

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0439

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 80503). Claimant filed a timely request for hearing. On March 22, 2016, ALJ Vincent conducted a hearing, and on March 28, 2016 issued Hearing Decision 16-UI-55921, affirming the Department's decision. On April 16, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information regarding two letters from the employer that were not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument to the extent it was based on that information when reaching this decision.

FINDINGS OF FACT: (1) Revive LLC employed claimant from March 9, 2015 to November 6, 2015 as a carpenter.

(2) The employer expected claimant to report to work on time for his scheduled work assignments or contact the employer before work if he was unable to report to work on time. The employer also expected claimant to sign written warnings presented to him by the employer. Claimant understood the employer's expectations as a matter of common sense.

(3) Sometime during the evening of October 11, 2015, claimant's telephone was stolen and claimant lost the oil plug for his vehicle, making the vehicle inoperable until he could replace the plug. On October 12, 2015, claimant knew he was scheduled to begin work at 8:00 a.m., but decided to purchase a new telephone and oil plug before contacting the employer or reporting to work. Claimant contacted the employer at 9:15 a.m., and reported to work at 10:00 a.m. The employer gave him a verbal warning for being a "no call, no show" for his work assignment that morning.

(4) During the week preceding November 6, 2015, claimant asked the owner for a meeting to discuss his supervisor's treatment of him after he reported to work late on October 12, his work hours, and a problem he encountered at one worksite. Claimant reported to the employer's office on November 6, at which time the owner told him he was dissatisfied with claimant's performance and discharged him. Claimant did not "defend [him]self," or argue with the owner before he left work. Audio Record at 24:48 to 25:46.

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

The employer's owner asserted at hearing that the employer discharged claimant due to a "no call, no show" on October 12, 2015, and because claimant refused to sign a disciplinary notice given to him by his supervisor on November 6 regarding the October 12 "no show, no call" and a performance issue. Audio Record at 6:29 to 6:42. However, the employer's owner testified that the employer would "probably not" have discharged claimant had he not allegedly refused to sign the disciplinary notice. Audio Record at 15:22 to 15:29. We therefore focus on the allegation that claimant failed to sign a disciplinary notice on November 6, and address prior incidents only if necessary to determine whether claimant's conduct on November 6 was an isolated instance of poor judgment.

The employer had a right to expect that claimant would sign a disciplinary notice to acknowledge having received it. We presume claimant understood that expectation as a matter of common sense. In Hearing Decision 16-UI-55921, the ALJ found that claimant acted with a willful disregard of the employer's expectation by refusing to sign the alleged disciplinary notice, and that it was not an isolated instance of poor judgment because the "no call, no show" on October 12 was also a willful or wantonly negligent violation of the employer's expectations.¹ We disagree.

Claimant denied having ever been given or asked to sign a disciplinary notice during his employment, and testified, moreover, that the only time his employer discussed the October 12 incident with him was when he reported to work on October 12. Audio Record at 19:24 to 19:30, 21:26 to 21:50. The employer provided only hearsay information to support its allegation that claimant was given and failed to sign a disciplinary notice on November 6. Absent a reasonable basis on this record to conclude that claimant was not a credible witness, we conclude that his firsthand denials are at least equal to the employer's hearsay evidence. 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

¹ Hearing Decision 16-UI-55921 at 2.

(1976). Because the evidence to support the employer's allegations about the final incident was, at best, equally balanced with claimant's denials, the employer failed to show by a preponderance of the evidence that claimant violated its expectation that he sign a disciplinary notice, let alone that he did so willfully or with wanton negligence. Absent such a showing we cannot find misconduct. Because the final incident was not misconduct, it is not necessary to address prior incidents.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-55921 is set aside, as outlined above.

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

DATE of Service: May 20, 2016

NOTE: 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.