

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1273

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 28, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 94329). Claimant filed a timely request for hearing. On October 13, 2015, ALJ Murdock conducted a hearing, and on October 16, 2015 issued Hearing Decision 15-UI-46059, reversing the Department's decision and concluding claimant voluntarily left work without good cause. On October 27, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) NW Navigator, LLC employed claimant as a taxi driver in its Nike Taxi division from June 11, 2015 until June 30, 2015.

(2) On June 29, 2015, the vehicle that claimant was assigned to drive did not have a radio, which the employer expected it to have. Claimant informed the employer's site manager of the absence of a radio and he understood the manager to direct him to remove a radio from another vehicle and to place it in his assigned vehicle. Claimant did so. The site manager told claimant that he had not been listening and that he had instructed claimant to obtain the needed radio from a supply of available radios in the office. Claimant disagreed and stated that he had done what the site manager told him to do.

(3) On June 30, 2015, at the beginning of his shift, the site manager instructed claimant to pick up a customer at a particular location and to transport the customer to another location. The site manager gave claimant written instructions to accomplish this task. Those instructions were incorrect and claimant did not pick up the customer on time. Claimant corrected the written instructions and turned those corrections in to the site manager. The site manager told claimant that he would not have been late in picking up the customer if he had listened to the instructions of the dispatcher. Based on claimant's statements during this interaction and that on June 29, 2015, the site manager concluded that claimant had a "very poor attitude." Audio at ~12:34.

(4) On June 30, 2015, near the end of claimant's shift, the site manager asked to speak with claimant out in a hallway adjacent to the dispatcher's office. The site manager told claimant that he thought they were having communication problems that they needed to "clear up." Audio at ~24:22; *see also* Audio at ~12:52. The site manager and claimant disagreed on the nature of the problem. Claimant stated that he thought the site manager had a problem with him. The site manager responded that if claimant did not like his behavior, "There's the door." Audio at ~24:37, ~24:58. Claimant told the site manager that he was not going to quit work. The site manager told claimant that he was discharged. The site manager then walked back into the dispatcher's office and told the employees in the office that he had "terminated" claimant. Audio at ~25:03, ~39:38, ~40:45.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for misconduct.

In Hearing Decision 15-UI-46059, the ALJ concluded that claimant's work separation was a voluntary leaving based on the testimony of the employer's site manager that he had not discharged claimant, but that claimant had "walked off the job" in the middle of their June 30, 2015 discussion. Hearing Decision 15-UI-46059 at 3. The ALJ disregarded the testimony of claimant that he had been discharged, and disregarded that claimant's witness as "less than impartial." Hearing Decision 15-UI-46059 at 3. Having decided that the work separation was a voluntarily leaving, the ALJ concluded that claimant was disqualified from benefits under OAR 471-030-0038(4) (August 3, 2011) because he did not show good cause for leaving work when he did. We disagree with the ALJ's finding about the nature of the separation and disagree that claimant is disqualified from benefits based on the work separation.

OAR 471-030-0038(2) sets out the standard for determining whether a work separation is properly characterized as a voluntary leaving or a discharge. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but is not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The testimony of claimant and the employer's witnesses about the facts giving rise to the work separation, and whether it was a voluntary leaving or a discharge, was irreconcilable. Audio at ~12:06, ~13:19, ~22:40, ~25:03. Both parties were interested in the outcome of the hearing, and there is no reason in the record to conclude, as the ALJ did, that one party had a greater bias. In addition to the factors considered by the ALJ in determining the nature of the work separation, there are other factors to consider. First, while the employer's chief executive officer (CEO) kept detailed notes on all of claimant's conversations with the site manager throughout his employment, he did not have any notes summarizing the final conversation between claimant and the site manager. Audio at ~18:31 *et seq.* If claimant had, in fact, quit, it is noteworthy that the substance of that final conversation was missing from the employer's otherwise relatively comprehensive documentation. Second, the CEO testified that he and the site manager were in apparent disagreement before June 30, 2015 about whether to continue to "try to work with [claimant]" given the site manager's perception of his attitude, which suggests that the site manager wanted to discharge claimant close in time to the final conversation. Audio at ~28:40. The likelihood that the site manager discharged claimant is further strengthened by the CEO's testimony referring to having had several conversations with the site manager about claimant "before [the site manager] let him go," suggesting that the work separation was initiated by the site manager and was involuntary on claimant's part. Audio at ~21:50. Finally, we found the testimony of claimant's live-in

girlfriend that the site manager admitted he had terminated claimant reliable. Although claimant's girlfriend might be assumed to have some bias in favor of claimant, her testimony was based on her contemporaneous notes about the events she witnessed on June 30, 2015, before claimant's work separation was an issue. Her testimony had other hallmarks of reliability, including that she did not purport to have overheard the details of the conversation or claimant's actual discharge, but only that she was present when the site manager told a group of employees in the dispatch office that he had just "terminated" claimant. Audio at ~39:15, ~40:48. Based on the totality of the evidence, we conclude that it is more likely than not that claimant's work separation was a discharge on June 30, 2015.

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) 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 carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Because the employer contended that it did not discharge claimant, it identified no reasons for why it might have done so. It can be discerned from the record, however, that the employer was concerned about claimant's poor attitude, his alleged failure to listen to and follow instructions, his alleged behavior with customers and the language he allegedly used when speaking to the site manager. Audio at ~12:18, ~14:43, ~15:10, ~18:31, ~19:00, ~19:22. For each incident that the employer's witnesses described, claimant presented a plausible explanation for his alleged behavior or denied that the event had occurred. Audio at ~25:34, ~27:09~28:48, ~29:20. In a discharge case, where the evidence on a disputed issue is evenly balanced and, as here, there is no principled reason to prefer the testimony of one party over the other, the uncertainty in the evidence must be resolved against the employer, since it is the party with the burden of persuasion. As such, the employer did not meet its burden to show that claimant engaged in misconduct for which he was discharged on June 30, 2015.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-46059 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 24, 2015

NOTE: 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.

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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