

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1011

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 83206). The employer filed a timely request for hearing. On August 5, 2016, ALJ Vincent conducted a hearing, and on August 11, 2016 issued Hearing Decision 16-UI-65464, affirming the Department's decision. On August 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Left Coast Canopy employed claimant as operations manager at Zion Cannabis from October 1, 2015 to May 31, 2016.

(2) On March 9, 2016, the employer gave claimant a performance review in which it had concluded his behavior, performance and attitude were not meeting expectations. After the performance review, the employer met with claimant every two weeks to review his performance in those areas.

(3) Claimant worked with the employer's owner to develop a software application. Although claimant's initial work on the project was delayed due to other, more pressing duties, claimant performed sufficient work on it that by late May 2016 the app was ready for the owner's approval and customer testing.

(4) On May 29, 2016, claimant observed employees rolling, packaging and labeling tubes of pre-rolled marijuana cigarettes. Claimant thought they were doing the job incorrectly and interrupted them to criticize and correct their work. A manager believed claimant yelled at and was condescending and aggressive toward the employees, believed his criticism of their work caused some of them to believe they were failing at their jobs, and believed it necessary to follow up with some of the employees present at the time to reassure them. Around the same time, the owner decided to discontinue work on the app project in favor of spending his time on other matters.

(5) On May 31, 2016, the employer discharged claimant. The primary reasons for the discharge decision were claimant's alleged behavior toward the employees on May 29, 2016 and the owner's decision to discontinue work on the app project.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that 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 connected with work. 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 employer has the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). To satisfy that burden, the employer must prove that it is more likely than not that claimant acted as alleged in violation of an expectation or standard of behavior the employer had the right to expect of him, and that he did so either willfully or with wanton negligence.

The employer alleged that it discharged claimant for a variety of reasons, including his refusal to text sales figures to the employer each night, refusal to vacuum the back room as instructed, and his open disdain for the owner's processes. The employer's witness was unable to describe the specific dates, times and details of many of those alleged incidents, however, and with respect to the other incidents, the evidence was at best equally balanced, with the employer's witness alleging the conduct occurred and claimant alleging that it did not. *Compare* Audio recording at ~13:45, 15:00, 15:30, 20:45, 21:45. Where the evidence is equally balanced and there is no basis in the record for doubting the credibility of either witness, the party with the burden of persuasion, here the employer, has not satisfied its burden. In any event, the employer did not decide to discharge claimant until the alleged incident on May 29th occurred and the owner decided to discontinue the app project. Because those incidents are the proximate cause of the discharge decision, they are the proper focus of the misconduct analysis.

With respect to the owner's decision to discontinue the app project, the employer's witness generally alleged it occurred because claimant had failed to perform, causing the owner to decide to spend his efforts elsewhere. Claimant provided unrefuted specific testimony, however, that at the time of the discharge he had completed all the work he could do on the app project until such time as the owner reviewed his work and authorized customer testing. It does not appear, given claimant's progress on the project, that any lack of progress with the project was attributable to him as willful or wantonly negligent misconduct. To any extent the employer might have expected him to complete his initial work on the project sooner, claimant provided unrefuted testimony that other duties interfered with his ability to make progress with the app project until that time, again making it appear unlikely that any delays in the project were attributable to him as willful or wantonly negligent misconduct.

With respect to claimant's behavior toward employees on May 29, 2016, the record again fails to show that claimant engaged in willful or wantonly negligent misconduct. Although the employer's witness

was present at the final incident, and alleged she saw claimant yell at employees in front of a customer, claimant disputed that he did so, testified that although he likely spoke sternly to the employees he did not, and never would have yelled at employees, particularly in front of customers. *Compare* Audio recording at ~7:55, 18:30. Claimant also testified that while he probably did say things similar to what the employer's witness alleged, such as telling them that he had previously discussed the same issues with employees and that it would have been simple for them to ask claimant for instruction or assistance if they did not understand, the employer's witness's characterization of his statements as aggressive or condescending was incorrect, as he did not intend his statements that way. Considering that the evidence about claimant's statements and demeanor in the final incident was equally balanced, and claimant's credible denial that he consciously behaved in an aggressive or condescending manner, even though the employer concluded that claimant had violated its expectations in the final incident, we conclude that the employer has not proven that any violation was willful or the result of a wantonly negligent indifference to the employer's expectation that he treat employees with respect.

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-65464 is affirmed.

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

DATE of Service: September 29, 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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