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BYE: 201646

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
2016-EAB-0517

Reversed
Disqualification

PROCEDURAL HISTORY: On March 1, 2016, the Oregon Employment Department (the Department) served notice of an amended administrative decision concluding the employer discharged claimant for misconduct (decision # 84327). On March 8, 2016, claimant filed a timely request for hearing. On April 11, 2016, ALJ Shoemake conducted a hearing, and on April 19, 2016 issued Hearing Decision 16-UI-57548, concluding the employer discharged claimant, but not for misconduct. On May 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB reviewed the entire hearing record and considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Boise Cascade Company employed claimant as an apprentice maintenance electrician from January 3, 2012 to December 18, 2015. Claimant's work shift was 5:30 a.m. to 2:00 p.m. with a 30 minute unpaid lunch break she was required to take on site.

(2) The employer expected claimant to be honest regarding work-related activities and to refrain from arranging for a coworker to clock her in or out of the employer's time clock system while she was off premises. The employer's written time clock policy expressly prohibited employees from clocking in or out for coworkers and was posted in plain view near the employee time clock. Claimant was aware of the employer's written time clock policy in fact and of its expectation regarding honesty as a matter of common sense.

(3) Claimant scheduled a dental appointment for 1:30 p.m. on December 10, 2015. Prior to the appointment, she "worked it out" with her father (McDowell), who was a coworker, that she would leave work early for her appointment and he would clock her out at 2:00 p.m. Transcript at 7. The maintenance supervisor (Brown), who typically started his shift at 1:30 p.m., heard from an employee on December 9 that a rumor was circulating that claimant intended to leave work early December 10 and

that her father would swipe her time card for her to avoid her use of vacation time. On December 10, Brown arrived at work at 1:15 p.m., positioned himself in the parking lot, and observed claimant leave the employer's premises at 1:23 p.m. He entered the building, verified on the employer's time system that claimant had not clocked out, determined from the assistant maintenance supervisor (Mansfeld) and the production supervisor that claimant had not received authorization to leave work early and then waited in the break room where the time clock was located. When Brown left the room at 2:02 p.m., he and McDowell were the only employees there and claimant had not returned to clock out. Shortly thereafter, Brown determined that claimant was clocked out at 2:03 p.m.

(4) On December 11, 2015, the employer investigated. An employer human resources employee and Brown interviewed claimant, who stated she clocked herself out at 2:03 p.m. After being asked "one more time" if she had clocked herself out, she admitted she had not and that her father had done so at her request. Transcript at 6-7. Claimant explained she had acted as she did because she had exhausted her "e-time", which was unpaid time the employer allotted in a limited amount to each employee for use for absences such as medical appointments. Transcript at 8, 37. The employer put claimant on suspension while it completed its investigation during which her father admitted he had clocked claimant out after the supervisor left the break room because he and claimant had "made that arrangement" in advance. Transcript at 28.

(5) On December 18, 2015, the employer discharged claimant for violation of its time clock rules.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant 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 had the right to expect claimant to be honest and avoid violating the employer's time clock rules. Claimant understood the employer's expectations both in fact and as a matter of common sense. Claimant asserted at hearing that she had authorization from her supervising electrician (Burke) to leave work early to make up for an untaken lunch period. Transcript at 19-22. However, claimant's assertions were not credible. She did not offer Burke as a witness on her behalf and her supervisor in fact, Brown, testified that he interviewed Burke who explained that although claimant had discussed the issue with him, he "didn't approve anything." Transcript at 41-42. Brown testified that Burke was not a supervisor and had no authority to excuse claimant from work or take her lunch off premises, which would violate employer policy. Transcript at 34-36. Moreover, both claimant and McDowell asserted that claimant had asked McDowell to talk to a supervisor before clocking her out, which demonstrated that claimant knew that Burke was not a supervisor and she did not have permission to do what she did. Finally, that claimant initially lied to the human resources employee on December 11 about clocking out

shows she knew her conduct violated the employer's policy. Claimant was conscious of her conduct, demonstrated her indifference to the employer's interests and was at least wantonly negligent.

Claimant's conduct cannot be excused as an isolated instance of poor judgment or a good faith error under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). In Hearing Decision 16-UI-57548, after concluding that claimant was at least wantonly negligent in violating the employer's time clock rules, the ALJ concluded that because claimant "had no prior incidents", the employer discharged claimant for an isolated instance of poor judgment and not misconduct. Hearing Decision 16-UI-57548 at 3. However, claimant's conduct involved at least three separate instances of willful or wantonly negligent conduct, each of which required the formation of a different decision to act, or not to act. For instance, claimant first decided to leave work early without authorization from a supervisor, later decided not to clock out when she left and to have her father clock out for her, and, the next day, she made yet another decision to lie about her previous conduct. The decision to lie, which violated the employer's expectation regarding honesty in relation to work activities and occurred separate from her decisions to leave work without authorization and to request that her father clock out for her in violation of the employer's time clock rules. Her conduct therefore involved repeated acts or a pattern of willful and wantonly negligent conduct, and was not isolated. Nor did claimant act in good faith with respect to any of those instances. By initially lying about her actions, she did not show that she sincerely believed, or had a factual basis for believing, the employer would condone such conduct.

The employer discharged claimant for misconduct under ORS 657.176(2)(a). Claimant is disqualified from receiving unemployment insurance benefits based on her work separation until she has earned four times her weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 16-UI-57548 is set aside, as outlined above.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: <u>June 14, 2016</u>

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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