

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0263**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On January 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 152619). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Shoemake conducted a hearing, and on February 22, 2016, issued Hearing Decision 16-UI-53436, concluding that the employer discharged claimant, but not for misconduct. On March 9, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

On March 25, 2016, the employer's attorney submitted a "Motion to Offer New Information." The information the employer wishes to have EAB consider consists of a case report prepared by the Sunriver Police Department which summarizes the computer crimes allegedly committed by the claimant, and a November 5, 2015 memorandum in which the employer notified claimant that his employment had been terminated. EAB may consider information not offered at the hearing if the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. In support of its request, the employer's attorney stated that the case report "was not in the possession of the Employer's representative." The employer's attorney provided no explanation why the employer's representative did not have the case report at the hearing. Without further details, we have no reason to conclude that any circumstances beyond the employer's reasonable control prevented it from offering the case report at the hearing. The employer's attorney provided no explanation why the November 5 memorandum, which was presumably in the employer's possession, was not offered into evidence at the hearing. The employer's request to have EAB consider new information is therefore denied.

**FINDINGS OF FACT:** (1) Sunriver Service District (employer) employed claimant as a firefighter and paramedic from August 25, 2005 until November 4, 2015. The employer is a service district for the community of Sunriver that includes a police and fire department.

(2) The employer's standards of conduct required that employees properly use and care for the employer's property and equipment. Claimant knew about and understood the employer's standards of conduct as a matter of common sense and because he received copies of the employer's policies when the employer hired him. In addition, copies of the standards of conduct were posted in the fire station where claimant worked.

(3) On or about January 12, 2015, an employee asked the fire chief if the employer was going to conduct an examination for the position of captain. The fire chief asked the employee why he was asking this question, and the employee responded that he had seen a bid from a vendor about conducting a captain's examination on one of the office computers. The employee showed the document to the fire chief on the computer where he found it; this was a computer to which all employees had access. The fire chief recognized the document as an attachment to an email he had received. The attachment consisted of a letter from a vendor that was going to conduct an assessment center for a hiring process the employer was planning. The fire chief had opened the letter on his computer and saved it to his desktop.

(4) The fire chief consulted the employer's IT department and was told that an individual had probably accessed the chief's email by using the administrator's password. The fire chief then contacted the Sunriver police department and the police department conducted an investigation into possible unauthorized access of the fire chief's computer.

(5) During the course of the police department's investigation, which lasted several months, claimant and his union representative were interviewed. Claimant denied that he had engaged in any unauthorized access of the employer's computers or computer records.

(6) On October 8, 2015, the Sunriver police department arrested claimant. He was eventually charged with 69 counts of computer crimes.

(7) On November 4, 2015, the employer discharged claimant because it believed it had violated its standards of conduct regarding proper use of the employer's equipment by engaging in unauthorized access of the employer's computer records.

(8) Claimant pled not guilty to the computer crimes with which he was charged. He is scheduled to go to trial on May 11, 2016.

**CONCLUSION AND REASONS:** We agree with the ALJ and conclude that 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. 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's standards of conduct required that employees make proper use of the employer's equipment. Claimant knew and understood this standard. The employer discharged claimant because it believed he violated this standard when he accessed employer computer records he had no authority to view.

Claimant denied that he ever engaged in any unauthorized access of the employer's computer records, and pled not guilty to the computer crimes with which he was charged. The fire chief, the employer's representative at the hearing, testified about the results of the investigation the Sunriver police department conducted into claimant's conduct that resulted in claimant being charged with computer crimes. The fire chief discharged claimant based on the results of this investigation, which included accounts of two eyewitnesses who asserted they had seen claimant accessing email accounts on an office computer, and which concluded that claimant had used the administrator's password to access four email accounts -- those of the fire chief, assistant fire chief, office manager and a captain. Transcript at 14-15. Absent any reason to doubt claimant's credibility (and we find none on this record), we give greater weight to claimant's first hand testimony about his conduct than to the hearsay testimony of the fire chief. We therefore conclude that the employer failed to meet its burden to demonstrate that claimant engaged in misconduct by accessing employer's computer records he had no authority to view.

**DECISION:** Hearing Decision 16-UI-53436 is affirmed.

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

**DATE of Service:** March 28, 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](http://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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