

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0795

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 133229). Claimant filed a timely request for hearing. On April 10, 2014 and April 11, 2014, ALJ Triana conducted a hearing, and on April 21, 2014 issued Hearing Decision 14-UI-15660, concluding the employer discharged claimant, but not for misconduct. On May 9, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Edwards Painting, Inc. employed claimant as a painter from June 14, 2013 through November 13, 2014.

(2) The employer's owner had, during claimant's employment, concluded that claimant and a coworker had intentionally destroyed a client's property by incorrectly applying paint to doors, used the wrong color when performing a painting assignments and sprayed paint onto a foundation. The owner disapproved of claimant's conduct, work performance and attitude in each of those incidents, and believed that claimant had sabotaged those assignments.

(3) On November 13, 2013, claimant and a coworker posted, on a community billboard maintained by a client of the employer, some flyers concerning parking fees charged by the client that included a reference to a union. Claimant did not use work time to post the flyers. Claimant did not observe any signs on the billboard restricting the types of postings that were permissible, and did not observe any signs requiring that he obtain permission from the client before posting items on the billboard. The flyers did not contain foul language or provocative images. Claimant did not think anyone at the client's business or the employer's business would object if he posted the flyers.

(4) The employer's client observed the flyers and decided to remove claimant and his coworker from the client's property. The project manager was notified that claimant and the coworker were going to be removed from the property. Because of concerns that claimant and his coworker might act out or sabotage the project, the project manager asked that the client allow him to remove them instead. The project manager arrived shortly thereafter and escorted claimant and his coworker from the property.

(5) The owner considered the November 13, 2013 incident, the concerns about sabotage, and claimant's job history, and decided as of the time of the November 13th incident that he would not allow claimant to return to perform any work for his company.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The employer's owner testified that he did not discharge claimant. *See e.g.* April 11, 2014 hearing, Transcript at 7. However, the owner also testified that he decided as of the November 13th incident that claimant would not be allowed to continue working for the employer. Because the employer would not allow claimant to continue working, the work separation was a discharge for purposes of unemployment insurance benefits, and the discharge was effective November 13th, the date after which the employer would not allow claimant to continue working.

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) 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 proximate cause of claimant's discharge, meaning, the event but for which the employer would not have discharged claimant when it did, was claimant's removal from a client's property for posting a flyer. We therefore focus our initial analysis on that incident to determine whether it was willful or wantonly negligent. Only in the event we determined that the final incident was willful or wantonly negligent would the prior incidents of alleged willful behavior be material to the outcome of this decision. Because this is a discharge case, the employer has the burden of proving by a preponderance of the evidence that claimant's discharge was for misconduct. *See accord Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant posted a flyer that was not shown to have contained patently offensive material on a client's community billboard. The billboard did not include any notices restricting postings or requiring that

someone posting a flyer first obtain permission to do so. The employer did not have any rules or policies prohibiting employees from hanging flyers on clients' billboards, and claimant was never told, did not believe, and did not have reason to know that his conduct was prohibited by the employer. Claimant did not use paid work time to engage in the activity, and, on this record, no evidence suggests that anything printed on the flyer connected the flyer to the employer's business. Claimant did not think it would be a problem to hang the flyer, and thought that if he had asked the client for permission to hang the flyer, that permission would have been granted. Under those circumstances, while the employer considered claimant's conduct in hanging the flyer, resulting in his removal from the client's property, to be a violation of the standards of behavior he expected of claimant, the record fails to show that claimant understood the employer's expectation, or that his unwitting violation of the expectation was willful or wantonly negligent.

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

DECISION: Hearing Decision 14-UI-15660 is affirmed.

DATE of Service: June 19, 2014

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.