

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0802

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 15, 2018 the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73145). Claimant filed a timely request for hearing. On July 18, 2018 and August 2, 2018, ALJ Murdock conducted a hearing, and on August 3, 2018 issued Order No. 18-UI-114402, affirming the Department's decision. On August 16, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Providence Health & Services employed claimant as a phlebotomist from July 11, 2007 until May 15, 2018.

(2) The employer expected claimant to keep accurate records of the time that she worked. The employer allowed claimant to take two fifteen minute paid rest breaks and one unpaid thirty minute meal break for each eight hour work day. Claimant understood that she needed to keep accurate time records and understood the length of break periods that the employer allowed her to take.

(3) The employer's electronic timekeeping system required employees to clock in at the beginning of the day and to clock out at the end of the day. The electronic system rounded time in quarter hour increments such that if an employee clocked in or out seven minutes or less past a quarter hour the employee's time record would be rounded down to the nearest quarter hour and similarly if an employee clocked in or out more than seven minutes but no more that fifteen minutes past a quarter hour the employee's time record would be rounded up to the nearest quarter hour. Claimant was aware of that the timekeeping system's method of keeping rounded time.

(4) The timekeeping system did not require an employee to clock out for lunch. When the employee clocked out at the end of the workday, the employee was asked to certify in the timekeeping system that the employee had taken only the required rest breaks, that the employee had taken only the required thirty-minute lunch break and that the employee's time record as shown in the system was accurate. If the employee made the requested certifications, the time system automatically deducted thirty minutes

from the employee's paid time for an unpaid lunch break. If an employee took longer than a thirty-minute lunch break, the employee was expected not to certify the accuracy of the timecard and to manually enter the time the employee had clocked out and in for lunch as well as the total time taken for lunch. The employer also expected that, if possible, an employee would obtain advance approval from a supervisor before take a lunch longer than thirty minutes and, if not possible, the employee would inform a supervisor after-the-fact that a lunch break in excess of thirty minutes had been taken. Claimant understood the employer's expectations.

(5) On April 25, 2018, sometime before claimant went to lunch, a very elderly patient in a wheelchair checked in at the lab around approximately 12:25 p.m. to have blood drawn. The lab was on the second floor of the facility. At around this same time, claimant's phone alerted her to an incoming call from her son's school. Claimant decided to wait to call the school until after she had started her lunch break. Sometime later, claimant performed the blood draw on the elderly patient in the lab, picked up her purse and keys and escorted the patient in his wheelchair down the elevator and waited with him on the ground floor until he was picked up. Sometime at about approximately 12:35 p.m., claimant's supervisor arrived at the lab to deliver appreciation gifts to claimant and a coworker. The supervisor did not observe claimant or the coworker in the lab and concluded that both had probably already left for lunch. The supervisor decided to stay and wait for claimant and the coworker to return from lunch. Sometime later, the elderly patient was picked up from the ground floor and claimant left the facility from the ground floor to pick up some lunch without seeing the supervisor.

(6) After leaving the facility, claimant proceeded to her car to go to a drive-through for lunch. While claimant was traveling to the drive-through she called her son's school and learned that her son had lost control of himself, physically acted out and it had required three adults to subdue him. Claimant's son had Tourette's Syndrome, was disabled and his behavior was unpredictable. The call upset claimant. Claimant continued to speak with the school while she was in the drive-through, for a total of what she believed was twenty minutes. After picking up food, claimant drove back to the facility, but she was delayed by some road construction on the way. When claimant arrived back at the facility, she stopped in at the management office to talk about her son's situation with a supervisor. Claimant then returned to the lab. Claimant did not see her supervisor when she arrived back at the lab. Claimant did not know exactly how long she was gone from lab or the facility after the elderly patient was picked up, but estimated that it could have been no longer than a very few minutes more than thirty minutes. When claimant had not returned to the lab from lunch by 1:25 p.m., claimant's supervisor left the gifts for claimant and her coworker at the lab and left the facility. Sometime after claimant returned, claimant sent a text to the supervisor thanking him for the gifts.

(7) At the end of the work day on April 25, 2018, when claimant clocked out, claimant entered certifications in the employer's timekeeping system that she had not taken a lunch break of longer than thirty minutes and that her time as shown by the system's default was accurate. Claimant did not know exactly how long her lunch break had been, but since she believed, she had a seven-minute period during which her return time would be rounded down and did not think she had taken a lunch break longer than 37 minutes, she did not manually enter her time for the day. Sometime later, claimant's supervisor reviewed her time card and observed that she had certified her timecard for April 25 as accurate, that she had not indicated in the time system that she had taken longer than thirty minutes for lunch on April 25, and that she had been paid for any time in excess of thirty minutes that she had taken for lunch.

(8) On May 8, 2018, claimant's supervisor met with her without prior notice to discuss her timecard for April 25. The supervisor told claimant that he had waited for her to return from lunch for approximately 50 minutes on April 25 and asked her why she had taken such a long lunch that day. Claimant did not recall that day or what she had done for lunch, but told the supervisor she had probably met someone off campus for lunch. The supervisor then asked claimant why she had not indicated in the time system that she had taken longer than thirty minutes for lunch on April 25, but certified that she had taken a lunch of thirty minutes. Claimant responded that she "didn't feel like it would be a big deal," because she did not recall that day, rarely took extended lunches and thought that if she had taken longer than thirty minutes for lunch, it would only have been a very few minutes longer and the way the time system rounded time, her lunch would have been accounted for as being thirty minutes long. Transcript of July 18, 2018 hearing at 22, 45-46.

(9) Later on May 8, claimant sent a text to the supervisor telling him that she now recalled drawing blood from a patient immediately before leaving for lunch on April 25 and that she had been delayed on her return from lunch by construction work and construction flaggers.

(10) On May 15, 2018, the employer discharged claimant for falsifying the time she reported for April 25, 2018 by certifying the default in the timekeeping system as accurate and not indicating that she had taken longer than thirty minutes for lunch that day.

(11) During her employment, the employer did not believe that claimant had certified or falsified any timecards other than the April 25 timecard.

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) (January 11, 2018) 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 prove claimant's misconduct by preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Order No. 18-UI-114402, the ALJ concluded that the employer demonstrated claimant had engaged in misconduct by failing to adjust her timecard for April 25, 2018 to reflect that she had taken longer than a thirty-minute lunch break that day and certifying that the timecard was correct. Order No. 18-UI-114402 at 3. The ALJ implicitly reasoned that claimant was consciously aware that she had taken much longer for lunch than thirty minutes that day, and since "[s]he knew or should have known to accurately record her time worked and her lunch break," her failure to adjust her timecard was a wantonly negligent violation of the employer's reasonable standards of behavior. Order No. 18-UI-114402 at 2. We disagree.

Claimant gave different accounts of the events that occurred during her lunch of April 25, during her meeting with her supervisor on May 8 and at the hearing, with the later account being more detailed. *See* Transcript of July 18, 2018 hearing at 22 *and compare* Transcript of July 18, 2018 hearing at 34-40, Transcript of August 2, 2018 hearing at 27-46. However, claimant's explanation was plausible that she had done so because she was unable to recall a lunch that occurred two weeks before when her supervisor questioned her about it on May 8, and she later was able to piece together some of those events by consulting records in the lab and her cell phone. Transcript of August 2, 2018 hearing at 29-30, 42. It does not appear under the circumstances that the differences in account are a reason to doubt the credibility of claimant's testimony at hearing.

It is accepted for purposes of this decision that claimant may have taken a longer than thirty minute lunch break on April 25, 2018. However, claimant consistently maintained throughout the hearing that, on April 25, 2018, she did not think upon returning to work that she had been gone any longer than only a very few minutes more than thirty minutes. Transcript of July 18, 2018 hearing at 34, 37, 45, 46; Transcript of August 2, 2018 hearing at 28, 32. That claimant might not have been punctiliously focused on the time she actually spent on her lunch break is understandable and plausible given that she left late for lunch due to the elderly patient, was then distracted by her son's school situation and simultaneously speaking with her son's school for around twenty minutes while driving to and proceeding through the drive-through and finally was sidetracked by road construction on her return to the facility. In addition, even though a seven-minute grace period might not have applied to enable claimant to permissibly take a thirty-seven minute lunch, claimant appeared to believe that it did, and as a result it is credible that she would not keep close track of time since she believed she had a seven-minute built-in cushion. Under these circumstances, claimant likely did not know to the minute how long she had taken for her lunch break on April 25, 2018, but certified the automatic entries on timecard because she did not think that she had taken a longer lunch that was allowed given the seven-minute grace period. Transcript of July 18, 2018 hearing at 43, 45.

On this record, the employer did not show that claimant deliberately or with willful intent falsified her timecard of April 25, 2018. This conclusion is reinforced by the fact that claimant had received no prior disciplinary sanctions in eleven years of employment for taking extended breaks or falsifying timecards, and it seems unlikely that she would abruptly start doing so. The employer also did not show that claimant acted with wanton negligence when she certified her time card on April 25, 2018. On this record, it appears, at worst, that claimant did not pay close attention to the length of her lunch break given the distractions to which she was subjected, and the number of minutes she was on break in excess of thirty was not so great that the mere passage of time, alone, should have alerted her that the break was too long. Violations of an employer's standards that result from an inadvertent failure to pay attention, a lapse, an oversight, a mistake or the like generally are not accompanied by the consciously aware mental state required to show that a claimant's behavior was wantonly negligent. *See* OAR 471-030-0038(3)(a). On the facts in this record, the employer did not show that claimant's behavior in certifying her time card for April 25, 2018 was a willful or wantonly negligent act, or that it constituted misconduct.

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

DECISION: Order No. 18-UI-114402 is set aside, as outlined above.

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

DATE of Service: September 21, 2018

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete

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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