

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1378

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 114426). The employer filed a timely request for hearing. On October 27, 2015, ALJ M. Davis conducted a hearing, and on November 3, 2015 issued Hearing Decision 15-UI-47043, affirming the Department's decision. On November 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Oakcraft Manufacturing, Inc. employed claimant from January 2014 until June 19, 2015, last working as a parts preparation person.

(2) The employer expected claimant to notify it if he was not going to report on a day when he was scheduled to work. Claimant understood the employer's expectation.

(3) Claimant had a history of alcohol abuse. The employer was aware of claimant's history.

(4) Claimant lived in a trailer on the employer's property. On June 18, 2015 at approximately 7:15 a.m., the employer's owner went to claimant's trailer to check on him. Claimant told the owner that he was not feeling well and was not going to report for work that day. At approximately 9:15 a.m., the owner again visited claimant's trailer and told claimant that he needed him at work. Claimant again told the owner that he was sick and was unable to report for work. Claimant spent the rest of the day in bed.

(5) On June 19, 2015, claimant reported for work as scheduled. The owner told claimant that he was discharged.

CONCLUSIONS AND REASONS: 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 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).

The employer's owner testified that the employer discharged claimant because he failed to notify the employer of his absence on June 18, 2015, and not because he failed to report for work that day. Audio at ~8:16, ~13:30, ~45:25. While the employer's owner testified about claimant's past behavior in not reporting for work and not notifying the employer of those prior absences, and the owner's belief that claimant missed work on these occasions due to intoxication, he was clear that claimant's alleged failure to notify the employer of his absence on June 18, 2015 was the "final straw" that caused him to discharge claimant. Audio at ~10:13, ~12:18, ~14:20, ~14:58, ~45:28. When several alleged instances of a claimant's alleged failure to comply with the employer's standards are set out at hearing as justifications for the discharge, EAB customarily limits its inquiry to the final instance of alleged misconduct, or the precipitating cause of the discharge, to determine whether claimant is disqualified from benefits. See *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). This approach is appropriate where, as here, the employer was aware of claimant's alleged past transgressions at or around the time they occurred and did not discharge claimant on those occasions, presumably because claimant's behavior on the previous occasions were not considered to merit discharge. Claimant's alleged failure to notify the employer of his absence of June 18, 2015 is therefore the proper focus of the inquiry into whether any misconduct led to claimant's discharge.

Claimant agreed that he understood the employer expected him to notify it if he was going to be absent from work. Audio at ~22:06. The employer's owner contended that he visited claimant's trailer at 7:15 a.m. on June 18, 2015 and found it unoccupied when claimant, without notice, did not appear at work. The owner contended that later that day, at around 9:00 a.m., he observed claimant returning from a local market with a bag that appeared to contain beer and when he spoke to claimant shortly thereafter in his trailer, claimant appeared to be intoxicated. Audio at ~7:13, ~43:41. Claimant contended that he was not intoxicated on June 18, 2015, that he notified the owner at 7:15 a.m. and again at approximately 9:15 a.m. when the owner visited his trailer a second time that he was sick and not able to report for work, and that he remained in bed, sick, the remainder of day on June 18, 2015. Audio at ~22:14, ~23:06, ~23:50, ~24:18, ~25:05. Although their testimonies were in conflict, both parties appeared credible and there was no reason in the record to prefer the testimony of one over the other. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer since it is the party who carries the burden of persuasion in a discharge case. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, given claimant's rebuttal, the employer did not demonstrate, more likely than not, that claimant failed to notify it of his absence on

June 18, 2015. Accordingly, the employer did not meet its burden to show that claimant engaged in misconduct on June 18, 2015.

The employer discharged claimant but did not show that it was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-47043 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 29, 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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