

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0471

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 9, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151503). Claimant filed a timely request for hearing. On April 6, 2017, ALJ Monroe conducted a hearing, and on April 13, 2017, issued Hearing Decision 17-UI-80973, affirming the Department's decision. On April 25, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments to the extent they were based on the record.

FINDINGS OF FACT: (1) Goody's Chocolates and Ice Cream employed claimant as a store manager from July 18, 2016 to January 5, 2017. Claimant was a salaried employee.

(2) The employer expected claimant to be honest regarding work-related matters. In that regard, the employer's written policies stated that "failing to record working time accurately" and "falsifying [the employer's] records and documents" were both prohibited conduct and terminable offenses. Exhibit 3. The employer expected its managers to perform certain duties, and if they were not completed at work, to complete them outside the work premises. When recording work time, claimant was required to complete both a labor sheet and time card, both of which, generally, were expected to accurately reflect her work time "on the floor." Transcript at 38. Claimant was aware of the employer's expectations.

(3) For the work day September 4, 2016, claimant completed her labor sheet the night before reflecting a work time of 9:00 to 5:00 because that is when she intended to work on September 4. However, she became ill before coming in and did not report to work until 9:26 a.m. When a co-owner saw the discrepancy between her labor sheet and the employer's automated clock in system, he prepared to terminate claimant for dishonesty. However, when he discussed the matter with claimant, he learned that she had accurately recorded her work time of 9:30 to 5:30 on her time card and rather than terminate her, warned her that she was expected to accurately record her work time on both her labor sheet and time card.

(4) On December 23, 2016, claimant was scheduled to report for work at 9:30 a.m. At approximately 7:30 a.m., while at home, she received a text message from a worker informing her she would not be in to work that day, following which claimant spent approximately 15 minutes attempting to cover the worker's shift. At approximately 9:00 a.m., while still at home, she worked on creating an employee work schedule. At approximately 9:16 a.m., claimant commuted to work arriving and clocking in at 9:26 a.m. When completing her time card for December 23, she reported that she began work at 9:00 a.m. because she wanted to be "honest" about recording all of her work time. Transcript at 47.

(5) On January 3, 2017, the other co-owner discovered that on December 23, 2016, claimant had reported on her time card that she began work at 9:00 a.m. when the employer's records showed that she had clocked in at 9:26 a.m. On January 5, 2017, the employer discharged claimant for falsifying her time card on December 23, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant for an isolated instance of poor judgment and not 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. An isolated instance of poor judgment is not misconduct. OAR 471-030-0038(3)(b).

As a preliminary matter, claimant's first-hand testimony differed from that of the employer's witness, which was based in part on hearsay. However, the ALJ did not explicitly find that claimant was not credible,¹ and in the absence of evidence demonstrating that claimant was not credible, her first-hand testimony was at least as credible as the employer's hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant's evidence.

In Hearing Decision 17-UI-80973, after finding that the employer expected its managers to record only the time that they worked "on the floor" when completing their time cards, and that on December 23, 2016, claimant reported on her time card that she started work at 9:00 a.m. which reflected some off the floor work she performed at home that day, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

...claimant denied falsifying her time card and testified that she correctly recorded the amount of time she worked on December 23... Although claimant asserted that the time card included the

¹ See ORS 657.275 (2) (EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to an ALJ's implied credibility findings).

time spent creating the work schedule prior to reporting to work, she also testified that she only reported work-from-home tasks on her time card when she received prior approval from the owner, and she acknowledged that she did not receive such approval on December 23. Claimant made a conscious decision to record an inaccurate start time on her time card and she knew, or should have known, that her conduct would violate the employer's policy and expectation... demonstrate[ing] an indifference to the consequences of her actions [and was] at the very least wantonly negligent.

Hearing Decision 17-UI-80973 at 1, 2 and 3. The ALJ went on to conclude that claimant's conduct constituted an act of dishonesty that exceeded mere poor judgment and could not be excused as an isolated instance of poor judgment. Hearing Decision 17-UI-80973 at 4. While we agree that claimant's December 23 conduct was probably wantonly negligent because she demonstrated some indifference by recording off the floor work time without checking with the owner first, we disagree that it is not excusable as an isolated instance of poor judgment.

OAR 471-030-0038(1)(d)(A) provides, in pertinent part, that an isolated instance of poor judgment is a single or infrequent occurrence of poor judgment rather than a repeated act or pattern of other willful or wantonly negligent conduct. Viewing the record as a whole, the employer failed to establish with first-hand evidence that claimant's failure accurately report her September 4 work time on her labor sheet was either willful or the result of conscious indifference to the employer's time recording expectations particularly when it was undisputed that claimant accurately recorded her work time that day on her time sheet. Transcript at 23-24. Accordingly, claimant's December 23 failure to record only "on the floor" work time on her time record was no more than an isolated instance of wantonly negligent conduct.

OAR 471-030-0038(1)(d)(D) also provides that some conduct, even if isolated, that are unlawful, tantamount to an unlawful conduct, cause a breach of trust or otherwise make a continued employment relationship impossible, exceed mere poor judgment and cannot be excused. Here, the record fails to show that claimant's inclusion of off the floor work time on her December 23 time record was unlawful or tantamount to unlawful conduct such as theft of time because the employer did not establish that claimant's actions resulted in any misappropriation of its property, nor that, as a salaried worker, her inclusion of off the floor work time was done with the intent to obtain wages she had not earned. Nor can we conclude that claimant's failure to record only her "on the floor" work time that day, made a continued employment relationship impossible, given the fact that the employer's written policy provided that "failing to record working time accurately", without differentiating between on the floor and off the floor work time, was a terminable offense and there was no dispute that claimant did report working time that day, albeit off the floor work time involving covering a shift and creating a schedule. Viewed objectively, claimant's conduct was not so egregious that it made a continued relationship impossible.

The employer discharged claimant for an isolated instance of poor judgment, which is not misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-80973 is set aside, as outlined above.²

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

DATE of Service: May 24, 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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.