EO: 200
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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

805
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1122

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 25, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct, but her wage credits were not subject to cancelation (decision # 180856). Claimant filed a timely request for hearing. On September 5, 2017, ALJ Shoemake conducted a hearing, and on September 12, 2017 issued Hearing Decision 17-UI-92368, concluding claimant's discharge was not for misconduct. On September 18, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument included new information that was not part of the hearing record, and, although the information was arguably relevant, she did not establish that factors or circumstances beyond her reasonable control prevented her from presenting the information in the hearing. Under OAR 471-041-0090 (October 29, 2006), claimant's new information is not admissible and it was, therefore, not considered by EAB when reaching this decision. EAB considered claimant's argument only to the extent it was based upon the hearing record.

FINDINGS OF FACT: (1) Viscosity, Inc. employed claimant as a water treatment technician from January 1, 2016 to May 22, 2017. Claimant and her husband had previously owned the business, which they sold to the employer, and she continued to work for the employer after the sale was completed.

(2) The employer required employees to accurately complete their time cards, and orally instructed employees on how to complete them. Claimant understood she was to accurately complete her time cards.

(3) Claimant usually worked until 6:30 p.m. On May 8, 2017, the employer asked claimant to leave work at 4:30 p.m. because he thought there was not enough work for her. Claimant worked until 6:30 p.m. because the employer had agreed to those hours at the start of her employment and because there was always work that needed to be done.

(4) On May 9, 2017, the employer again asked claimant to leave work at 4:30 p.m. Claimant was still on the road working at 4:30 p.m. and could not leave. She stayed on the road until 5:15 p.m. At 5:33 p.m., she sent a text to the employer that she had arrived back at the store and needed to clean out the van and do some paperwork. Claimant took her paid rest break period after arriving back at the store and, during her break, used the employer's computer to look at information about her Mexico vacation. She resumed working after her break, worked until 6:30 p.m., and clocked out at that time.

(5) The employer was concerned because claimant reported on her time card that she had worked until 6:30 p.m. both days despite having been asked to leave early. On May 11, 2017, the employer looked at claimant's browser history, saw that she had been using the computer for personal reasons after 4:30 p.m. on May 9, 2017, and concluded that claimant had engaged in theft of time and time card fraud by using the computer during a time she had claimed she was working.

(6) Between May 10, 2017 and May 22, 2017, claimant was on a pre-approved vacation leave period. On May 22, 2017, the employer discharged claimant for time card fraud.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected claimant not to engage in time card fraud. Claimant understood the expectation. The employer alleged claimant engaged in time card fraud on May 8, 2017 by reporting on that she had worked until 6:30 p.m. despite having been told to finish work at 4:30 p.m. that day. Claimant testified, however, that although the employer wanted her to leave at 4:30 p.m. due to lack of work, she had work to do and did in fact perform work until 6:30 p.m., and therefore only claimed to have worked hours that she actually spent working. The evidence of whether or not claimant committed time card fraud on May 8, 2017 is, therefore, no better than equally balanced, and the employer has not proved that claimant engaged in misconduct on that date.

Likewise on May 9, 2017, the employer alleged that claimant engaged in time card fraud again by reporting that she had worked until 6:30 p.m. despite having been instructed to leave at 4:30 p.m., and by claiming that she worked during a period of time her browser history showed she was using the computer for personal reasons. Claimant testified that she was on the road until 5:15 p.m. and therefore unable to stop working at 4:30 p.m. as instructed. She testified that she sent a text message to the employer stating that she needed to perform specific tasks after returning to the store, and clocked out at 6:30 p.m. after she completed those tasks. The evidence about claimant's activities is again equally balanced, and the record therefore does not show that claimant committed time card fraud by clocking out at 6:30 p.m. on May 9th. With respect to claimant's personal use of the internet at work, claimant testified that she used the computer only during her paid break period, and the employer did not dispute her testimony that she was entitled to a paid break, used her paid break period to look at the internet, and resumed working when her paid break ended. The record therefore fails to show that claimant engaged in time card fraud by using the computer while on a paid break.

For the reasons explained, claimant's discharge was not for misconduct. Claimant therefore is not disqualified from receiving unemployment insurance benefits because of her discharge from work.

DECISION: Hearing Decision 17-UI-92368 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: October 17, 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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