

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0223

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113951). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Wyatt conducted a hearing, and on February 23, 2016 issued Hearing Decision 16-UI-52563, reversing the Department's decision. On February 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument which offered new facts that it did not present during the hearing. The employer did not explain why it was not able to present this information at the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the new information that the employer sought to present in its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Northwest Staffing Resources, Inc., an employee leasing company, employed claimant from January 13, 2015, when he began an assignment with its client Eyelevel, until December 4, 2015, the date on which Eyelevel ended claimant's assignment.

(2) The employer expected claimant to treat others who worked on Eyelevel's premises reasonably. Claimant understood the employer's expectation as a matter of common sense and as he reasonably interpreted it.

(3) In June 2015, Eyelevel promoted claimant to the position of floor supervisor in its warehouse. Sometime later, claimant's supervisor at Eyelevel told claimant that "if someone does not obey the orders to come and get him [the supervisor]." Audio at ~17:12

(4) On December 4, 2015, claimant was supervising the work of ten or twelve workers for Eyelevel. Sometime between 2:00 p.m. and 2:30 p.m., claimant told the workers that they all needed to work to get certain items out of the warehouse for delivery. One of the workers told claimant he "didn't want to

help” and then said some “derogatory things” to claimant. Audio at ~15:18. Claimant and the recalcitrant worker “went back and forth for a few minutes” until the worker started helping. Audio at ~15:30. The remainder of the shift proceeded without incident, and claimant left the workplace for home at 5:00 p.m.

(5) On December 4, 2015, at around 7:00 p.m., claimant’s supervisor at Eyelevel called claimant and told him that his work assignment was over because he had dealt with the recalcitrant worker on his own rather than seeking the assistance of the supervisor. Sometime later, a representative from Eyelevel informed the employer that Eyelevel had terminated claimant’s work assignment on December 4, 2015.

(6) On December 9, 2015, the employer informed claimant that he was discharged due his involvement in an altercation with another worker for Eyelevel on December 4, 2015.

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).

At the outset, the employer’s witness contended that it discharged claimant not only because its client Eyelevel was unwilling after December 4, 2015 to allow claimant to continue with his assignment, but also because of other prior instances in this assignment and in prior assignments with Eyelevel and other clients, when claimant allegedly engaged in misconduct. Audio at ~ 6:52; Exhibit 1 at 1-2. However, EAB customarily focuses on the final act that precipitated claimant’s discharge to determine whether claimant was discharged for misconduct. *Appeals Board Decision*, 13-AB-0341, March 28, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the event that “triggered” the discharge); *Appeals Board Decision*, 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); *Appeals Board Decision*, 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); *Appeals Board Decision*, 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). The focus of the discharge analysis is narrowed in this manner for the common sense reason that the employer must necessarily have determined that the prior alleged prior instances of misconduct did not merit discharge, and it was only the precipitating reason that the employer considered sufficiently weighty for discharge. Claimant’s behavior on December 4, 2015, which was the reason the Eyelevel terminated claimant’s assignment, is therefore the proper focus EAB’s analysis of whether the employer discharged claimant for misconduct.

The employer had no first-hand information about the incident that occurred during claimant’s assignment with Eyelevel that caused Eyelevel to end his assignment. It discharged claimant based on a report from a representative from Eyelevel that claimant had an “altercation with another employee” at

Eyelevel on December 4, 2015. Audio at ~10:58. The only specific information about the alleged “altercation” came from claimant, and it was first-hand. As claimant described the incident, he exchanged a few words, as floor supervisor, with a subordinate employee who was reluctant to work and then the recalcitrant worker then started working. Audio at ~15:00. While claimant offered the information that his Eyelevel supervisor had told him to seek the supervisor’s assistance if a subordinate employee did not “obey the orders,” it is not at all clear that in the interaction between claimant and the subordinate, the subordinate had refused to “obey orders” since the subordinate ultimately started working after getting “a little verbal.” Audio at ~15:44, ~17:22.

Given claimant’s un rebutted description of the interaction, the employer did not demonstrate that claimant engaged in an “altercation” with the subordinate worker, as that term is commonly understood. Nor did the employer show that claimant willfully or with wanton negligence failed to comply with his Eyelevel supervisor’s instruction to have the supervisor intervene when one of claimant’s subordinates failed to follow his orders, since there was significant ambiguity about whether and if the interaction with the subordinate ever reached the point that the subordinate refused to follow claimant’s instructions, which was the triggering event for claimant to seek the intervention of his supervisor.

The employer therefore failed to establish claimant was discharged for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 16-UI-53563 is affirmed.

J. S. Cromwell and D. P. Hettle;
Susan Rossiter, not participating.

DATE of Service: March 22, 2016

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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