

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1702

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 28, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #111417). The employer filed a timely request for hearing. On October 14, 2014, ALJ S. Lee conducted a hearing, and on October 17, 2014, issued Hearing Decision 14-UI-27097, concluding the employer discharged claimant for misconduct. On October 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Portland Habilitation Center, Inc. (PHC) employed claimant as a janitor from February 12, 2013 until July 14, 2014.

(2) The employer expected claimant to follow its “building security policy” described in its employee handbook. The policy stated, in relevant part, “you cannot under any circumstances allow anyone access to a secure building for any reason.” Transcript at 5; Exhibit 1. Claimant acknowledged receiving a copy of the employer’s handbook on January 11, 2013 and understood that at a secure jobsite he was not permitted to allow anyone “in the building”. Transcript at 20.

(3) On July 7, 2014, claimant was scheduled to perform janitorial work for an employer customer - DES wastewater treatment plant (DES). To enter the DES parking lot, claimant was required to scan his security badge. Claimant’s roommate, who was not employed by PHC, drove claimant to work. Upon arrival at DES, claimant scanned his badge at the parking lot gate and his roommate drove through the gate to the building where claimant worked and dropped him off. Claimant entered the building, which did not require a security card scan, after which claimant’s roommate entered the building and asked a DES employee if he could use the restroom which the employee allowed. Claimant had begun his janitorial work at or near the restroom in question, and when he heard his roommate’s voice, told him, “[Y]ou’re not allowed in here...what are you doing in here? You’re not allowed in here. You have to leave.” Transcript at 23. Later that day, the employer received an email from DES reporting that a person not an employee of PHC was seen in the building with claimant.

(4) Although claimant admitted that his roommate had dropped him off in the parking lot inside the gate, he denied that he had brought him into the DES building. Transcript at 11, 20. On July 14, 2014, the employer discharged claimant for violating its building security policy by allowing his roommate to enter the secure parking area at DES without authorization. Transcript at 7-8, 11.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer had the right to expect claimant to adhere to its "building security policy" because claimant acknowledged receiving the employer's handbook in which it was contained. Claimant probably violated that expectation on July 7 when he allowed his roommate drop him off inside the secure gate before entering the building where he was scheduled to work. In Hearing Decision 14-UI-27097, after finding claimant "did not read the Employee Handbook" and "was given little or no training during this last period of employment", the ALJ concluded that claimant violated the employer's policy and was wantonly negligent, reasoning,

Failing to read the policy does not excuse claimant's actions. Claimant's allowing an unauthorized individual into a secure area where he would then have unobstructed access to the client's premises showed a blatant disregard for the client's and the employer's interests.

Hearing Decision 14-UI-27097 at 2, 4.

However, for a violation of an employer expectation to be wantonly negligent, a claimant must at least be conscious of his conduct at the time he engages in it. Conscious means "perceiving, apprehending or noticing with a degree of controlled thought or observation." *Webster's Third New International Dictionary* (unabridged ed. 2002) at 482. Claimant testified that he "didn't realize" that allowing his roommate to transport him through the secure gate violated the employer's policy and expectation. Transcript at 20. Although the ALJ also found, "There [were] signs posted at the gate noting that it [was] a secure area", claimant denied seeing any signs and the employer's evidence consisted of testimony by a witness who had not been at the site that a "Google Maps" search on the morning of the hearing three months after the final incident showed that there were signs at the gate. Hearing Decision 14-UI-27097 at 2; Transcript at 9, 15. It also was undisputed that once claimant realized his roommate was in the building on July 7, he immediately demanded that he leave demonstrating he was not indifferent to the employer's interests. On this record, the evidence that claimant was "conscious" that

he was violating the employer's "building security policy" on the day in question was no more than equally balanced. Where the evidence is equally balanced, the party with the burden of production, here the employer, has failed to make its case that claimant was consciously indifferent to the employer's building security policy.

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

DECISION: Hearing Decision 14-UI-27097 is set aside, as outlined above.

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

DATE of Service: December 12, 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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