

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1111

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 100736). Claimant filed a timely request for hearing. On September 2, 2016, ALJ Wyatt conducted a hearing, and on September 8, 2016 issued Hearing Decision 16-UI-67117, reversing the Department's decision. On September 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but did not certify that it provided a copy of that argument to the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider the employer's written argument. EAB considered only information received into the hearing record when reaching this decision.

FINDINGS OF FACT: (1) Albertson's LLC employed claimant as a produce clerk from January 17, 2015 until May 25, 2016.

(2) The employer expected claimant to use its automated time keeping system to record the times at which he clocked in and out from work. If claimant forgot to use the automated system or it was not functioning properly, the employer allowed him to fill out a "white slip," on which he handwrote his clock in or clock out times and which the employer used to manually enter those times in the timekeeping system. Claimant understood the employer's expectations.

(3) Sometime after May 22, 2016, the employer observed that claimant was filling out "white slips" to manually record his clock in and clock out times much more frequently than other employees. Representatives from the employer's asset protection team investigated to determine whether claimant was intentionally using "white slips" in preference to the automated system for a dishonest purpose. From approximately March 2016 through late May 2016, the asset protection representatives reviewed all white slips that claimant had filled out and compared the in or out times claimant had written on the white slips for particular dates with the time stamps shown on the employer's video surveillance system

when claimant was observed to enter or leave the workplace on those same dates. From March through late May 2016, the asset protection representatives determined that the time claimant had written on twelve white sheets that he entered or left the workplace differed from the time stamps shown on the video surveillance systems. The employer concluded that claimant over-reported his time at work by a total of 226 minutes on the white sheets when compared to the time stamps shown on the video system.

(4) Examples of the discrepancies that the employer identified between claimant's white slips and the times shown on the video surveillance system occurred on March 17 and 22, 2016 and May 22, 2016. On March 17, 2016, claimant wrote on a white slip that he returned from lunch at 5:18 p.m., but the video system showed him entering the workplace at 5:25 p.m., for a discrepancy of 7 minutes. On March 29, 2016, claimant wrote on his white slip that returned from lunch at 4:38 p.m., but the video system showed him returning to the workplace at 4:48 p.m., for a discrepancy of 10 minutes. On May 22, 2016, the final discrepancy the employer identified, claimant wrote on a white slip that he left work for the day at 3:30 p.m., but the video showed him leaving the workplace at 3:18 for a discrepancy of 12 minutes. Because these discrepancies between the times shown on the white slips and the video surveillance systems indicated claimant had worked less time than indicated on the white slip, the employer concluded claimant was using the white slips to intentionally over-report the hours he worked to receive pay for time he did not work.

(5) From approximately March 2016 through late May 2016, there were a few occasions when the automated time system was not functioning and claimant was required to use white slips to record his times in and out of the workplace. On several occasion during this period, claimant needed to drop off or pick up product or supplies at other store locations. The automated time system would not allow him to enter times earlier or later than when he was using the system. After claimant became aware that the employer would pay him for the time he spent delivering or picking up supplies, he sometimes wrote on a white slip that he ended worked later than when he had actually left the workplace, or he wrote on a white slip that started work earlier than his arrival at the workplace to account for the time he spent in picking up or dropping off product or supplies at other store locations. During the period of March 2016 through late May 2016, the automated time system sometimes did not accept claimant's time card or allow him to use the system to enter his time, and the human resources department advised claimant to use white slips instead. Sometimes during this period, claimant also forgot to clock in or clock out using the automated system and he was required to fill out white slips to record his time. Occasionally, claimant was required to fill out a white slip the day after he missed clocking in or out.

(6) On May 25, 2016, a representative from the asset protection team met with claimant to discuss the results of the investigation into his use of white slips. The representative thought claimant was intentionally stealing time from the employer. Claimant denied doing so. The representative told claimant she would be contacting him later about the status of his employment. After May 25, 2016, no employer representative ever contacted claimant. On May 25, 2016, the employer discharged claimant for theft of time.

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 connected with work. 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 show 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 at hearing that the employer discharged claimant because it thought claimant was overusing white slips to claim that he worked more hours than he had worked, for the purpose of receiving pay he was not entitled to receive. The employer's witness referred to the days she identified claimant to have done so as "time theft days." Transcript at 5, 6. Although the employer clearly established that there were discrepancies between the times claimant reported on his white slips and the employer's video surveillance, however, the employer did not show that claimant actually over-reported the total amount of time he actually worked on the alleged "time theft days." Claimant used, or perhaps overused, the employer's white slips, but did so for permissible purposes, such as to record his time when the automated time system malfunctioned, when he forgot to use the system, or when he worked before or after his shift and was unable to record his time using the automated system. The employer acknowledged that the produce manager sent claimant on errands to other stores, for which he was entitled to pay; claimant did those errands on the way to or from work and had to use white slip entries to report the amount of time he had worked. The employer did not establish that the time claimant "added" to his white slips for those errands exceeded the amounts of time claimant actually spent running the errands. Transcript at 18, 24-25. The employer also acknowledged that its automated time system sometimes malfunctioned, which necessitated claimant using white slips to report his time, sometimes the day after he had worked. Transcript at 20, 30. Absent a showing that he intentionally or consciously reported more hours than he worked, the fact that claimant used white slips more frequently than other employees does not, by itself, suggest that claimant engaged in misconduct.

At best, the record shows that claimant might occasionally have inaccurately reported his time when he used white slips. There is little in this record to suggest that claimant claimed time he had not actually worked, and, to any extent he did, there is little to suggest that his inaccurate reports were more than unintentional errors on his part. Absent evidence that claimant's errors on the white slips were conscious errors or done with indifference to the consequences of his conduct, the employer did not meet its burden to show claimant's behavior in making those errors amounted to willful or wantonly negligent misconduct. Because the employer did not prove that it discharged claimant for misconduct, claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-67117 is affirmed.

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

DATE of Service: October 25, 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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