

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0530

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 3, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 93600). The employer filed a timely request for hearing. On March 13, 2014 ALJ Wipperman conducted a hearing, and on March 19, 2014 issued Hearing Decision 14-UI-12839, concluding that the employer discharged claimant, but not for misconduct. On April 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Scenic Fruit Co. Inc. employed claimant from July 26 through 31, 2013.

(2) Claimant attended a paid work orientation on July 26, 2013. At the end of the orientation, the employer's human resources employee instructed claimant to take a drug test, and told him that if he passed the test, the human resources employee would contact claimant to schedule a forklift driving test.

(3) On July 31, 2014, the employer discharged claimant for allegedly failing to return the human resources employee's calls to schedule the forklift driving test.

CONCLUSIONS AND REASONS: We agree with the Department, and not 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-12839, the ALJ found in accordance with the employer's human resources employee's testimony that he twice telephoned claimant's cell phone to schedule a forklift driving test, and that claimant did not receive or return the calls because his cell phone service had been disconnected.¹ As noted by the ALJ, however, claimant testified that he telephoned the human resources employee, informed him that his cell phone service had been disconnected, and instructed him to telephone claimant's home telephone to schedule the forklift driving test.² According to claimant, the human resources employee never telephoned him, even after he twice telephoned and left messages for the human resources employee regarding the test.³

The ALJ implicitly determined that claimant was not a credible witness, summarily concluding that the human resources employee's testimony was "more likely than not true," and that claimant's testimony was "not persuasive."⁴ However, we have reviewed the record in its entirety, and find no basis for concluding that claimant was not a credible witness. We therefore find the evidence as to whether claimant failed to return calls from the human resources employee regarding the forklift test, at best, equally balanced. The employer failed to show by a preponderance of evidence that claimant engaged in the conduct for which he was discharged. Absent such a showing, the employer failed to establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-12839 is set aside, as outlined above.

DATE of Service: April 22, 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.

¹ Hearing Decision 14-UI-12839 at 2.

² *Id.* at 4.

³ *Id.*

⁴ *Id.* at 4-5.