

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1252

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73634). Claimant filed a timely request for hearing. On October 9, 2015, ALJ Vincent conducted a hearing, and on October 15, 2015 issued Hearing Decision 15-UI-45971, affirming the Department's decision. On October 20, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument 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 the argument when reaching this decision.

FINDINGS OF FACT: (1) Whit-Log Inc. employed claimant from June 20, 1996 to August 11, 2015.

(2) The employer expected employees to report for work as scheduled unless the employer allowed them to take time off. Claimant understood that expectation.

(3) On Friday, August 7, 2015, claimant told the employer's owner that he was taking Monday, August 10, 2015 off from work. The owner allowed claimant to take the day off. Claimant took the day off to file some paperwork regarding an addition to his house on the Oregon coast. However, other employees informed the owner that claimant had taken the day off to go fishing.

(4) The employer discharged claimant because the owner mistakenly believed claimant had taken the day off to go fishing.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's discharge was 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. OAR 471-030-0038(1)(c) defines wanton 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 acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. 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). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 15-UI-45971, the ALJ found as fact that claimant decided to go fishing on August 10, 2015, did not want to tell the employer's owner why he wanted the day off, and therefore told the owner he was taking the day off due to unspecified exigent circumstances.¹ Based on those findings, the ALJ found that the employer discharged claimant for "misrepresenting an exigency that required him to miss work," and concluded that the employer discharged claimant for misconduct.²

However, the ALJ's finding that claimant misrepresented his reason for wanting August 10 off from work is not supported by the record, which shows only that that claimant told the owner he taking the day off, and that the owner allowed him to do so. Audio Record at 5:20, 13:00-16:45. The employer's evidence that claimant took the day off to go fishing consisted entirely of hearsay, and is outweighed by claimant's sworn testimony that he took the day off to file some paperwork regarding an addition to his house on the Oregon coast. Audio Record at 8:00, 15:20-15:45. The employer therefore did not discharge claimant for misrepresenting his reason for wanting the day off, but because the owner mistakenly believed that claimant had taken the day off to go fishing. Absent a showing claimant engaged in the conduct for which he was discharged, the employer failed to establish that it discharged him for misconduct.

DECISION: Hearing Decision 15-UI-45971 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell.

DATE of Service: November 10, 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 Hearing Decision 15-UI-45971 at 1.

² *Id.* at 3.

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