

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0174

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 93717). The employer filed a timely request for hearing. On January 22, 2014, ALJ Wiperman conducted a hearing, and on January 24, 2014 issued Hearing Decision 14-UI-09196, affirming the Department's decision. On January 27, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) The Personnel Department employed claimant as the director of operations in its Portland office until October 29, 2013. Claimant was responsible for ensuring the profitability of the Portland office, generating sales, maintaining client relationships and supervising staff.

(2) The employer expected claimant to report all absences from the workplace to her supervisor, the employer's president. Notwithstanding this expectation, claimant thought it was sufficient to report her absences to the Portland office or to the office manager at that office.

(3) By 2013, the employer had determined that the Portland office was not sufficiently profitable. On March 27, 2013, claimant entered into an agreement with the employer's chief executive officer in which claimant agreed to generate certain specified staffing levels at four of the employer's clients and to accomplish other financial goals. Despite her best efforts, claimant did not achieve those goals.

(4) In August 2013, the employer expected claimant to attend a leadership meeting in Vancouver. At the time she was expected to travel to Vancouver, claimant was away from Portland on business and intended to fly into Vancouver from the away location. However, claimant's flight to Vancouver was significantly delayed and, as a result of the delay, the flight would not arrive in Vancouver until the meeting was over. Claimant changed her flight to one arriving in Portland.

(5) In August 2013, the employer's president travelled to the Portland office to discuss, among other things, claimant's failure to arrive in Vancouver for the leadership meeting. He told claimant she needed to improve her communication to the Portland office about her whereabouts when she was going to absent from the office. He also indicated to claimant she was not achieving the goals set out in the March 27, 2013 agreement.

(6) On September 15, 2013, the employer assigned a business unit specialist to the Portland office to increase its profitability and the efficiency of its operations. While she was in the Portland office, the business unit specialist was claimant's immediate supervisor.

(7) Sometime before October 21, 2013, claimant received word that her mother was seriously ill in Mississippi and it was thought that her mother might die. As soon as she learned of her mother's condition, claimant left a message on the main line for the Portland office stating that she was going to be absent for approximately the next week due to her mother's serious illness in Mississippi. Claimant also sent a text message to the cell phone of the office manager for the Portland office providing this same information to her. Claimant did not directly notify either the employer's president or the business unit specialist of her absence. On October 23 or 24, 2013, claimant contacted the Portland office to provide an update on her mother's condition and told the employer that her mother was hospitalized. On Friday, October 25, 2013, claimant called the Portland office and notified the employer that she was going to return to work on Monday, October 28, 2013.

(8) On October 28, 2013, claimant reported for work and worked a full day. On October 29, 2013, the employer discharged claimant.

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

At hearing, the employer's witness generally contended that the employer discharged claimant for a multitude of reasons, including that she did not achieve the goals in the March 27, 2013 agreement, that she did not correctly record her time when she was absent from work due to illness, that she did not attend the leadership meeting in August 2013 and that she did not notify the president of the company of her absence from work from October 21 through October 26, 2013. Transcript at 5, 7-9, 10, 11. When specifically asked why the employer discharged claimant, the employer's witness stated the decision was made because of claimant's failure to report her final absence from work to the employer's president. Transcript at 11. In general, EAB focuses on the final incident of alleged misconduct as the proximate cause of a claimant's discharge. See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the

“final straw” that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred). Here, the employer was aware of all of the past incidents of claimant’s alleged past misconduct before it decided to discharge claimant for failing to notify the president of her absence from the office from October 21 through October 26, 2013. Because the employer did not think those incidents of which it was aware were of a sufficient gravity to discharge claimant at around the time that they occurred, claimant’s alleged failure to properly report her absence from work from October 21 through October 26, 2013 was the proximate cause of her discharge. That incident is the correct focus of the analysis to determine whether the employer discharged claimant for misconduct.

The employer’s witness contended that when the employer’s president spoke to claimant in August 2013, he made clear to claimant that she was required to report all her absences from work directly to him. Transcript at 12. Claimant contended that the president did not make such a statement to her, and that she had always reported her absences to the Portland office and to the office manager at that office, as she did for her absence from October 21 through October 26, 2013. Transcript at 19, 20. The employer did not dispute that this was claimant’s usual practice, nor did it dispute that the only way claimant would have been aware of its expectation was if the president had told her. There is no reason to believe or disbelieve the testimony of either party. In a discharge case, when the evidence on a disputed issue is evenly balanced, we are required to resolve the uncertainty against the employer because it is the party that carries the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, the president did not tell claimant to report her absences to him, and claimant reported her absence from October 21 through October 26, 2013 as she reasonably understood the employer’s expectations. On this record, the employer did not meet its burden to establish claimant violated its expectations by not notifying the president of her absence on October 21, 2013.

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

DECISION: Hearing Decision 14-UI-09196 is affirmed.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: March 3, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

