

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0568

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged, but not for misconduct (decision # 91833). The employer filed a timely request for hearing. ALJ Wipperman conducted a hearing on March 19, 2014, and on March 25, 2014 issued Hearing Decision 14-UI-13397, concluding claimant was discharged for misconduct. On April 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her 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.

FINDINGS OF FACT: (1) Sprint United Management employed claimant, last as a store manager, from October 1, 2005 to January 21, 2014.

(2) The employer expected store managers to train inventory technicians to scan inventory accurately, record inventory accurately, reconcile inventory overages or shortages honestly and to oversee the inventory process to ensure the employer's procedures were correctly followed. The employer also expected store managers to be honest regarding work related matters. Claimant received training regarding the employer's inventory procedures and documentation regarding its integrity policy. Claimant was aware of the employer's expectations.

(3) On October 10, 2013, the employer warned claimant in writing for violating its conflict of interest policy by maintaining a personal relationship with a district sales representative without disclosure. On November 27, 2013, the employer warned claimant in writing for poor oversight of store personnel when it was discovered that certain store employees fraudulently obtained commissions through the use of backdated promotional codes without her knowledge.

(4) In January 2014, while claimant was on vacation, an assistant manager tried to disguise an inventory discrepancy by recording a transaction on a recently used gift card. The transaction appeared on an audit report and was investigated by the employer's risk prevention analyst. The assistant manager was viewed on video making the transaction and the assistant manager and an inventory technician allegedly reported that claimant instructed them to disguise inventory discrepancies using gift cards. Claimant denied the allegation, but on January 21, 2014, the employer discharged claimant for providing inappropriate direction to staff and falsifying company inventory records.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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 had the right to expect that claimant would direct her staff to record and reconcile inventory information accurately and honestly in accordance with its procedures because it trained claimant regarding those procedures and informed her of its integrity policy. The employer's witness asserted claimant violated those expectations by instructing the assistant manager and inventory technician to disguise inventory discrepancies using gift cards. However, to support her assertion, the employer's witness provided only hearsay evidence of the employer's investigative report which was based on hearsay statements claimant allegedly made to the assistant manager and technician.

Claimant denied ever instructing anyone to falsify inventory information and neither the assistant manager nor the technician in question testified at hearing. Transcript at 15-17. In Hearing Decision 14-UI-13397, the ALJ found that claimant gave the instructions in question, essentially finding that claimant's first-hand denials were outweighed by the employer's hearsay evidence,¹ and concluded the employer discharged claimant for misconduct, reasoning that the hearsay statements of the assistant manager and technician were "corroborating" and therefore "more likely to be true." Hearing Decision 14-UI-13397 at 3, 4. The ALJ's finding was not supported by substantial evidence.

Claimant's denials at hearing were consistent with her previous denials to employer, and the ALJ did not explicitly find that claimant was not credible.² Transcript at 26. The employer's hearsay testimony was its only evidence of claimant's reported instructions to her staff, and because the individuals who allegedly were the source of that evidence did not testify at hearing, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from current or former employees to substantiate its allegations, and the facts sought to be proved were central to its assertion

¹ See, OEC 801 (3)(defining hearsay as a statement by other than the declarant offered in evidence to prove the truth of the matter asserted).

² See, ORS 657.275 (2)(EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to implied credibility findings).

of misconduct. The employer's witness even refused to provide detailed evidence of the hearsay statements contained in its investigative report. Transcript at 27-28. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that her first-hand testimony under oath is not outweighed by the employer's hearsay evidence. The evidence as to whether claimant instructed her staff to falsify inventory information was, at best, equally balanced, and the ALJ's finding that she did was not supported by substantial evidence.³

In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer failed to meet its burden here. Claimant was discharged, but not for misconduct under ORS 657.176. She is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 14-UI-13397 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 5, 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.

³ *See, Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).