

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0164

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 144036). The employer filed a timely request for hearing. On January 31, 2017, ALJ Lohr conducted a hearing, and on February 7, 2017 issued Hearing Decision 17-UI-76427, affirming the Department's decision. On February 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lane Community College employed claimant from July 1, 2015 until September 30, 2016 as a "titan pair associate," a financial aid office student work study position.

(2) On July 1, 2016, the employer hired claimant's girlfriend, also as a titan associate in its financial aid office. Before the girlfriend's hire date, claimant began training her. When the financial aid advisor who supervised claimant became aware that claimant had been training his girlfriend before she was formally hired, the advisor realized that the girlfriend needed to be paid for the time she spent in training. The advisor told claimant and the girlfriend that, in order to pay the girlfriend, she should divide up her training hours and report them on timecards as having been worked on days after her hire date even though they had been worked earlier. The girlfriend did so.

(3) Sometime before summer 2016, claimant began assisting the financial aid advisor in comparing the hours reported on coworkers' timecards with the hours shown for the coworkers on the "grid." Transcript at 45-46. If there were discrepancies, claimant would correct the coworkers' timecards to report the time shown on the grid as having been worked. Although the employer generally prohibited employees from making entries on each others' time cards, the employer did not instruct claimant that he should not change the coworkers' timecards when the hours shown on the timecards differed from those shown on the grid.

(4) On approximately September 26, 2016, the financial aid advisor mentioned to claimant and his girlfriend that the employer had failed to credit the girlfriend for twelve hours she had worked during

summer term, and had not paid her for those hours. The advisor stated that because summer term was over and fall term had started that day, the summer term timecards could not be altered to reflect those hours. The advisor recommended that, as appropriate, the girlfriend add the uncredited hours to certain days listed on fall term timecards when she did not otherwise work until the added hours totaled the twelve for which she had not been credited during summer term.

(5) On September 28, 2016, claimant's girlfriend did not report for work due to the death of a family member. Claimant spoke with the girlfriend that day, told her not to report her absence because the financial aid advisor was out, and stated he would add five of the uncredited and unpaid hours from summer term to her timecard for that day. Claimant then entered on the girlfriend's timecard that she had worked five hours on September 28, 2016 when she had not. Claimant failed to inform the financial aid advisor that he had added hours to the girlfriend's time card for September 28, 2016 to make up for some of the uncredited time owed to her from summer term. On approximately September 28, 2016, the girlfriend signed the time card that included September 28, 2016 and submitted it to the employer.

(6) On September 30, 2016, the employer discharged claimant for reporting hours on his girlfriend's time card that she had not worked on September 28, 2016 and thereby falsifying her time card.

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. 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).

While the employer's witness described certain alleged acts of insubordination by claimant, claimant's allegedly improper use of a key card, and claimant's pursuit of personal business during work time, she testified that claimant was discharged because of his actions in connection with entering hours on his girlfriend's time card for September 28, 2015. Transcript at 9-14, 16. Because claimant's actions on the time card were the proximate cause of his discharge, it is the initial focus of our misconduct analysis.

While claimant and his girlfriend testified that the financial aid advisor had told them to report the hours which the girlfriend had erroneously not been credited during summer term on her time cards as hours worked during fall term, the financial aid advisor denied she gave them this advice and contended that the entry claimant made on the girlfriend's time card was fraudulent. Transcript at 6, 20, 23, 32, 36, 49-52, 60. However, the advisor did not deny that the girlfriend had worked hours during summer term for which she was not credited and that the employer needed to take some action in fall term to ensure she received compensation for those hours. If so, it is not clear that the entry claimant made on the girlfriend's time card was intended to deceive the employer or to obtain funds from the employer to which the girlfriend was not entitled. In addition, claimant and his girlfriend presented testimony that tended to corroborate the likelihood the advisor told them to take account of the uncredited summer term hours by adjusting one of the girlfriend's fall term time cards when they described how the advisor had

previously approved such an adjustment to a later time card when the girlfriend accrued training hours before she was hired; the employer's witness did not dispute their testimony. *Compare* Transcript at 35, 49, 58-59; Transcript at 62-63. Given the conflict between claimant and his girlfriend's testimony and that of the employer's witness and because there is no reason in the record to prefer the testimony of either party's witnesses or to doubt the credibility of any of those witnesses, the evidence as to whether the financial aid advisor told claimant and his girlfriend to adjust her fall term time cards to account for the uncredited hours during summer term is evenly balanced. Where the evidence on a disputed issue in a discharge case is of equal weight, the conflict in the evidence must be resolved against the employer since it is the party who carries the burden of proof in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the evidence is sufficient to show that the financial advisor advised that one or more of the fall term time cards for claimant's girlfriend be adjusted to report the summer term hours the girlfriend was not credited; as such, the employer did not show that the entry of such hours on the girlfriend's time card for September 28, 2016 was a willful or wantonly negligent violation of the employer's expectations.

The employer also appeared to contend that even if adding the summer term hours to the girlfriend's time card for September 28, 2016 did not violate the employer's expectations, it was a violation for *claimant* to have entered any hours on a time card that was not his own, including that of his girlfriend. Transcript at 45. However, claimant explained that based on his previous adjustments of the hours reported on coworkers' time cards to conform with the hours shown on the grid, he thought he was allowed to adjust his girlfriend's time card to implement what he believed were the financial aid advisor's instructions about reporting the uncredited summer term hours for his girlfriend. Transcript at 46. While the employer's witness stated that claimant was not allowed to adjust any time cards for other coworkers, she did not dispute that claimant had previously done so when comparing hours reported on time cards to hours shown on the grid, and did not contend that claimant was ever told he was not authorized to adjust the time cards of his coworkers in this manner. As well, the employer did not present evidence showing how claimant was informed of the employer's supposed across-the-board prohibition against making entries on, or altering, other coworkers' time cards. *See* Transcript at 44-45, 60. On this record, the employer did not show that claimant knew or reasonably was aware that he was prohibited from entering time on another's employee's time card for any reason. As such, the employer did not demonstrate that claimant's behavior in entering time on his girlfriend's time card for September 28, 2016 was a willful or a wantonly negligent violation of the employer's standards.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-76427 is affirmed.

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

DATE of Service: March 14, 2017

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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