

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0038

Affirmed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On November 26, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 113542). Claimant filed a timely request for hearing. On December 29, 2014, ALJ Frank conducted a hearing, and on January 2, 2015 issued Hearing Decision 15-UI-31225, concluding the employer discharged claimant, not for misconduct. On January 17, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Los Dos Amigos 1 & 3 employed claimant from July 20, 2009 to October 19, 2014 as a dishwasher.

(2) The employer had no written policy regarding the use of drugs or alcohol in the workplace. However, the employer expected employees to refrain from being under the influence of alcohol while at work. Claimant understood that expectation.

(3) On October 18, 2014, claimant began to have foot pain after completing a portion of his shift. He took Naproxen to treat the foot pain. Claimant also takes antidepressants. Claimant began to have difficulty standing and walking, and stumbled and bumped his head on a wall. A coworker told the assistant manager claimant's breath smelled of alcohol. The assistant manager saw claimant's behavior and sent him home from work.

(4) On October 19, 2014, claimant reported to work. The employer discharged claimant for allegedly being under the influence of alcohol at work on October 18, 2014.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant 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.¹

The employer discharged claimant because he allegedly was under the influence of alcohol at work. Claimant's coworker confirmed claimant's admission that he was unable to walk properly, and asserted that claimant "smelled like alcohol." Transcript at 20. However, claimant testified that he consumed no alcohol on October 18, 2014, and attributed his inability to walk properly to the medication he took after he began working to treat his foot pain, and its possible interaction with depression medication. Transcript at 12, 23. Moreover, the coworker also testified that claimant seemed normal when he began working, and that there was a "sudden" change in his behavior. Transcript at 20. The coworker's testimony is consistent with claimant's explanation regarding his own behavior. The evidence that claimant was under the influence of alcohol is, at best, equally balanced between the parties. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its burden. *Babcock v. Employment Division*, 25 Or App 661, 50 P2d 1233 (1976).

The employer failed to show that claimant willfully or with wanton negligence violated its expectation that he refrain from being under the influence of alcohol at work. Therefore, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-31225 is affirmed. *Decisión de la Audiencia 15-UI-31225 queda confirmada.*

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

DATE of Service: March 2, 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. Once on the website, click on the blue tab for

¹ The employer discharged claimant for allegedly being under the influence of alcohol at work. Such a discharge would typically be analyzed under the disqualification provisions at ORS 657.176(2)(h) and ORS 657.176(9). However, OAR 471-030-0125(11) provides that, if the employer discharges an employee because of use, sale, or possession of drugs or alcohol in the workplace, and the employer has no written policy regarding the use, sale, or possession of drugs or alcohol in the workplace, the provisions of OAR 471-030-0038 apply. The record in this case shows the employer did not have a written drug and alcohol policy regarding the use, sale, or possession of drugs in the workplace. Thus, the provisions of OAR 471-030-0038 apply.

“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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NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros, (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en court.oregon.gov. En este sitio web, haga clic en “Help” para acceso a información en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.