

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0326

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131309). Claimant filed a timely request for hearing. On February 26, 2016, ALJ Vincent conducted a hearing, and on March 4, 2016 issued Hearing Decision 16-UI-54421, affirming the Department's decision. On March 23, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a). We did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) J. R. Ventures, Inc. employed claimant as an evening supervisor at its pizza restaurant from May 12, 2012 to December 5, 2015.

(2) The employer expected claimant to report to work on time and accurately report his departure times on his time card. Claimant understood those expectations as a matter of common sense. Claimant had a significant history of tardy arrivals and regularly failed to use his time card to record his arrival and departure times, and the employer's owner had spoken with claimant about those matters.

(3) On approximately November 28, 2015, the employer scheduled claimant to work until 9:00 p.m. Claimant did not clock out on his time sheet when he left work that night. On November 29, 2015, the owner asked claimant what time he left, and claimant replied that he had left at or around "9:00."¹ The owner spoke with claimant's coworkers about his departure time, and concluded that claimant had actually left work at 8:30 p.m. The owner also concluded claimant was dishonest about his departure time. On December 5, 2015, the employer discharged him for those reasons.

¹ Audio recording at ~ 23:00 (claimant said, unsworn, during his cross examination of the employer's witness that he initially told the owner he left "around 9:00"); 25:00 (claimant said he told the owner he left "at 9:00").

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude 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.

The ALJ found as fact that claimant initially told the employer's owner that he left work at 9:00 p.m., then later returned and said he had left at 8:30 p.m. The ALJ summarily concluded that claimant "intentionally violated the employer's expectations" by providing a false report to the owner about his departure time, and that his discharge was for misconduct. Hearing Decision 16-UI-54421 at 3. We disagree.

In a discharge case, the employer has the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore must show that it is more likely than not that claimant engaged in the conduct alleged. In this case, the ALJ's finding that claimant left early, which formed the basis of his conclusion that claimant was dishonest, was based on the employer's owner's testimony that claimant left work at 8:30 p.m., which claimant refuted. The owner testified that claimant's coworkers confirmed claimant left work at 8:30 p.m.; claimant testified that his coworkers did not see him leave at that time and provided a written statement to that effect from one of the coworkers the employer alleged had said he left work at 8:30 p.m. The owner testified that claimant recanted his initial statement and admitted that he left work at 8:30 p.m.; claimant denied having done so. The parties' evidence is in dispute, but the record does not show a sufficient basis to believe one party over the other.² Therefore, the parties' testimony about what time claimant left work on November 28th has equal weight, and the evidence about what time claimant left work on November 28th is equally balanced. Because the evidence is equally balanced, the employer has not proven that it is more likely than not that claimant left work at 8:30 p.m. on November 28th, or that he was dishonest about what time he left.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not subject to disqualification from receiving unemployment insurance benefits because of this work separation.³

DECISION: Hearing Decision 16-UI-54421 is set aside, as outlined above.⁴

² In weighing the probative value of the parties' testimony, we observed that both parties' credibility was somewhat undermined by their conduct during the hearing. Claimant was somewhat evasive when answering the ALJ's questions about the employer's expectations, and the employer's owner engaged in inappropriate behavior throughout claimant's testimony (nearly constant negative commentary, making laughing, sighing and scoffing noises to audibly demonstrate his feelings about claimant's testimony). Based on both parties' conduct, we conclude that neither witness was particularly credible, and, therefore, neither party's testimony had greater weight than the other's.

³ Having so concluded, we need not analyze the employer's allegations about claimant's prior instances of tardiness or failures to complete his time card. Evidence about incidents that preceded the incident that was the proximate cause of the discharge is only relevant if we concluded that the final incident was attributable to claimant as willful or wantonly negligent conduct. Because we have concluded otherwise, those instances are not at issue.

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

DATE of Service: April 20, 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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⁴ 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.