EO: 200
BYE: 201706

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0755

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85329). Claimant filed a timely request for hearing. On May 2, 2016, ALJ Seideman dismissed claimant's hearing request for failure to appear at the scheduled hearing. On May 5, 2016, claimant filed a request to reopen the hearing. On June 6, 2016 and June 14, 2016, ALJ Kangas conducted a hearing, and on June 16, 2016 issued Hearing Decision 16-UI-61857, allowing claimant's request to reopen, and affirming the Department's decision. On June 27, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument, but only to the extent we found it relevant and based on evidence in the hearing record.

FINDINGS OF FACT: (1) Wackenhut employed claimant as a security officer from May 12, 2013 to February 26, 2016.

(2) The employer expected claimant to check in and out for work at the train station, and, otherwise, remain on his patrol routes. Claimant's patrol routes did not usually include the train station. In 2015 and 2016, the employer received reports that claimant was at the train station. The employer concluded that claimant had been at the train station during times he should have been on assigned patrols.

(3) On February 17, 2016, someone reported to the employer that claimant had been at the train station during his shift. The employer investigated. Four individuals confirmed to the employer that they had seen claimant at the train station that day. The employer concluded that claimant was at the train station during a period of time when he should have been on an assigned patrol.

(4) On February 26, 2016, the employer discharged for being at the train station during a time he should have been on an assigned patrol route.[1]

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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 bears the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The ALJ concluded claimant's discharge was for misconduct, reasoning that although claimant denied the employer's allegation that he was at the train station when he should have been on patrol, the employer's consistent hearsay reports from four people who saw claimant at the train station "when he should have been on patrol" on February 17, 2016 made it more likely true than not that he was, and supported the conclusion that claimant engaged in misconduct. Hearing Decision 16-UI-48461 at 5. However, although those reports establish that all four of those people drew the conclusion, they do not explain the basis upon which they arrived at that conclusion. Hearsay about the conclusions others drew is not a sufficient basis upon which to conclude that those conclusions were correct.

We have reviewed the record in this matter and conclude that the employer did not establish by a preponderance of the evidence that claimant was at the train station during times he was supposed to be on an assigned patrol. The employer's evidence did not include the kinds of details necessary to substantiate its allegation that claimant acted as alleged. For example, the employer's witnesses were unable to describe where claimant was assigned to patrol on the specific date(s) in question, what times he was expected to do those patrols, what times he was supposed to have been in the train station checking in or out of work, where in the train station claimant was seen and at what times, or whether those locations, dates and times coincided with the dates and times claimant was supposed to be patrolling other locations. Those details are important where, as here, claimant had a legitimate reason to go to the train station at least two times per shift to clock in and out for work, possibly more if the employer required him to clock in or out for any of his breaks. Absent that sort of specific evidence, it is just as likely as not that the people who saw claimant at the train station saw him when he was supposed to be at the train station as it is that they saw him when he was supposed to be elsewhere.

[1] It appears on this record that the employer learned, during an investigation of a sexual harassment allegation against claimant, that claimant was spending time at the train station during his shifts, and discharged claimant for that reason. Because the employer did not allege or show that the basis of claimant's discharge was the sexual harassment complaint, however, the analysis in this matter is focused on the allegation that claimant was at the train station when he was supposed to be on an assigned patrol route.

Notably, one of the reasons the ALJ continued the hearing in this matter was to allow the employer the opportunity to provide an eyewitness to claimant's conduct, but, ultimately, no eyewitnesses appeared. Based on the documentation in evidence, it appears that the employer had some serious concerns about claimant's behavior, both with respect to his performance of his assigned duties and toward one train station employee who had reported that claimant engaged in a pattern of sexual harassment that had caused her to feel afraid. Although many of those alleged incidents reportedly occurred at the train station, the evidence of them did not include the kinds of details that would support a conclusion that they occurred on dates and times claimant was assigned elsewhere. Absent such evidence, we cannot conclude that claimant was at the train station when he was supposed to be elsewhere doing his assigned patrols, and the record fails to show that claimant committed misconduct.

Although the evidence suggests that the employer might have had a sound business interest in discharging claimant, the evidence in this record is insufficient to support a finding of misconduct. We therefore conclude that claimant's discharge was not for misconduct, and claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-61857 is set aside, as outlined above.

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

DATE of Service: July 29, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if 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.

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