

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0628

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141842). Claimant filed a timely request for hearing. On April 28, 2017, ALJ Lohr conducted a hearing, and on May 1, 2017 issued Hearing Decision 17-UI-82232, concluding claimant's discharge was not for misconduct. On May 22, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision. Even if we had, however, this decision would remain the same for the reasons explained.

FINDINGS OF FACT: (1) Best Buy Stores LP employed claimant from February 26, 2015 to December 23, 2016.

(2) The employer expected employees to accurately report their hours of work using the employer's time sheet system. The employer expected claimant to use time clocks to clock in and out at the beginning and end of each shift and unpaid lunch period, and allowed employees who failed to clock in or out of work for whatever reason to use manual punches to report their time. A supervisor had to review and approve each manual punch. Claimant understood the employer's expectations and procedures.

(3) The employer frequently scheduled claimant to work a morning shift before the store opened. The manager was supposed to arrive at the same time and unlock the door so employees could report to work. If the manager was not there when the employee arrived, the employer expected the employee to press a buzzer that alerted people inside to come open the door. Claimant often reported to work and had to wait ten minutes before someone would open the door for her. Claimant's manager at the time of her hire instructed claimant "when we pull into the driveway that's the time we clock in" because "it is our time that is being wasted waiting for the manager to come open the doors for us to do our job."

Transcript at 18-19. Thereafter, claimant noted the time she arrived at the driveway and used the manual punch option to record her start time on those occasions.

(4) Claimant did not have scheduled rest break times, but was instead expected to take breaks whenever she found the time. Sometimes claimant could not find the time to take her breaks and added her break period to her lunch period. Claimant clocked out for a 30-minute unpaid lunch period, but would take a 45-minute break to “add” her missed break “on to our lunch.” Transcript at 21. Claimant also did not have scheduled lunch breaks, and often forgot to clock out or did not clock out because someone was using the computer she intended to use to clock out. Claimant used manual punches to record her break periods on those occasions, as well.

(5) Claimant thought she was allowed to add breaks to her lunches to make up for missed breaks. Claimant also relied upon a coworker, whom she thought watched the time during lunch breaks, to determine when she was supposed to return to work. Claimant thought each of her manual punches accurately reflected the time she began working and took lunch breaks, and always had a supervisor approve each of claimant’s manual punches.

(6) In approximately December 2016, the employer noticed that claimant had an abnormally high number of manual punches and decided to investigate. The employer reviewed several weeks of surveillance video footage and compared claimant’s actual arrivals at work to her manual punches. The employer determined that claimant worked fewer hours than she had manually recorded on her time sheets. The employer concluded that claimant used manual punches to prevent the employer from finding out about instances of tardiness. The employer also determined that claimant was away from work for extended periods of time during her lunch breaks without clocking out from work, resulting in claimant being paid during extended lunch breaks that were supposed to be unpaid. The employer determined that in approximately November and December 2016, claimant had claimed and was paid for 7.19 hours of work more than she had actually worked.¹

(7) Based on its investigation, the employer concluded that claimant had intentionally falsified her time sheets. On December 22, 2016, the employer notified she was discharged, effective December 23, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ that 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

¹ The information printed on the timesheets the employer submitted into evidence in Exhibit 1 were, for the most part, illegible, leaving us unable to compare claimant’s actual arrivals and departures to her reported arrivals and departures. We used the summary materials on claimant’s written statement in Exhibit 1 as the basis of the findings of fact. We determined the number of extra hours claimant claimed based on the employer’s estimation that it paid claimant approximately \$80.00 more than she had earned; which, at a pay rate of \$11.12 per hour, would equal 7.19 hours. See Transcript at 35, 37.

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 accurately record and report her hours of work, regardless whether she used the employer's time clock system or manual punches. Claimant knew, or should have known, that expectation, and there is little dispute that claimant repeatedly violated it by inaccurately reporting the times she began work and took breaks in November and December, and, given the evidence, likely throughout her employment. In order for claimant's violations of the employer's expectations to be considered misconduct, or disqualify her from receiving unemployment insurance benefits, the employer must prove that it is more likely than not that claimant's violations were done willfully or with wanton negligence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer did not meet its burden in this case.

Claimant manually reported that she arrived at work when she arrived at the driveway because her previous manager instructed her to do so in order to compensate her for the time she spent waiting to get into the employer's locked building at the start of her shift. Although the employer disputed the regularity with which such waiting time occurred, the employer's witness acknowledged that there was a basis for claimant's understanding, testifying, "I have heard the instruction given that they are able to claim that time as paid time since they were on time to work and just haven't been able to make it into the building yet." Transcript at 30. Claimant testified that she was never told not to add her missed breaks to her lunch periods using manual punches, never told she was using manual punches or reporting her hours of work incorrectly, and was not aware she was doing anything wrong. Notably, all of claimant's disputed, inaccurate manual punches were approved by a supervisor.

Absent evidence that claimant knowingly falsified her manual punches, or that she was conscious that she was reporting her time inaccurately or in a manner that contravened her understanding of the employer's expectations with regard to her time sheets, the record fails to show that claimant's violations of the employer's expectation as willful or wantonly negligent. In the absence of such a showing, claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-82232 is affirmed.

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

DATE of Service: June 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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