

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0697

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 95111). Claimant filed a timely request for hearing. On May 23, 2016 and June 8, 2016, ALJ Frank conducted a hearing, and on June 10, 2016, issued Hearing Decision 16-UI-61548, concluding that the employer discharged claimant, but not for misconduct. On June 13, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Broadway 310 LLC, doing business as Bowery Bagels, employed claimant as an overnight baker from September 6, 2013 until November 29, 2015.

(2) The employer's attendance policy required that an employee report for work on time, and notify the employee's supervisor if unable to report for a scheduled shift, and also to notify a supervisor if the employee was unable to report for work on time, or unable to remain at work until the end of the employee's scheduled shift. Exhibit 1. Claimant knew about and understand this policy, partly as a matter of common sense and also because he had received and read a copy of the attendance policy.

(3) On August 15, 2015, the employer warned claimant in writing about "excessive, unexcused lateness on August 14th." The warning stated that for the next 60 days, claimant's "lateness will be monitored closely. More than two (2) instances of excessive unexcused lateness will result in further disciplinary action, up to and including termination." Exhibit 1.

(4) On October 14, 2015, the employer warned claimant in writing for "excessive insubordination and uncooperativeness on October 14th." The warning stated that for the next 60 days, claimant's "cooperativeness and attitude will be monitored closely. More than two (2) instances of excessive insubordination and uncooperativeness will result in further disciplinary actions, up to and including termination." Exhibit 1.

(3) From September 5 through November 14, 2015, the employer determined that claimant was "tardy" on 30 occasions because he clocked into work from 5 to 17 minutes late. From October 11 through

November 15, 2015, the employer determined that claimant was “excessively tardy” to work on five occasions because he clocked into work from 17 minutes to one hour and six minutes late. On one occasion, claimant clocked in late for his scheduled shift because he had to wait for the day shift bakers to complete their work and clean the kitchen before he could start working. At times, claimant left his scheduled shift early if the bakery was overstaffed; he did so to allow the part time workers an opportunity to earn more by working more hours.

(4) On November 25, 2015, claimant clocked out from work early, probably because the bakery was overstaffed. Audio recording at 33:07.

(5) On November 28, 2015, the employer met with claimant and told him he was discharged for excessive tardiness, insubordination and abandoning his job on November 25. Because the employer was unable to find anyone to replace claimant for the shift he had been scheduled to work on November 29, claimant worked for the employer on that date.

CONCLUSION AND REASONS: We agree with the ALJ and conclude 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.

In a discharge case, the proximate cause of the discharge must be the initial focus for determining whether a claimant engaged in misconduct. The proximate cause of a discharge is the incident without which a discharge would not have occurred when it did. Although the employer testified that it discharged claimant for excessive tardiness and insubordinate behavior, the employer's decision to discharge claimant occurred only after claimant allegedly abandoned his job by leaving work early on November 25. Accordingly, the November 25 incident was the proximate cause of claimant's discharge and is the proper focus of the initial misconduct analysis.

As a matter of common sense, claimant understood that the employer expected him to work his scheduled shifts, and notify a supervisor if he needed to leave work early. Although claimant could not offer a specific explanation why he clocked out early on November 25, he testified that he probably left early on that date because the kitchen was overstaffed and he wanted to give the employer's workers a chance to increase their hours and earnings. According to claimant, he had left work early in the past, without any objection from a supervisor; the employer offered no evidence to rebut this assertion. Although the employer claimed that claimant clocked out for his lunch break on November 25 and then never returned to work, this explanation is implausible. Both the employer's witness and claimant agreed that employees did not clock out when they took their lunch breaks. Audio at 37:42. 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 (1976). Based on this record, we conclude that the employer failed to meet its burden to demonstrate that claimant's conduct in leaving work early on November 25 constituted a willful or wantonly negligent disregard of the employer's standards of behavior.

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

DECISION: Hearing Decision 16-UI-61548 is affirmed.

DATE of Service: July 19, 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.