

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0251

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84628). Claimant filed a timely request for hearing. On February 26, 2015, ALJ Seideman conducted a hearing, and on March 2, 2015, issued Hearing Decision 15-UI-34350, affirming the Department's decision. On March 5, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Wilks Staffing Co LLC employed claimant from October 3, 2013 to September 13, 2014. Claimant worked for a subsidiary of the employer, Breckenridge Exploration Co., last in the state of Texas.

(2) The employer expected its employees to report for work as scheduled or notify the employer if they would be absent. The employer also expected its employees to complete a leave of absence request form if the employee expected to be absent for more than fourteen days. The employer's expectations were contained in its handbook, a copy of which claimant received at hire. Claimant was aware of the employer's expectations.

(3) On or about August 10, 2014, claimant received unfavorable information about the status of his father's cancer and received permission from his supervisor to travel to Oregon the next day to be with his family. Claimant's supervisor told claimant to take as much time as he needed and to not worry about the 14 days. Audio Record ~ 15:00 to 16:00. On or about August 13, while in Oregon, claimant was arrested on an old traffic warrant for non-payment of fines and immediately notified his supervisor by text message and then phone that he had to appear in court and perform some community service work that would end on September 18, after which he would return to work. The supervisor did not advise claimant that his job was in jeopardy or that he needed to complete a leave of absence request form and did not notify the employer of their communication.

(4) On September 13, 2014, the employer discharged claimant as a “no call no show” because it concluded he had not contacted the employer after August 24, 2014, when the customary 14-day break period expired. Audio Record ~ 5:30 to 6:00. On September 18, after his community service work was completed, claimant contacted the employer about returning to work and learned he had been discharged.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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. In a discharge case, the employer bears the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-34350, after finding that claimant “never contacted the employer” after arriving in Oregon, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

Claimant was granted permission to be back from his leave on August 24, 2014, but didn't return or call the employer. Although he testified he called his supervisor, the supervisor testified that claimant did not. I find the supervisor's testimony to be more credible... Claimant's continual absence was a willful disregard of the employer's interest and constituted misconduct.

Hearing Decision 15-UI-34350 at 2, 3. Notably, the ALJ failed to explain why the supervisor's testimony was “more credible” than claimant's. Claimant testified unequivocally that the day before he left for Oregon, his supervisor (Cesar) told him in the employer's Graham, Texas office “Take as much time as you need... Forget about the 14 days...” Audio Record ~ at 15:00 to 16:00. He also asserted that on August 13, the day he learned about the Oregon warrant, he contacted Cesar from Oregon by both text message and phone and told him about his court dates, the reason for the warrant and that he needed to complete two days of community service that would end on September 18 after which he would return. Audio Record ~ at 16:00 to 17:00. Cesar essentially testified he “did not remember receiving a call” and that his “phone broke” as a result of which he “lost all [his] information on it.” Audio Record at 11:00 to 17:00. Given claimant's detailed testimony about his conversations and calls to Cesar and Cesar's lack of memory and phone problem, there is nothing inherently “more credible” about the employer's evidence and claimant's assertions that he kept his supervisor apprised of his circumstances and anticipated return to work has at least as much probative value as the employer's evidence that he did not. Accordingly, the evidence on that issue being no more than equally balanced, the employer has failed to satisfy its evidentiary burden and we based our findings on claimant's evidence.

Although the employer also expected its employees to complete a leave of absence request form if the employee anticipated being away for more than fourteen days, on this record, claimant's failure to do so was not misconduct. In light of claimant's initial communication with Cesar in Texas and his contacts

with him on August 13, claimant's failure to complete the form did not demonstrate conscious indifference to the employer's interests. He did not originally anticipate being in Oregon for more than 14 days and it is not implausible that claimant reasonably believed that his communications with Cesar on August 13 sufficed to inform the employer of his expected return. Accordingly, claimant's failure to complete a leave of absence request form was neither willful nor wantonly negligent.

The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.¹

DECISION: Hearing Decision 15-UI-34350 is set aside, as outlined above.

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

DATE of Service: April 23, 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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¹ 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.