

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0623

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 140005). The employer filed a timely request for hearing. On May 4, 2016, ALJ R. Frank conducted a hearing, and on May 12, 2016 issued Hearing Decision 16-UI-59457, affirming the Department's decision. On May 27, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it 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 when reaching this decision to the extent it was relevant and based on the record.

FINDINGS OF FACT: (1) Foundation of Human Understanding employed claimant from July 4, 2014 to February 8, 2016.

(2) The employer's owner generally expected claimant to perform his work, act in the best interests of the company's assets, keep the owner informed of any matter affecting the business, and refrain from being argumentative. Claimant understood the employer's expectations.

(3) The employer formed concerns about the quality of claimant's work performance over time. In the final incident, the employer had received a donation of photography equipment at claimant's primary place of work. The equipment was left outdoors for several weeks while claimant ordered and took delivery of a weather-proof storage container. Once the storage container was onsite, the owner expected claimant to move the equipment into the container before it became weather-damaged.

(4) Claimant believed he needed a forklift to move the bulk of the equipment. He made efforts to locate a forklift, but was not successful. The owner believed claimant had not made sufficient efforts to secure a forklift or had intentionally failed to either secure the forklift or otherwise move the equipment into the

storage container. The owner also believed claimant had intentionally failed to keep him adequately informed of his failure to move the equipment into the storage container and became argumentative when the owner questioned claimant about the matter. On February 8, 2016, the employer discharged claimant for those reasons.

(5) After claimant's discharge, the owner observed other problems with claimant's work, but, as those problems were unknown to the owner at the time of the discharge, they did not form the basis of the owner's decision to discharge claimant.

CONCLUSIONS AND REASONS: We agree with the ALJ 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.

There is no dispute in this case that the owner received a donation of photography equipment, that he expected claimant to move it into a weather-proof storage container, and that claimant did not move the equipment into the storage container. As a consequence, the equipment became ruined, causing a loss to the employer. In order for the loss of the equipment to be attributable to claimant as misconduct, though, the record must show that it is more likely than not that claimant acted willfully, or with indifference to the consequences of his acts or failures to act, with respect to moving the equipment. Although the employer's owner alleged that claimant intentionally left the equipment exposed to weather or made minimal, inadequate efforts to protect it, the record shows that claimant was involved in the purchase of the weather-proof storage container and made significant efforts to locate the forklift he believed was necessary to move the equipment into the container. These actions demonstrate that his failure to move the equipment was not willful and he was not indifferent to the consequences of his actions. That claimant perhaps did not make the same efforts the owner would have made, that the owner believed claimant overstated the difficulties he encountered, or that claimant ultimately failed to accomplish what he intended to do within a timeline the owner found acceptable do not require a conclusion that claimant acted willfully or with indifference to the consequences of his conduct. Likewise, the record does not show that claimant's interactions with the owner about moving the equipment, or failure to adequately inform the owner of the difficulties he encountered, was willful or wantonly negligent. It appears just as likely as not that the interaction between claimant and the owner on the final day of employment was mutually heated, and the record fails to show that claimant knew or should have known that the owner would consider his efforts to inform the owner of his difficulties moving the equipment into the storage container inadequate.

In a discharge case, the employer bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Generally speaking,

that means that the employer must prove not only that claimant engaged in the conduct alleged, but also that he engaged in the conduct with a willful or wantonly negligent mental state. Here, there is no dispute that claimant engaged in the conduct; the dispute is over claimant's mental state at the time. Claimant and the employer were the only witnesses who testified about the events in question, and, on this record, there is no reason to consider either of them more or less credible than the other. Where the record consists of equally credible, equally balanced evidence, we conclude that the party with the burden of persuasion, here the employer, has failed to satisfy its burden to prove misconduct. We conclude that the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-59457 is affirmed.

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

DATE of Service: July 7, 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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