

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0693

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80918). Claimant filed a timely request for hearing. On March 31, 2014, ALJ Wipperman conducted a hearing, and on April 7, 2014 issued Hearing Decision 14-UI-14488, affirming the Department's decision. On April 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Commercial Design Systems, Inc. employed claimant, last as a CNC lead, from October 1, 2007 to February 18, 2014.

(2) On February 17 and February 18, 2014, an employee reported to the employer that claimant had made a statement indicating his intent to sabotage company property. The employee opined that claimant had intended the statement as a serious threat against the employer, and not as a joke.

(3) On February 18, 2014, the employer discharged claimant for threatening to sabotage company property.

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. 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.

In Hearing Decision 14-UI-14488, the ALJ found as fact that claimant commented that he "could switch some wires on employer's server, quit his job, and shut down employer's production process." Hearing Decision 14-UI-14488 at 1. The ALJ reasoned that, although claimant denied ever having made such a remark and testified that the employee who had accused him of doing so had a potential self-interest in getting claimant discharged, had gotten a promotion and raise to claimant's job after claimant's discharge, and had a history of having gotten other employees discharged to his own benefit, the ALJ was nonetheless "persuaded" that claimant had made the remark because claimant had voiced dissatisfaction with changes to the work environment to coworkers and the employee who accused claimant was specific about claimant's complaints. Hearing Decision 14-UI-14488 at 3. We disagree.

Claimant categorically denied making the remark about sabotaging the employer's equipment, and offered unrefuted evidence that the person who accused him of making the remark might have had a self-interest in causing claimant's discharge. The employer's evidence to the contrary consisted entirely of a written statement by the accuser, who did not testify about what he heard, and whose statement did not explain why it was that he considered claimant's statement to constitute a serious threat of sabotage rather than the dissatisfied venting claimant had engaged in previously. The accuser's statement referenced another employee, Nic, who was alleged to have overheard claimant's remark. However, the employer did not provide any statement from Nic confirming that claimant made the statement.

In sum, the employer's evidence that claimant made the statement in question consists of unconfirmed hearsay from an individual with a potential self-interest in making an accusation against claimant. Even considering that some of the detail about claimant's dissatisfaction lends some credibility to the written statement, when the statement is weighed against claimant's categorical denial that he made the statement, the evidence is no better than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has not proven that it is more likely than not that claimant acted as alleged. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 14-UI-14488 is set aside, as outlined above.

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

DATE of Service: May 28, 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.