

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1172

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 9, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 164643). The employer filed a timely request for hearing. On September 1, 2015, ALJ R. Davis conducted a hearing, and on September 9, 2015, issued Hearing Decision 15-UI-44023, affirming the Department's decision. On September 28, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Interstate Group LLC employed claimant as a parts and service manager from October 25, 2011 to June 18, 2015.

(2) The employer's written policy prohibited employees from "[c]ontributing to unsanitary conditions in the workplace or performing poor housekeeping tasks." Exhibit 1. As the parts and service manager, claimant also was expected, "at the end of the day... to keep the – the shop, and anything that they've been working on... organized." Transcript at 6. On January 28, 2015, claimant acknowledged receiving and understanding the employer's written policy and was otherwise aware of the employer's expectations.

(3) In March 2015, the employer received a report that the lot where claimant worked was not clean and organized, trailers were out of place, equipment was broken or not working and that trash was overflowing out of a garbage can, among other things. The employer gave claimant a corrective action

notice that notified him that he was expected to keep the lot “clean, organized and under control at all times” through his own efforts or that of his assistant. Exhibit 1.

(4) On June 16, 2015, during the work day, claimant and his assistant worked on different trailer repair projects in different areas of the employer’s yard with parts, tools and some debris from the repairs on the ground nearby. While they worked, two loads of trailers were delivered to the employer’s lot, and claimant immediately had to leave his repair project and unload the deliveries with a forklift, leaving various tools and parts scattered on the ground. A delivery driver took photos of the lot and sent it to the employer. The pictures reportedly showed “tools...left out and not secured away” but “left where...they were last worked on, “debris all over” and that claimant “had not cleaned up his work area after doing a job...or the night before” and that the parts area was “not clean” and “unorganized.” Transcript at 6.

(5) On June 18, 2015, after viewing the photos and before speaking to claimant, the employer concluded claimant was “not taking any pride in his work” or “acting as a manager” and that it was best for the employer to “move in another direction.” The employer discharged claimant that day for that reason. Exhibit 1.

CONCLUSIONS AND REASONS: We agree with the Department and 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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer’s expectation. Here, the employer failed to satisfy that evidentiary burden.

As a preliminary matter, we agree with the ALJ that the employer chose not to discharge claimant until after it reviewed the photos taken of its premises on June 16, 2015. The discharge analysis initially is focused on the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. Hearing Decision 15-UI-43668 at 5. *See e.g. Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that “triggered” the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the “final straw” that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred when it did). Here, the initial analysis of whether claimant’s

discharge disqualifies him from unemployment benefits is, therefore, properly limited to the employer's complaints regarding the condition of its premises based on the June 16 photos.

To substantiate its complaints based on those photos, the employer presented testimony from its district manager, who was not present on the day in question, and did not offer testimony from the truck driver who took the photos, its store manager or the assistant parts and service employee who was working with claimant. Nor did the employer offer copies of the photos in question or any evidence regarding when they were taken on June 16. Claimant asserted that when the delivery trucks arrived, he and his assistant were in the middle of separate repair projects in different parts of the lot and he was immediately pulled off of this project to unload the deliveries with a forklift. Transcript at 23. He also asserted he had to pull his assistant off the project he was working on to help him unload the deliveries that it was "not the normal status of my lot to – to be messy like that...and just a bad timing on when the picture was taken." *Id.* While the district manager's assertions may have been sufficient for the employer to decide to "move in another direction" and discharge claimant on June 18, without more, they were insufficient for the employer to meet its burden to establish that claimant violated the employer's expectations at the time and place in question, much less that he did so consciously at that time.

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-44023 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 30, 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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