

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0223

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95908). Claimant filed a timely request for hearing. On February 9, 2015, ALJ R. Davis conducted a hearing, and on February 11, 2015 issued Hearing Decision 15-UI-33316, affirming the Department's decision. On February 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Goodwill Industries employed claimant from July 17, 2010 to December 16, 2014 as a donation attendant processor.

(2) The employer expected claimant to answer managers' questions and to refrain from insubordination at work. Claimant understood the employer's expectations.

(3) The employer discharged claimant for allegedly failing to respond to his manager on December 11, 2014 when the manager called to claimant and asked what he was working on, and when the manager walked up to claimant and asked him again what he was doing, and told him to stay on task. Claimant allegedly ignored the manager, then turned and returned to work.

(4) The employer did not discuss the alleged incident from December 11, 2014 with claimant when it allegedly occurred or when the employer discharged claimant.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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 for allegedly behaving in an insubordinate manner by failing to respond to a manager's questions, and ignoring the manager on December 11, 2014. In Hearing Decision 15-UI-33316, the ALJ found in accordance with the testimony of the employer's manager that claimant twice ignored the manager's inquiries about what claimant was doing even though the manager was close to claimant when he questioned him, and claimant's coworker appeared to hear the manager.¹ Based on those findings, the ALJ concluded claimant's conduct was, at best, a wantonly negligent violation of the employer's policy against insubordination.²

We disagree with the ALJ and conclude the employer failed to meet its burden to establish claimant violated the employer's policy against insubordination. Claimant testified that he never ignored his manager, and did not recall an incident like the one alleged by the employer's manager. Audio Record at 19:23 to 20:34. The employer offered no evidence that tended to corroborate the manager's testimony. The record tended to support claimant's testimony because the employer did not discuss the alleged incident of insubordination with claimant, or tell claimant that the alleged December 11 incident was the reason for discharge, even though the employer had discussed all of claimant's prior conduct violations with claimant. Audio Record at 20:53 to 21:00; 16:36 to 16:49. The ALJ did not make an express finding regarding the credibility of claimant or the employer's witness, and the record fails to show an objective reason to disbelieve either witness. Absent a reason to disbelieve either party, evidence is equally balanced regarding the alleged final incident of insubordination. The employer therefore failed to show by a preponderance of evidence that claimant was insubordinate. The employer therefore failed to establish claimant violated its policy against insubordination, let alone that he did so willfully or with wanton negligence.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 15-UI-33316 is set aside, as outlined above.³

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

¹ Hearing Decision 15-UI-33316 at 1.

² *Id.* at 3.

³ This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

DATE of Service: April 15, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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