EO: 300
BYE: 201519

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

843
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1155

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145905). Claimant filed a timely request for hearing. On June 30, 2014, ALJ Kirkwood conducted a hearing and issued Hearing Decision 14-UI-20639, affirming the Department's decision. On July 7, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted two written arguments, the first generally repeating his hearing testimony and the second replying to the employer's written argument. The employer submitted a written argument that also repeated its hearing testimony in response to claimant's first written argument and offered new information about claimant's alleged prior violations of its attendance policy and prior written warnings that it had issued to claimant. As explained more fully below, claimant's behavior prior to May 19, 2014 was not the proximate cause of his discharge and was therefore not relevant to the issue of whether the employer discharged him for misconduct. In addition, to the extent that either party's written argument presented new information, neither party showed that factors or circumstances beyond that party's reasonable control prevented the party from offering that new information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, EAB considered only information received into evidence when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Harvey & Price Co. employed claimant from February 20, 2012 until May 20, 2014. Claimant was last employed as a field installer of fire sprinkler systems and a job foreman.

(2) The employer expected claimant to report for work as scheduled unless he was given permission to take time off. Claimant understood the employer's expectations as a matter of common sense.

(3) In 2010, when the employer previously employed claimant, and again in 2013, the employer issued written warnings to claimant. The employer's disciplinary policy stated that an employee was discharged after the employee received three disciplinary "strikes." Transcript at 7.

(4) On several occasions between February 20, 2014 and May 12, 2014, claimant was tardy or absent from work.

(5) On Thursday, May 15, 2014, claimant was installing a fire sprinkler system and was foreman on the job. Although the wet sprinkler system had already been installed, the superintendent representing the general contractor wanted the dry system installed immediately. The employer's sprinkler division manager asked claimant that day to work over the weekend of May 17 and May 18, 2014 to complete the installation of the dry system. Claimant was not scheduled to work that weekend and initially declined because his daughter, of whom he did not have custody, was going to be staying with him for parenting time that weekend. Claimant reconsidered his decision not to work over the weekend and called his former wife and arranged to delay the start of his parenting time until Tuesday, May 20, 2014. Claimant then called the manager and told him he was willing to work over the weekend but wanted the next week off, starting on May 20, 2014, to enable him to have parenting time. The manager agreed and said, "If you get it [the dry system] in, you can take the rest of the week off." Transcript at 25. The manager repeated, "Just get it in" and did not state that he expected claimant to be present when the fire marshal made a final inspection of the system during the upcoming week. Claimant worked long days on the dry sprinkler system over the weekend of May 17 and 18, 2014. On Monday, May 19, 2014, claimant was still working on installing the dry system and was having difficulty hooking it up to water. At approximately mid-morning, the sprinkler division manager called claimant to check on claimant's progress in completing the installation. The manager told claimant that the general contractor was threatening to fine the employer $22,000 per day if the system was not completed and inspected by Tuesday, May 20, 2014. Transcript at 26. The manager still did not tell claimant that he expected claimant to be present for an inspection of the system on May 20, 2014.

(6) At the end of the workday on May 19, 2014, claimant sent a text message to the sprinkler division manager notifying him that the installation of the dry system was "100 percent complete" and that his work was completed. Transcript at 28. In that text message, claimant commented that he "did not want to set foot" on that job site again so long as the general contractor's superintendent was there, referring to his dislike of the superintendent for threatening to levy a financial penalty if the installation was not timely completed and inspected. Transcript at 15, 28. The manager replied by text message telling claimant to report to the shop to meet with the owners at 9:00 a.m. the next day, May 20, 2014. Transcript at 13. The manager still did not tell claimant that he expected claimant to be present at the job site for the fire marshal's final inspection of the system on Tuesday, May 20, 2014, and did not tell claimant the purpose of meeting with the owners on May 20, 2014. Claimant responded to the manager's text message by stating that he was "sorry," but he was not able to come to the workplace on May 20, 2014 because, after he got up on May 20, 2014, he was going to pick up his daughter for parenting time and he had the rest of that work week off. Transcript at 15.

(7) On May 20, 2014, claimant did not report to work and was not present for the final inspection of the sprinkler system by the local fire marshal. The employer's vice-president called claimant on May 20, 2014 and asked him to report to the workplace for a meeting at 2:00 p.m. On that day, the vice-

president discharged claimant for not reporting for work on May 20, 2014 because that incident was claimant's "final strike" under the employer's disciplinary policy. Transcript at 7.

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. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-20639, the ALJ concluded that claimant's failure to report for work to attend the final inspection on May 20, 2014 was, under the circumstances, wantonly negligent. Although claimant testified that he had agreed to work only until the dry sprinkler system was completely installed, and he finished the physical installation on Monday, May 19, 2014, the ALJ reasoned that a complete installation included attending the final inspection. Hearing Decision 14-UI-20639 at 4. To support this decision, the ALJ relied on the employer's evidence that "[i]t is typical for a foreman to handle the inspections" and "a job is not typically considered complete until the work passes inspection. Therefore, the implication or default understanding of when a job is complete is when it passes inspection." Hearing Decision 14-UI-20639 at 4. The ALJ decided that, even if the sprinkler division manager did not expressly mention that he wanted claimant to attend the inspection, claimant knew or should have known that he was expected to attend the inspection on May 20, 2014, and his failure to do so was therefore misconduct. Hearing Decision 14-UI-20639 at 4. We disagree.

At the outset, the employer's evidence at hearing included several prior incidents in which claimant allegedly violated the employer's attendance policy and the employer's witness contended that the employer was required to discharge claimant under its disciplinary policies because his failure to report for work on May 20, 2014 was his "final strike." Transcript at 7, 8-10. Whatever the nature of claimant's past violations, or the penalty requirements of the employer's progressive disciplinary policy, EAB traditionally evaluates only the final incident that led to claimant's discharge to determine whether claimant engaged in disqualifying misconduct under OAR 471-030-0038(3)(a). *See generally* June 27, 2005 letter to the Employment Appeals Board from Tom Byerley, Assistant Director, Unemployment Insurance Division (where an individual is discharged under a point-based disciplinary policy, the last occurrence is considered the reason for the discharge). Accordingly, claimant's behavior in not reporting for work on May 20, 2014, and not his prior behavior, is the proper focus of our inquiry.

At hearing, the sprinkler division manager testified that he negotiated with claimant on May 15, 2014 to work on the dry system until he "got me past [the] inspection" and that he had agreed to allow claimant to have the remainder of the work week off for parenting time with his daughter after the inspection had taken place. Transcript at 11, 13. Claimant contended the sprinkler division manager never specifically stated that he needed to attend the final inspection to complete the system installation, and that he had understood he needed only to physically complete the installation. Transcript at 25, 31. In light of the unusual circumstance of claimant delaying his planned weekend parenting-time with his daughter to install the sprinkler system and arranging for that parenting time to start on Tuesday, May 20, 2014, it

does not appear reasonable to gauge claimant's understanding of what the manager meant by "completing" the installation, as the ALJ did, based on claimant's practice of attending inspections. Rather, it appears on this record, that claimant's need to have parenting time created an exigent circumstance . Moreover, the employer's witnesses did not rebut claimant's testimony that, although it is typical for the job foreman to handle the final inspection with the fire marshal, the employer on past occasions had allowed apprentices or other employees to do so when the foreman was not available. Transcript at 33, 42. Claimant's stated understanding that, given the rearrangement of his plans, he only needed to complete the actual physical installation of the system before he could leave work to start his parenting time was not, on this record, patently unreasonable or implausible. In this respect, it is highly significant that on May 19, 2014, when claimant told the sprinkler division manager that he did not intend to report for work on May 20, 2014 in order to pick up his daughter for the start of his parenting time, and the employer knew he was not going to be at the inspection, neither that manager or the employer's other witness presented evidence that, at that time, it was communicated to claimant that his attendance at the May 20, 2014 inspection was required. Transcript at 15, 29.

This case hinges on whether the sprinkler division manager explicitly told claimant that his work on the system would not be completed until it had passed the inspection, and that claimant needed to report for work and attend the inspection on May 20, 2014 before claimant's agreed time off would start. The testimony of claimant and the sprinkler division manager is in conflict on this issue. Transcript at 11, 13, 25, 31. There is no reason in the record to believe or disbelieve the testimony of either party or to prefer the testimony of one over the other. When, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer, who is the party that has the evidentiary burden in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). More likely than not, claimant was not informed and was not reasonably aware that he was required to attend the final inspection of the system on May 20, 2014 before his time off started. Because it is not disputed that sprinkler division manager had previously given claimant permission to take time off starting after he had completely installed the system, and claimant had done so on May 19, 2014 as he reasonably understood the extent of this commitment, the employer did not meet its burden to establish that claimant's failure to report for work and attend the inspection on May 20, 2014 was a wantonly negligent violation of its expectations and was misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-20639 is set aside, as outlined above.

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

DATE of Service: <u>August 6, 2014</u>

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.

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