

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1136

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 9, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131918). Claimant filed a timely request for hearing. On May 29, 2014, ALJ L. Lee conducted a hearing that was continued on June 9, 2014, and on June 11, 2014, issued Hearing Decision 14-UI-19456, affirming the Department's decision. On June 30, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Oregon Youth Authority (OYA) employed claimant as a group life coordinator from August 31, 2009 to March 20, 2014.

(2) The employer expected claimant to provide accurate and honest information during employer investigations. Claimant understood the employer's expectation as a matter of common sense.

(3) At the end of January 2014, the employer received information from two female employees describing separate incidents involving claimant's on-duty behavior the employer considered inappropriate and of a sexual nature. An employer human resource representative, in a relationship prohibited by employer rules with an employee against whom claimant had filed a complaint, conducted an investigation by interviewing both women, as well as a male employee who was a reported witness to both incidents. The first woman [AW] described an incident that occurred around January 20, 2014 in which claimant allegedly asked her more than once if she liked anal sex and about lubrication despite the women's refusal to respond and efforts to end the conversation. The male witness [MB] reported that during the conversation, which he was having with AW that day about the woman's boyfriend, their

considerable difference in age and the use of Viagra, he heard claimant, who was working nearby, say “anal sex.” Transcript at 9. The second woman [AH] described an alleged incident that occurred around December 29, 2013, that was first reported by her manager about whom claimant had previously complained, in which claimant reportedly straddled her and mimicked a lap dance as she sat in a chair. MB gave the representative a statement regarding the incident that was reportedly similar to that of AH. However, after the human resources representative was removed from the investigation due to complaints of bias against claimant, MB requested a second interview with a new investigator, changed his statement and described only consensual horseplay between claimant and AH. Transcript at 45. Claimant’s union’s request for a new investigation based on the removal of the original investigator was declined. The employer recorded and transcribed the interviews with the two women and the initial interview with MB.

(4) When claimant was interviewed, he denied talking to AW about anal sex or lubrication. He also denied mimicking a lap dance with AH or engaging in physical horseplay with her. The employer concluded claimant had been dishonest during the investigation and on March 20, 2014, discharged him for that reason.

(5) Claimant had no prior disciplinary record involving dishonesty, sexual harassment or inappropriate behavior.

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. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer’s witness testified that it was claimant’s perceived dishonesty during its investigation into his conduct that was “the nail in the coffin” and “pushed it to the point of dismissal.” Transcript at 27-28. Consequently, because that alleged conduct triggered the employer’s decision to discharge claimant, it was the proximate cause of the discharge and is the proper focus of the misconduct analysis.

In Hearing Decision 14-UI-19456, after finding as fact that claimant was accused by one female coworker [AH] of “mimicking a lap dance” over her despite her protests and by another [AW] of “more than once” asking her if she liked anal sex despite her repeated efforts to end the conversation, which accusations claimant denied before being discharged “for being untruthful during an investigation”, the ALJ concluded that claimant was discharged for misconduct, reasoning, in pertinent part,

...The employer did not call either of the two women as witnesses. Their versions [of the events in question] constituted hearsay. In contrast, claimant and the male witness provided first-hand testimony at the hearing. The testimony of both claimant and his witness was not credible; they were both evasive and disingenuous in their responses to

the ALJ's questioning... In one regard, however, their testimony was in conflict; claimant denied talking to the first woman about "anal sex" whereas the witness confirmed that he heard claimant use that term in conversation with her. More likely than not, claimant gave self-serving, but untruthful, testimony at hearing. In contrast, it is unlikely that both female witnesses, the male witness, and the investigators would all falsify and manipulate information, individually or together, against claimant, *at least initially*, in an effort to get him in trouble... Based on the totality of the evidence, claimant was not honest with the employer during the investigation into his behavior towards his two female co-workers. (Italics added).

Hearing Decision 14-UI-19456 at 4. The employer did not offer the recorded statements or transcripts of any witness interviewed by the initial human resources representative into the record and its witness paraphrased or quoted selected parts of the statements at hearing.

In reasoning as she did, it appears the ALJ considered the employer's double hearsay evidence to be more credible than claimant's first hand denials despite evidence in the record that AH waited 30 days to report the first incident and did so at the behest of a friend, also a manager, about whom claimant had complained to initial human resources representative, that AW reluctantly filed a complaint against claimant after being forced to do so by the employer, that the human resources representative that conducted the initial, recorded and transcribed interviews of AH, AW and MB, was later removed by the employer as the investigator due to potential bias against claimant and that the second investigator refused the union's request to re-interview the witnesses or investigate accusations of bias by AH against claimant based on his refusal of her personal invitation to accompany her to Las Vegas. June 9, 2014 Transcript at 15-16, 27, 42, 44, 62-63. It also appears the ALJ concluded claimant was not a credible witness based on the inconsistency of parts of his testimony with that of MB, whom she also found not credible. In addition to that non sequitur in her reasoning, the ALJ went on to explain "it is unlikely that both female witnesses, the male witness, and the investigators would all falsify and manipulate information, individually or together, against claimant, *at least initially*, in an effort to get him in trouble", suggesting the ALJ considered it plausible if not likely that those individuals might have falsified and manipulated information against claimant after the initial reports.

Regardless of the ALJ's reasoning, we disagree with her conclusion that the record establishes that the employer met its burden to show misconduct "by a preponderance of the evidence, i.e., 51%." Hearing Decision 14-UI-19456 at 4. Weighing the evidence as a whole, and notwithstanding the ALJ's credibility determinations, there seems to be no reason to believe the employer's questionable double hearsay evidence over claimant's first hand denials, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden.

The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 14-UI-19456 is set aside, as outlined above.

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

DATE of Service: August 7, 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 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.