

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0289

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93731). The employer filed a timely request for hearing. On February 25, 2016, ALJ Monroe conducted a hearing, and on March 4, 2016 issued Hearing Decision 16-UI-54455, affirming the Department's decision. On March 10, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Washington County employed claimant as a park superintendent from July 11, 2012 to December 11, 2015.

(2) The employer reasonably expected that claimant would provide truthful information on his application for employment. In addition, the employer expected that claimant would accurately manage his employees' time cards, responsibly steward the employer's funds, and generally comply with the employer's policies. Claimant understood the employer's expectations.

(3) On October 26, 2015, the employer received a complaint that \$373 was missing from the ranger station attendants' till bags. The employer began an investigation into claimant's management activities.

(4) Claimant allowed ranger station attendants' cash to be stored off-season in an on-site safe instead of returning it to the vault. Claimant believed that storing the money in the safe was sufficient to secure it. He believed that the safe code and keys were securely stored. Through the employer's investigation, claimant learned that some of the money was missing and the code and keys were not secure.

(5) Through its investigation, the employer developed other concerns about claimant's work performance. Claimant approved an employee's time sheets on which the employee claimed she had worked on four occasions she had been absent, and indicated that she had worked a full day on one occasion when she had only worked an hour. Claimant relied upon employees to accurately report their

time without claimant verifying the time sheets or cross-checking them against other sources. Claimant did not realize when he was approving the employee's time sheets that the time sheets were inaccurate, and did not realize that he should be cross-checking them for accuracy.

(6) The employer learned that claimant left work with a previous employer after having been accused of dishonesty, a conflict of interest, behavior that caused discredit to the employer, and failure to properly perform his job duties. When claimant had applied for his job with the employer, however, claimant reported that he had resigned from that job, and certified that the information was truthful. The employer concluded that claimant had been dishonest about the work separation from his previous employer. Claimant believed he was being truthful about his work separation, however, because he resigned from his previous employment in lieu of a potential discharge while the allegations were pending and before any disciplinary action was taken against him based on those allegations.

(7) The employer learned that an employee's son had disposed of personal items in one of the employer's dumpsters. The employer investigated and determined that the quantity of items disposed of filled more than half the dumpster, and cost the employer several hundred dollars to empty. The employer also learned that claimant was aware after-the-fact of the employee's son's use of the dumpster, and concluded that claimant should have reported the incident, made the employee's son remove the personal items, or paid for the waste removal. Claimant learned about the employee's son's actions after they occurred, and also learned that a lead worker had authorized the dumpster's use. Claimant warned the lead worker and the employee whose son had used the dumpster that they had violated the employer's policy. Claimant believed that the employee's son had only disposed of a small amount of personal materials, however, so he did not report the matter to the employer or require the employee or her son to remove the personal items from the dumpster.

(8) The employer concluded that claimant had repeatedly failed to perform his duties and violated the employer's policies and procedures. On November 24, 2015, the employer notified claimant of a pre-disciplinary meeting scheduled for November 30, 2015. On December 10, 2015, the employer notified claimant that his employment would be terminated effective December 14, 2015 at 5:00 p.m. The employer notified claimant that, if he chose, he could resign in lieu of termination by submitting a resignation to the employer prior to the effective date of his termination. On December 14, 2015, claimant submitted a resignation to the employer and the employer accepted it.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

At the time claimant submitted his resignation, he had been suspended from work and his involuntary separation from work was both inevitable and imminent. There is nothing in this record indicating that claimant was unwilling to continue working for the employer at the time, had the employer allowed it, but the employer would not allow him to continue working. The work separation was, therefore, a discharge.

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) 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. The employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

There is little dispute in this record that the employer held claimant to certain standards of behavior and that claimant either failed to meet or violated those standards. The employer considered his performance deficient in many respects, alleging that claimant did not adequately supervise his employees or safeguard the employer's resources. In addition, the employer alleged that claimant did not fully disclose the circumstances under which his previous employment had ended. The employer therefore clearly had good business reasons for choosing to end claimant's employment. For claimant's conduct in those instances to be considered misconduct that disqualifies him from receiving unemployment insurance benefits, however, claimant must have acted willfully or with wanton negligence. The record in this case fails to show that he did because, in each instance cited by the employer, claimant was either unaware that his conduct was inconsistent with the employer's expectations or appears to have sincerely believed that he was complying with them. Absent evidence showing that claimant violated the employer's expectations intentionally or with a conscious indifference to the standards of behavior the employer had the right to expect of him, the employer has not established that claimant engaged in disqualifying misconduct.

We therefore conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-54455 is affirmed.

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

DATE of Service: April 5, 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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