

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0604

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 6, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 70540). The employer filed a timely request for hearing. On May 6, 2015, ALJ Seideman conducted a hearing, and on May 12, 2015, issued Hearing Decision 15-UI-38329, concluding the employer discharged claimant for misconduct. On May 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Target Corporation employed claimant as a warehouse worker from September 26, 2007 to February 23, 2015.

(2) The employer prohibited employees from using cellphones or other electronic devices on the warehouse floor except in case of emergency. The prohibition was set forth in a written policy claimant received at hire. Exhibits 5, 6. Claimant was aware of and understood the employer's expectation.

(3) On February 20, 2015, claimant approached a group leader desk where two group leaders were having a conversation. The group leaders believed they heard music coming from an electronic device on claimant's person and reported it to the employer. On February 23, 2015, the employer discharged claimant for violating its prohibition against using an electronic device on the warehouse floor for a reason other than an emergency.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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 the evidence. *Babcock v Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's first hand witness asserted that both he and another group leader heard music coming from an electronic device on claimant's person and that when they confronted claimant about using an electronic device to stream music on the warehouse floor, he left the floor for the breakroom without admitting to the policy violation in question. Audio Record ~ 10:00 to 13:00. Claimant denied streaming music, having an electronic device in his possession, going to the breakroom or even being confronted and asserted the employer "made something up" and discharged him for it. Audio Record ~ 14:00 to 17:00. In Hearing Decision 15-UI-38329, the ALJ concluded the employer's witness was "more credible", found that claimant violated the employer's policy as alleged and concluded it discharged claimant for misconduct, reasoning,

If claimant just had his phone with him, then why did he hurry to go to a different area. It was not against employer policy to just have his phone there. He just couldn't play it.

Hearing Decision 15-UI-38329 at 4. However, the employer's witness asserted two group leaders heard the music and confronted claimant, who admitted to possessing a cell phone but not playing music with it. Audio Record ~ 10:00 to 13:00. The other group leader was not offered as a witness and the employer otherwise failed to corroborate its allegation against claimant. Weighing the evidence as a whole, there seems to be no reason to believe witness over claimant, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of production, here the employer, has failed to establish that claimant violated the employer's policy, much less that he did so willfully or with wanton negligence.

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

DECISION: Hearing Decision 15-UI-38329 is set aside, as outlined above.¹

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: July 8, 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.

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.

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