a family "emergency." Audio at ~35:40. When the manager told claimant his down-time was reported to have been longer than twenty minutes, claimant consulted his cell phone and saw he had been in the park for thirty-seven minutes. When claimant mentioned the "emergency," the manager asked him if he needed to leave and claimant said he did not. The manager then told claimant, "We're not done. We'll have to talk [about this]." Audio at ~28:13. Claimant and his partner left the park and reported to Shady Cove. The lead at Shady Cove told claimant that he and his partner were not needed for work, and they could leave for the day if they chose. Claimant decided to leave and went back to speak with the manager who had spoken to him earlier at the county park. That manager told claimant he did not want to have a discussion with him at that time about his activities in the park. Claimant left and returned to the employer's shop.

(6) After claimant returned to the shop, he encountered the second manager who had spoken to him at the county park. Claimant repeated that a personal emergency had required him to make phone calls from the park. Claimant asked the manager if he could have the next day off to take care of some personal business that the emergency necessitated, appearing in court with his child. The manager gave claimant permission to take the requested time off. Claimant ended his work on September 23, 2015 at 3:27 p.m. When claimant completed his time card for September 23, 2015, claimant reported five hours, as his lead instructed him, for the time he worked in the sign shop. Claimant reported eight hours for the time on his regular shift between 7:00 a.m. and 3:27 p.m., rather than the eight and one-half hours he was on-the-clock. Because claimant had devoted approximately thirty minutes to the personal phone calls in the park, and had not had a lunch break that day, claimant accounted for the time he spent on the phone as his unpaid lunch break. Afterward, the employer adjusted claimant's timecard by deducting one hour from his work in the sign shop since he worked four hours, deducting one-half hour for a lunch break that he had not taken and deducting forty-one minutes to represent the time claimant spent in the county park not performing work for the employer.

(7) On October 12, 2015, the employer discharged claimant for not working for an excessive period of time on September 23, 2015.

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 establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Absent exigent circumstances, the employer reasonably could expect claimant to work when he was on-the-clock and to ask for time off, or a leave, if he needed to use work time for non-work purposes or personal business. Here, the employer did not rebut claimant's explanation that on September 23, 2015, at the county park, he reasonably needed to communicate three times on his cell phone to deal with the emergent personal circumstance of his child's arrest. While the employer contended claimant might have called a supervisor or a lead worker for permission to take time off from work to address the non-work issues he and his child were facing, it was not reasonable to expect such dispassionate, detached actions from claimant in the midst of what we infer was family crisis. Audio at ~42:10. That immediately after learning of this emergent circumstance claimant made three phone calls to deal with it was not, under the circumstances, a wantonly negligent violation of the employer's reasonable standards. Notably, the employer did not contend that claimant's calls were for any purpose other than to try to manage the issue of his child's arrest, or that the calls were not a reasonable response to his child's predicament.

Nor was claimant indifferent to the fact that he was not working during the ostensible work time he spent on the phone addressing his child's issues. After determining that the time he spent at the park making phone calls relating to his child was somewhat less than thirty minutes and since he had not taken his thirty minute unpaid lunch on September 23, 2015, claimant accounted for that time as his lunch, and deducted it from the work time for which the employer paid him. Audio at ~29:18, ~32:41. While the employer contended that claimant spent forty-one minutes in time not working in the county park and, apparently, that he had taken a lunch break before arriving at the park, claimant testified that he spent approximately thirty minutes on his phone in the park, and up to that time he had not taken his lunch break. Audio at ~27:44, ~33:12. Since there was no reason to question the credibility of either party, the conflicting evidence on the issue of the time claimant spent on personal business in the park and whether he had or had not taken his lunch break was evenly balanced. The uncertainty on this issue must be resolved in claimant's favor because the employer carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). As such, claimant likely spent somewhat less than thirty minutes in the park on his cell phone addressing issues arising from his son's arrest and he accounted for that time on his time card as constituting his unpaid lunch. The manner in which claimant accounted on his time card for the time he spent on non-work issues on September 23, 2015 was not a willful or a wantonly negligent violation of the employer's standards.

With respect to the additional hour claimant reported on his time card for his work between 3:00 a.m. and 7:00 a.m., claimant testified his lead worker instructed him to report five hours of work for his work and not four hours. Audio at ~20:10, ~25:56. The employer's witness testified that he had spoken to claimant's lead worker, and the lead worker stated he could not remember if he gave this instruction to claimant. Audio at ~20:55. The employer did not persuasively rebut claimant's contention, and did not attempt to rebut claimant's further testimony that the employer's leads and managers occasionally told employees to report more hours than they had actually worked as a way to give employees bonuses that those supervisors did not have the budgetary authority to award employees. Audio at ~30:01. Given

this undisputed testimony about the employer's practices, the employer did not show claimant's lead did not authorize him to add an additional hour to his work time on September 23, 2015 as an informal reward. The employer did not meet its burden to show that claimant's behavior in adding that hour was not at his lead's instruction, or that it was a wantonly negligent violation of the employer's standards.

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

DECISION: Hearing Decision 16-UI-51189 is affirmed.

Susan Rossiter and J. S. Cromwell.

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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