

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1052

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 130546). Claimant filed a timely request for hearing. On August 17, 2016, ALJ M. Davis conducted a hearing, and on August 19, 2016 issued Hearing Decision 16-UI-65947, reversing the Department's decision. On September 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The deadline for submission of written arguments in this matter was October 3, 2016; according to OAR 471-041-0080(2)(b), written arguments "will not be considered" unless "*received* within the time allowed." Therefore, unless the employer obtained an extension of the deadline, EAB had to receive the employer's argument on or before October 3, 2016 or the argument will not be considered. In this case, the employer did not mail its argument until October 4, 2016, one day after the deadline expired, and EAB did not receive the argument until October 6, 2016, three days after the deadline expired. The employer did not seek an extension of the deadline for a timely submission and none was granted. We also note that the employer's argument also contained information not presented during the hearing, but did not explain why the employer was unable to offer this information at the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For those reasons, considered individually or together, EAB did not consider the employer's written argument or the new information it contained. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Portland Bicycle Tours employed claimant from April 15, 2015 until June 8, 2016, last as a rental and tour guide staff member.

(2) The employer expected claimant to perform her job duties in a reasonably satisfactory manner. Claimant understood the employer's expectations as a matter of common sense.

(3) On June 8, 2016, claimant opened the store for business. As part of opening, the employer expected claimant to release the employer's bicycles from a cable to which they were attached to ready them for

renting. In the afternoon, claimant led a cycling tour. After the tour, the customers returned the bikes that belonged to the employer to the workplace. Claimant was unable to put those bikes away immediately because she needed to perform other work-related tasks, such as assisting customers in the store, answering the phone, processing online reservations, and facilitating bicycle repairs. Claimant put the bikes away approximately two hours after the tour ended when she was able to do so.

(4) On June 8, 2016, the employer's owner looked at video surveillance of the store and concluded that claimant had not put the bikes away promptly after the cycling tour had ended that day. The owner also concluded that claimant had not timely "uncabled" the bicycles when she opened the store that day. On June 8, 2016, the employer discharged claimant for failing to un-cable the bikes in the morning and put them away in timely manner.

CONCLUSIONS AND REASONS: 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 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for not performing two job tasks on June 8, 2016 as promptly as she might have. With respect to the allegation that she failed to "uncable" the bikes that day, claimant disagreed with the owner's contention and testified she had done so immediately upon opening the store. Transcript at 5, 13. There is no reason in the record to question either party's credibility or to doubt the accuracy of either's testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty is resolved against the employer since it is the party that carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not meet its burden to demonstrate the claimant failed to "uncable" the bikes promptly after she opened the store on June 8, 2016.

With respect to putting away the bikes promptly after the cycling tour ended on June 8, 2016, the owner did not dispute that the need to perform other at least equally important work-related tasks prevented claimant from putting the bikes away for two hours after they were returned to the store. Transcript at 11, 12. Accepting this explanation, it does not appear that claimant's failure to put the bikes away more quickly after the tour ended showed indifference to the employer's interests since it was serving other of those interests that prevented her from putting the bikes as promptly as the employer alleged that she should have. Absent evidence that the employer had communicated to claimant that putting the bikes away took precedence over all other work-related tasks or that claimant's explanation for the delay was not truthful, the employer did not demonstrate that claimant's failure to put away the bikes more promptly on June 8, 2016 was willful or wantonly negligent violation of its standards.

The employer did not meet its burden to show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-65947 is affirmed.

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

DATE of Service: October 7, 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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