

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0998

Affirmed
No Disqualification

ROCEDURAL HISTORY: On July 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer suspended claimant for misconduct on June 6, 2016 (decision # 80715). Claimant filed a timely request for hearing. On August 11, 2016, ALJ Frank conducted a hearing, and on August 17, 2016 issued Hearing Decision 16-UI-65852, reversing the Department's decision. On August 25, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB extended the written argument deadline in this case; the written argument had to be received by the close of business on September 26, 2016. OAR 471-041-0080(2) (4) (October 29, 2006). The employer submitted two written arguments, one received September 26, 2016 and one received on September 27, 2016. With respect to the argument received September 26th, the employer failed to certify that it provided a copy to the other parties as we instructed in the August 30, 2016 "acknowledgment" letter we mailed the parties and as required by OAR 471-041-0080(2)(a). The argument also contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider the employer's September 26th argument or the new information contained in it. With respect to the argument received September 27th, the argument was received late, the employer did not certify it provided a copy to claimant, and the argument contained new information. *See* OAR 471-041-0080(2); OAR 471-041-0090. For those reasons, EAB did not consider the September 27th argument, either. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Lube It USA suspended claimant from working at his job as a lubrication technician on June 6, 2016.

(2) The employer expected claimant to treat customers in a professional manner. Claimant understood the employer's expectation as a matter of common sense.

(3) Before June 1, 2016, the employer received complaints from customers about claimant's attitude. On June 1, 2016, the employer told claimant he was not going to receive an expected bonus due to those customer complaints.

(4) On June 6, 2016, after the conclusion of his shift, claimant was called into a meeting with two managers. The managers told claimant he was being suspended for one day because of "bad behavior" and to allow the employer to evaluate his continued employment with the employer. Audio at ~18:00, at ~21:44. When claimant asked what he had done specifically, one of the managers told him he had exhibited a "bad attitude" on Saturday, June 4, 2016. Audio at ~19:58. When claimant inquired further, the manager asked him "why are your [sales] numbers so low?" Audio at ~18:44. Neither manager further elaborated on the reason that claimant was being suspended.

CONCLUSIONS AND REASONS: The employer suspended claimant on June 6, 2016 but not for misconduct.

ORS 657.176(2)(b) requires a disqualification from unemployment insurance benefits if the employer suspended 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. The employer carries the burden to show that it suspended claimant for misconduct. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer testified at hearing that it suspended claimant on June 6, 2016 both as a disciplinary measure for his allegedly poor customer service and also to allow it to determine whether it would discharge claimant. To the extent the employer suspended claimant to provide it time to determine whether to discharge him, and not for any alleged violation(s) of the employer's standards, its suspension could not have been attributable to any alleged misconduct on claimant's part. To the extent the employer suspended claimant for his allegedly poor treatment of customers, the employer could provide no details, and it was unable to specifically describe any incidents underlying claimant's suspension. Audio at ~10:11, ~10:50, ~11:28, ~12:19, ~12:39, ~13:00. Accordingly, the employer did not show that claimant's alleged treatment of customers constituted misconduct. To the extent the employer discharged claimant for not meeting sales objectives, there was no evidence in the record showing that claimant's poor sales was the result of any behavior that might constitute willful or wantonly negligent misconduct. Since these are the only discernible reasons in this record that might account for the employer's suspension of claimant on June 6, 2016, the employer did not meet its burden to show that its suspended claimant for misconduct.

The employer suspended claimant but not for misconduct on June 6, 2016. Claimant is not disqualified from benefits as a result of this suspension.

DECISION: Hearing Decision 16-UI-65852 is affirmed.

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

DATE of Service: September 27, 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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