

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0335**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 113621). Claimant filed a timely request for hearing. On February 24, 2016, ALJ Vincent conducted a hearing, and on March 3, 2016, issued Hearing Decision 16-UI-54332, affirming the Department's decision. On March 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Freres Lumber Inc. employed claimant as a millwright trainee from January 10, 2014 to December 30, 2015. Claimant worked the graveyard shift.

(2) The employer expected its employees to notify their shift "lead" and maintenance manager before leaving the work site for any unauthorized reason. Audio Record ~ 8:00 to 9:45. The employer notified employees of its expectation by a work site bulletin board display and notices on time cards and calendars.

(3) On December 29, 2015, claimant had an "anxiety attack" with about three hours left in his shift that caused his heart to race and extreme breathing difficulty. Audio Record ~ 20:45 to 26:00. His shift "lead man" was present during the "anxiety attack" which claimant had not experienced before, and came to assist claimant before claimant went outside to the parking lot to attempt to calm down and catch his breath. After about 30 minutes, claimant notified his lead by text message that he could not return to work and was going home. Claimant's lead man was in the parking lot when claimant's roommate picked him up to go home.

(4) On December 30, 2015, the employer discharged claimant for failing to notify the employer that he was leaving work before the end of his shift.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ. 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 standards of behavior 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. In a discharge case, 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).

In Hearing Decision 16-UI-54332, after finding as fact that on December 29, 2015, “approximately three hours before the end of his shift, the claimant left his workplace without notice to his manager”, the ALJ concluded, without any analysis, that the employer discharged claimant for misconduct. Hearing Decision 16-UI-54332 at 1, 2. We disagree.

Claimant testified that he was unaware of the specific requirement to personally notify the maintenance manager at all hours of the day and night before leaving the work site and “in [his] mind and thought” believed the lead worker later on would notify the manager, who was at home sleeping at 3:00 a.m., of what had transpired. Audio Record ~ 26:00 to 27:30. The employer’s maintenance manager testified that the next afternoon he spoke with claimant about leaving work during his shift without notifying him and that claimant described the anxiety attack he experienced and also stated that he had notified the lead worker that he was leaving. The manager further testified that he spoke with the lead worker, who denied that claimant had so notified him, after which the employer discharged claimant for violating its policy. Audio Record ~ 10:45 to 13:30.

However, the lead worker was not offered as a witness and the employer failed to assert or show that the witness was not available to testify.<sup>1</sup> Weighing the evidence as a whole, there seems to be no reason to accept the employer’s hearsay over claimant’s first hand testimony, leaving the evidence, at best, equally balanced. Where the evidence is equally balanced, the party with the burden of proof, here the employer, has failed to meet its burden to establish that claimant violated a known employer expectation; much less that he did so willfully or with wanton negligence. On this record, claimant established that by notifying the lead worker of his condition and intent to leave work, he was not indifferent to the employer’s interests.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 16-UI-54332 is set aside, as outlined above.<sup>2</sup>

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<sup>1</sup> See, *Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

<sup>2</sup> 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.

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

**DATE of Service: April 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](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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