

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0610

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 83433). The employer filed a timely request for hearing. On April 28, 2015, ALJ Wipperman conducted a hearing, and on May 6, 2015, issued Hearing Decision 15-UI-38043, affirming the Department's decision. On May 26, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Securitas Security Services, Inc. employed claimant, last as a lead security officer, from December 11, 2013 to February 17, 2015.

(2) The employer expected its employees to refrain from falsifying any company record or providing false information to management. Claimant was aware of the employer's expectation.

(3) During February 2015, the employer assigned claimant to work as a lead security officer on the filming site of a television show. On the site was a porta-lisa, a mobile restroom used by the cast and crew of show. The porta-lisa had two sets of keys, an original and a replacement set, which had a green tab on it. On February 6, 2015, the television show site manager reported to the employer that the keys to the porta-lisa were missing. Claimant's supervisor directed claimant to ascertain the whereabouts of the keys. Claimant contacted the overnight security officer, learned that she had keys to the porta-lisa, travelled to her residence, retrieved the green-tabbed set of keys, returned them to the filming location and reported to his supervisor that he had done so.

(4) On February 10, the overnight security officer reported to the employer that she still had a set of keys. On February 11, the television show site manager reported to the employer that the original set of

keys to the porta-lisa was still missing. On February 12, claimant confirmed to the employer that he had retrieved and returned a set of keys to film site.

(5) On February 17, 2015, the employer concluded claimant had been untruthful about retrieving the keys and reporting that he had done so and discharged him for dishonesty.

CONCLUSIONS AND REASONS: We agree with the Department and 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.

The employer discharged claimant for dishonesty in reporting to the employer that he had retrieved and returned keys to the porta-lisa when, it asserted, he had not. At hearing, the employer provided only hearsay evidence in support of its conclusion that claimant had been dishonest. Claimant testified under oath that he retrieved from the overnight security officer a green tabbed set of keys for the porta-lisa, returned it to the filming site, gave the keys to the officer on duty and watched him hang the keys up. Audio Record ~ 21:30 to 26:00. Neither the overnight security officer nor the officer on duty to whom claimant asserted he gave the keys was offered as a witness, and consequently, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias. On this record, the employer had the alternative of presenting live testimony from current or former employees to substantiate its allegations, and the facts sought to be proved were central to its assertion of misconduct. Weighing the evidence as a whole, there seems to be no reason to accept the employer's hearsay evidence over claimant, leaving the evidence, at best, equally balanced. Where the evidence on an issue in dispute is equally balanced, the party with the burden of production, here the employer, has failed to provide substantial evidence¹ in support of the fact in issue, here, that claimant failed to retrieve and return the keys as he described and thereafter was willfully dishonest to the employer in reporting he had done so.

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 failed to meet its burden here. Claimant was discharged, but not for misconduct under ORS 657.176(2)(a) and he is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 15-UI-38043 is affirmed.

¹ See, *Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

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

DATE of Service: July 13, 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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