

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0943

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 161750). Claimant filed a timely request for hearing. On July 18, 2016, ALJ Seideman began a hearing, at which only claimant appeared and was later disconnected due to a problem with his telephone. That hearing was dismissed for that reason and later rescheduled. On August 2, 2016, ALJ Seideman conducted a second hearing, at which both claimant and the employer appeared, and on August 8, 2016, issued Hearing Decision 16-UI-65194, affirming the Department's decision. On August 12, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was 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 as required by OAR 471-041-0090 (October 29, 2006). Accordingly, we considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) All RV Needs employed claimant as a "tech/lot attendant" from May 27, 2015 to June 2, 2016. Audio Record ~ 10:00 to 10:30.

(2) The employer expected its employees to perform their job duties in a satisfactory manner in accordance with the employer's standards. Claimant was aware of the employer's expectations.

(3) Between the beginning of his employment to close to the end of May, 2016, the employer expressed its dissatisfaction with what it considered claimant's unsafe use of power tools, forklifts and moving of recreational vehicles around its lot without using a spotter. Claimant received several warnings for that conduct but was not discharged.

(4) On June 2, 2016, following a pre-delivery inspection, claimant notified his service manager about a damaged cabinet door within a recreational vehicle. After initially telling claimant he would get back to him about what to do with the damaged door, near the end of claimant's shift, the service manager told claimant to "take the cabinet door and do what you can with it." Audio Record ~ 21:20 to 21:45. Following those instructions, claimant attempted to repair the door, but the result was both aesthetically and functionally unacceptable to the service manager who reported the matter to the sale's manager. After concluding that claimant repaired the door "in a manner that did not meet our standards", and due to claimant's prior work performance, the sale's manager discharged claimant. Audio Record ~ 10:40 to 11:15.

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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer has the right to expect of an employee. 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).

As a preliminary matter, the employer initially testified, and the ALJ found as fact, that claimant was discharged for "poor work performance", citing several safety violations involving power tools, moving motor homes without a spotter and the improper use of a forklift, which the ALJ concluded constituted disqualifying misconduct. Audio Record ~10:30 to 10:40 and 12:15 to 16:30; Hearing Decision 16-UI-65194 at 1-3. However, the employer's primary witness clarified that the incident that triggered claimant's discharge on June 2, 2016 occurred that day and involved a damaged motor home door. Audio Record ~10:40 to 11:15. Because that incident was the motivating factor for the employer's decision to discharge claimant when it did, it was the proximate cause of his discharge and is the proper initial focus of the misconduct analysis.

To the extent claimant was discharged for ignoring Strawn's instruction not to repair the cabinet door, the employer did not establish the discharge was for misconduct. Strawn, the service manager, asserted, "The cabinet door was damaged. I told him not to do anything with it and I would figure out a way to get it taken care of. . . . [Later] he chose to repair the cabinet doors and the way that he did was aesthetically as well as functionally unacceptable," which Strawn brought to Jones who then discharged claimant. Audio Record ~ 17:30 to 18:20. However, claimant asserted that at the end of his shift, Strawn told him to "take the door and do what you can with it," which instructions claimant followed with a repair result that was unacceptable to both the service manager and sales manager. Absent a reasonable basis on this record for concluding that claimant was not a credible witness, we find claimant's sworn testimony that Strawn authorized him to attempt the door's repair at least as persuasive as Strawn's testimony to the contrary. Accordingly, the evidence as to what happened was equally

balanced. Because the employer failed to meet its burden of proof on this issue, we found facts about the instruction claimant received in accordance with claimant's testimony. The record fails to show that claimant ignored or disobeyed Strawn's instruction with respect to repairing the cabinet door. The sales manager, Jones, also asserted, "the cabinet door was damaged . . . [and the service manager] told him not to fix it. [Claimant] decided to go ahead and put it back together in a manner that did not meet our standards." Audio Record ~ 10:40 to 11:15. Jones' assertion demonstrates that claimant was likely discharged for the poor result in repairing the door rather than for allegedly failing to follow Strawn's instructions. As there was no evidence that claimant intentionally or even recklessly damaged the door beyond repair, or gave less than his best effort to adequately repair the door, the employer failed to show by a preponderance of evidence that claimant consciously failed to adequately repair the door.

The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.¹

DECISION: Hearing Decision 16-UI-65194 is set aside, as outlined above.

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

DATE of Service: September 9, 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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¹ 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.