

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1957

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134308). The employer filed a timely request for hearing. On December 19, 2014, ALJ Kirkwood conducted a hearing and issued Hearing Decision 14-UI-30688, reversing the Department's decision. On December 29, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) AA Maintenance Roof Pro Company employed claimant as a limited maintenance electrician from November 13, 2012 until January 7, 2013.

(2) The employer expected claimant to perform the work that he was assigned. Claimant understood the employer's expectation as a matter of common sense.

(3) On January 3 or 4, 2013, the employer told claimant to replace or repair one or two non-functioning lamps that were on poles to illuminate the outdoors of a customer's property. Claimant went to the customer's property to replace the lamps. When he was at the customer's property claimant determined that the lamps were not functioning because electricity was not being delivered to the poles that they were on and only replacing the lamps would not correct the problem. Claimant investigated to learn the configuration of the underground electrical circuit to the light poles. Claimant then investigated the condition of the electrical circuit. Claimant discovered that one junction box buried beneath a large volume of bark dust was crushed, its wiring was lying in water and that the wires running from another junction box in the circuit, affixed to a building wall, were disconnected. Claimant purchased some wiring and then repaired and rewired the crushed box, rewired the disconnected box and laid some new underground wire to the poles. Claimant did not replace the lamps because the old lamps resumed working after he repaired the electrical circuit. Claimant turned in paperwork to the employer stating

that he performed approximately ten hours of work to restore the proper functioning of the lamp or lamps.

(4) Sometime after January 3 or 4, 2014, the employer's operations manager asked claimant to explain what work he did to justify the ten hours he recorded for the job on January 3 or 4, 2014. Claimant told the operations manager that he encountered problems on that job and needed to spend time determining the location of the underground electrical circuit, inspecting it and repairing and rewiring parts of it.

(5) Sometime after January 3 or 4, 2014, the employer's operations manager sent an electrician to the customer's property to investigate the work that claimant performed on the two lamps. The electrician told the manager that the two lamps were not replaced, that one of the junction boxes did not appear to have been opened and that the electrical circuit to the two poles appeared in proper functioning order.

(6) On January 7, 2014, the employer discharged claimant for not performing the work that he represented having performed for the customer on January 3 or 4, 2014.

**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 has 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).

At hearing, the employer's operations manager testified that the employer discharged claimant because claimant represented that he performed certain work at the customer's property on January 3 or 4, 2013 when he had not. Transcript at 5, 6, 7, 9. Apparently in response to claimant's testimony in which he conceded that he did not replace the two lamps he was asked to repair, the employer narrowed its position in its written argument to contend that it discharged claimant for dishonestly representing to the operations manager, among other things, that he had replaced those two lamps. Transcript at 13, 14; Employer's Written Argument at 1. While the operations manager made repeated references at hearing to claimant's failure to replace those lamps, it was never clear that the operations manager instructed claimant to do more than to correct the failure of the lamps to illuminate, or that he instructed claimant to change out those lamps even if he could restore their functioning in another way. Transcript at 6, 7, 9, 18. Nor was it clear that claimant ever specifically stated to the operations manager that he had changed out the two lamps, rather than merely representing that he had corrected the problem that caused the lamps to fail to illuminate and that he had restored their functioning. Transcript at 6, 7, 10, 13-14, 20. Since the events relevant events occurred almost two years before the hearing and both parties' recollections of them were somewhat vague, their testimony about them was understandably imprecise. Transcript at 7, 8, 9, 18, 19. However, the lapse of time does not relieve the employer of its burden to demonstrate claimant's misconduct. Absent more specific evidence, the employer did not show, more likely than not, that claimant willfully misrepresented to the operations manager that he changed out the two lamps. Nor did the employer show, more likely than not, that claimant willfully or with wanton

negligence violated the employer's standards when he did not replace the two lamps on the customer's light poles.

The employer also contended that claimant did not perform work on the customer's property that justified the ten hours that he spent on that job. Transcript at 7, 8, 9, 10. In his testimony, the operations manager stated that the scope of work he assigned to claimant encompassed ensuring that power actually was delivered to the two lamps on the light poles. Transcript at 7. In his testimony, claimant contended that he spent most of his time working on that job in inspecting, rewiring and repairing the underground electrical circuit that delivered power to the lamps, that he did not replace the lamps because they functioned after these repairs were made and that it took ten hours to accomplish these tasks. Transcript at 11, 12, 13-14, 16, 18, 20. To support its contention that claimant did not perform this work, the employer relied on the hearsay report of the employer's electrician who visited the customer's property soon after claimant's work and who allegedly observed that the two lamps were not replaced with new lamps, that one junction box did not appear to have been worked on and that the circuit was functioning properly. Transcript at 6. Claimant's explanation that the electrician would not have detected problems with the electrical circuit after he repaired it was plausible, and without more details about the one junction box that the electrician inspected, it cannot be concluded that the electrician was describing one of the junction boxes that claimant stated that he repaired. Transcript at 12. Claimant's first-hand evidence about the work that he performed on the customer's property is entitled to greater evidentiary weight than the electrician's hearsay observations. The employer did not meet its burden to show, more likely than not, that claimant did not perform the tasks on the customer's property that he testified that he had or that he recorded on his time card. In addition, because the employer did not show that the work that claimant described would reasonably have taken far less time than the ten hours he reported on his time records, the employer did not present sufficient evidence to support an inference that claimant misrepresented his time to the employer's operations manager, and did not establish, more likely than not, that claimant willfully did so. Further, as addressed above, the employer also did not present sufficient evidence to show that, by failing to switch out the two lamps, claimant willfully or with wanton negligence violated the employer's standards.

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

**DECISION:** Hearing Decision 14-UI-30688 is affirmed.

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

**DATE of Service:** February 18, 2015

**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](http://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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