

EMPLOYMENT APPEALS BOARD DECISION

2015-EAB-1638

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 95008). Claimant filed a timely request for hearing. On December 11, 2014, ALJ S. Lee conducted a hearing, and on December 17, 2014 issued Hearing Decision 14-UI-30552, concluding the employer discharged claimant, but not for misconduct. On January 5, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) J Meyers Construction LLC employed claimant as a carpenter from July 31, 2013 to May 23, 2014.

(2) On May 13, 2014, the employer's senior carpenter reported to the employer's owner that claimant was not performing his assigned tasks, and instead sitting in his vehicle. The owner told the senior carpenter, "Okay, well just give him a couple minutes, I'm sure it'll be all right." Transcript at 7. The owner later warned claimant that he was expected to perform his assigned tasks.

(3) On May 14, 2014, the employer's owner learned that the owner of a home near claimant's job site had accused claimant of theft. The employer discharged claimant for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

At hearing, the employer's owner initially testified that claimant was discharged for sitting in his vehicle instead of performing his assigned tasks on May 13, 2014, and because the owner of a home near claimant's job site accused claimant of theft. Transcript at 5. However, the owner then testified that on May 13, 2014, he instructed the senior carpenter to give claimant a couple of minutes to return to work, and later warned claimant that he was expected to perform his assigned tasks. Transcript at 7, 9. The owner testified that he decided to discharge claimant only after he learned that claimant was being investigated for theft of the homeowner's property. Transcript at 9. The owner's own testimony therefore shows the employer discharged claimant because the homeowner accused him of theft, and not because of his allegedly insubordinate behavior on May 13, 2014. However, the owner did not assert, and the record fails to show, that claimant committed theft of the homeowner's property. Absent such a showing, we cannot find that the employer discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-30552 is affirmed.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: February 17, 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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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