

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1382

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 120624). The employer filed a timely request for hearing. On July 18, 2014, ALJ Vincent conducted a hearing, and on August 4, 2014 issued Hearing Decision 14-UI-22729, affirming the Department's decision. On August 19, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Medicineman Medicinal Services LLC employed claimant as a maintenance worker from September 12, 2012 to May 19, 2014.

(2) At approximately 11:00 a.m. on May 17, 2014, claimant entered one of the employer's buildings and noticed a slight electrical odor. Claimant twice attempted to notify the employer's owner by calling the owner's cell phone, but the owner did not answer. He then sent a text message to the owner's cell phone stating what he had observed. Claimant then walked through the building but did not notice the electrical odor in any of its six rooms. He then checked the building's electrical panel and discovered that the circuit breaker for one of the rooms had turned off. Claimant plugged the equipment in the room to outlets in two other rooms, and turned the circuit breaker back on. Claimant worked in the building until approximately 3:00 p.m., and did not notice an electrical odor during that time.

(3) At approximately 6:00 p.m., claimant returned to the building and noticed that the equipment wasn't working because the two other rooms were without electrical power. Claimant again checked the electrical panel and turned off the circuit breaker for the two rooms. He then telephoned the owner's cell phone and home phone and left voice messages stating what he had observed and done. Claimant also sent text messages to the owner's cell phone stating what he had observed and done.

(4) The employer discharged claimant for failing to call the employer's office phone and, if necessary, the owner's home phone when he first noticed the electrical odor, and for turning the circuit breaker back on and leaving the building for several hours.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant's discharge was 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 a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, in part, for failing to call the employer's office phone and, if necessary, the owner's home phone after first noticing the electrical odor when entering the employer's building. At hearing, the owner testified that he had instructed claimant to call the office phone and, if necessary, his home phone in such a situation, and not to send a text message to his cell phone. Transcript at 5-6. However, claimant testified that the owner instructed claimant to contact him on his cell phone when such a situation occurred during business hours, preferably by text message. Transcript at 20-21, 23-24. We find the evidence on that issue equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant knew or should have known that failing to call the office phone or the owner's home phone probably violated the employer's expectations. Nor does the record show that claimant was indifferent to the consequences of his actions, given that he twice called the owner's cell phone, and sent a text message to the owner's cell phone stating what he had observed. Absent such showings, we cannot find that claimant violated the employer's expectations willfully or with wanton negligence.

The employer also discharged claimant, in part, for turning the breaker back on and leaving the building for several hours. However, the record fails to show claimant knew or should have known through prior training, experience, warnings or as a matter of common sense that his conduct probably violated the employer's expectations. Nor does the record show that claimant was indifferent to the consequences of his actions, given that he worked in the building for four hours before leaving, and did not notice an electrical odor during that time. Again, absent such showings, we cannot find that claimant violated the employer's expectations willfully or with wanton negligence.

We therefor conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-22729 is affirmed.

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

DATE of Service: September 23, 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.

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