

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0018

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 123427). The employer filed a timely request for hearing. On December 21, 2015, ALJ Vincent conducted a hearing, and on December 29, 2015 issued Hearing Decision 15-UI-50023, reversing the Department's decision. On January 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that presented information he did not offer at the hearing. Claimant did not explain why he was not able to present this information during the hearing and did not show, as required by OAR 471-030-0041 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from doing so. For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Kaiser Foundation Health employed claimant as a housekeeper from January 2, 2009 until October 16, 2015.

(2) The employer expected claimant to work only the hours he was scheduled unless a supervisor or a lead worker authorized claimant to work additional hours. Claimant understood the employer's expectations.

(3) Beginning sometime before January 2015, claimant was regularly scheduled to work five days per week, five hours per shift at one particular building. Before January 2015, it was a "common practice" for the manager of environmental services, or one of his lead workers, to ask claimant to work up to three additional hours on each of his scheduled work days at other of the employer's buildings. Transcript at 15, Claimant's supervisor, who approved claimant's time card, was usually not informed that claimant was authorized to work these additional hours and the supervisor would call the manager

of environmental services to confirm claimant's authorization before he approved the time card. The manager of environmental services never told claimant's supervisor that claimant had not had authorization to work the additional hours that were shown on claimant's time card. Around January 2015, claimant's supervisor stopped contacting the manager of environmental services to confirm that claimant was authorized to work additional hours since he always received confirmation that claimant was and he simply approved claimant's time cards without further inquiry.

(4) From January 2015 through August 2015, the manager of environmental services and his leads continued to ask claimant to work additional hours in various of the employer's buildings. During these additional hours, claimant was asked to, among other things, clean and wax floors, clean carpets, clean sinks and clean counters. Claimant performed this additional work and listed it on his time card for the week in which it was performed.

(5) Sometime in approximately summer 2015, the manager of environmental services audited the budget for his department and thought he had not authorized claimant to work all of the additional hours shown on his time cards for the months of January 2015 through mid-August 2015. On August 11, 2015, claimant's supervisor spoke with claimant about his authorization to work the additional hours listed on his time cards. Claimant told his supervisor that he had performed the additional work at the request of the manager of environmental services or one of his leads.

(6) On October 16, 2015, the employer discharged claimant, believing he had worked additional hours between January 2015 and August 2014 without authorization.

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).

In Hearing Decision 15-UI-50023, the ALJ concluded that the employer demonstrated it discharged claimant for misconduct. The ALJ stated that claimant was aware the employer prohibited him from working hours in excess of those for which he was scheduled without permission and, without any analysis of the facts in dispute, the ALJ asserted that claimant had done so and had thereby violated the employer's standards with at least wanton negligence. Hearing Decision 15-UI-50023 at 3. We disagree.

The employer conceded that the manager of environmental services himself or through one of his leads very often authorized claimant to work additional hours without informing claimant's supervisor. Transcript at 15. While the manager of environmental services testified at hearing that he had authorized claimant to work additional hours on only five separate days between January 2015 and August 2015, his testimony was not sufficiently detailed to rule out the possibility that he might have requested claimant to work additional hours on additional days and did not recall them or that one of his

leads might have, without his knowledge, asked claimant to work additional hours on additional days. Transcript at 17-18. In contrast, claimant testified forcefully that he had never performed additional work on his own initiative or without a supervisor or lead's authorization. Transcript at 20-22. There is no reason in the record to find the testimony of one party more credible than the other, and the evidence on this disputed fact is evenly balanced. In such a situation, the uncertainty must be resolved against the employer since it 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, the employer did not show by a preponderance of the evidence that claimant worked additional hours beyond those for which he was scheduled without a supervisor or lead's permission. The employer therefore did not demonstrate that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not show that its discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-50023 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 22, 2016

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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