

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0085

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision 90553). Claimant filed a timely request for hearing. On December 11, 2016 and January 6, 2017, ALJ Seideman conducted a hearing, and on January 13, 2017 issued Hearing Decision 17-UI-74726, affirming the Department's decision. On January 24, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted argument that contained information that was not part of the hearing record. The employer did not explain why it did not offer this information during the hearing or otherwise show that factors or circumstances beyond [party's] reasonable control prevented [party] from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Medcure, Inc. employed claimant as a donation coordinator from September 28, 2015 until September 19, 2016. The employer facilitated and coordinated the donation of deceased persons' bodies for medical and scientific research and education.

(2) The employer expected claimant to answer all incoming calls on his shift if at the time the call came in he was not occupied on another call. Notwithstanding this expectation, claimant understood that, due to the employer's limited staffing, he should allow all incoming calls to be answered by the employer's answering service after 4:00 p.m. on weekdays and during weekends so those calls could be prioritized

based on messages left with the answering service before they were returned. The employer also expected that claimant would not delete any emails or electronically transmitted faxes from the employer's main inbox that were from donor's families, other parties and the answering service even after claimant had forwarded those communications to the employer's employee responsible for following up on them. Notwithstanding this expectation, claimant thought he should delete such messages after he had appropriately forwarded them to avoid confusion and the possibility of multiple responses to the same inquiry.

(3) In approximately February 2016, a former supervisor told claimant that because the employer did not have a receptionist on duty to answer and prioritize incoming calls after 4:00 p.m. on weekdays and during the weekends, all incoming calls at those times should be allowed to ring through to the answering service where, before they were returned, the calls could be prioritized based on the messages that callers left with the answering service. Sometime later, claimant was participating in the training of another employee and he informed that other employee in the presence of the employer's director of donor coordination of the employer's practice of allowing all evening and weekend calls to be answered by the answering service. The director of donor coordination stated to the other employee, "[W]e always let calls roll over to the answering service at night." Transcript of January 6, 2017 Hearing (Transcript 2) at 10.

(4) On September 16, 2016, at approximately 11:00 a.m., the director of donation coordination held a staff meeting at which claimant was present. At that meeting, the director brought up that one of the employer's employees had not followed up on a call the answering service had recently received about the death of person whose family was interested in donating the decedent's body. Transcript 2 at 17. The director discussed with the employees who were present the "severity of letting calls go unanswered." Transcript of December 22, 2016 Hearing (Transcript 1) at 15.

(5) On September 16, 2016, after the director of donor coordination's regular work day was over, the director arrived unannounced in claimant's work area with another supervisor at approximately 7:30 p.m. Claimant's shift was scheduled to end at 8:00 p.m. Claimant and another donation coordinator who was coming on shift to relieve claimant were also both present. Claimant was showing some cards for an online game to the employee who would be relieving him. Claimant was aware of the arrival of both of supervisors. At that time, claimant's phone was ringing with an incoming call, neither claimant nor the other donation coordinator answered it and they allowed it to be picked up by the answering service. Transcript 1 at 5, 6. The director of donation coordination then went to her office to review the status of all calls that had been received that evening. She noticed from the employer's records that an email from the answering service received at 5:36 p.m. that day and about a potential whole body donation had been deleted. Claimant was the only donation coordinator on duty at that time and she assumed claimant had deleted the email. Transcript 1 at 26. She also observed that an email from a mortuary had been deleted and could not find a response to it from the employer. Transcript 2 at 51-52. The director of donation coordination assumed that sending a response was claimant's responsibility and that he had not done so. After reaching these conclusions, she heard the phone ring with another incoming call that was not answered at 7:59 p.m. The director of coordination services did not think claimant should have answered that call since his shift was over at 8:00 p.m., but that the oncoming donation coordinator should have answered it. Transcript at 37. The director told both claimant and the other donation coordinator to go home, and she took that call.

(6) On September 19, 2016, the employer discharged claimant for not answering the incoming call at approximately 7:30 p.m. on September 16, 2016 and for deleting emails on September 16, 2016.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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 employee made a number of allegations regarding claimant's conduct. The employer alleged that claimant was playing cards with the relief donation coordinator when the director of coordination services arrived at the workplace around 7:30 p.m. on September 16, 2016, that claimant's did not promptly or adequately respond to incoming calls, and as sometimes not prompt or adequate enough, and that claimant was inappropriately demanding when he returned to work after taking a leave shortly before September 16, 2016. It appeared, however, that the employer discharged claimant specifically for not answering the incoming call to the employer on September 16, 2016 at around 7:30 and for the two emails he allegedly deleted on September 16, 2016. Transcript 1 at 5-7, 14-19, 26, 37, 40; Transcript 2 at 46-49, 56, 57-58. The allegations about claimant's behavior on September 16, 2016 are the appropriate focus of our inquiry into whether the employer discharged claimant for misconduct.

With respect to claimant's failure to answer the incoming call around 7:30 p.m. on September 16, 2016, the employer presented persuasive evidence that under usual circumstances it expected claimant to answer all incoming calls that came to his phone. Notably, however, the employer did not attempt to specifically rebut claimant's testimony that around February 2016, a supervisor had instructed him to allow calls that he received after 4:00 p.m. on weekdays or on weekends to be answered by the answering service and that, on one occasion, the director of donor coordination had heard claimant so instruct an employee in training and had confirmed that instruction as the employer's policy. Transcript 2 at 10. While the director of donor coordination did testify that she told claimant during the staff meeting on September 16, 2016 that he was forbidden from allowing the answering service to answer incoming calls received after 4:00 p.m., claimant denied she had so advised him and any mention of the director giving that advice was conspicuously missing from the director's notes summarizing the substance of that meeting. Transcript 1 at 17, 27; Transcript 2 at 10, 18, 21, 52-53; Exhibit 3 at 1, Exhibit 5 at 2. Because there is no reason in the record to doubt the truthfulness of either party's testimony, the evidence on the issue of the instructions that claimant received about handling incoming calls after 4:00 p.m. on weekdays is evenly balanced. Where the evidence on a disputed issue in a discharge case is of equal weight, the uncertainty must be resolved against the employer since in is the party who carries the burden of proof. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Moreover, that claimant did not answer, but ignored, the incoming call at 7:30 p.m., when he was aware that the director of donor coordination and another supervisor were present and observing him in his working area, is strong evidence that he sincerely believed the employer's policy was to allow calls received at that hour to be answered by the answering service. The preponderance of the evidence

in this record does not show that claimant was aware that he was expected to answer incoming calls that were received on a weekday, as was September 16, 2016, after 4:00 p.m., let alone at 7:30 p.m. To the extent that the employer's policy was that claimant should have answered the call, claimant's behavior in doing so was a sincere and good faith error based on what the record shows he knew or reasonably should have known on September 16, 2016 at 7:30 p.m. Good faith errors do not constitute misconduct. *See* OAR 471-030-0038(3)(b).

With respect to the two emails claimant allegedly deleted on September 16, 2016, the employer did not present sufficient evidence to rule out that another employer, not claimant, might have performed the deletion. To the extent that claimant was the employee who deleted those two emails, the employer also did not present any evidence ruling out that, rather than having done so willfully or with wanton negligence, claimant's behavior in deleting the emails was an inadvertent error, a mistake, the result of an accident or the like. The employer therefore did not present sufficient evidence to show that, assuming claimant performed the deletion, his actions were accompanied by the conscious mental state necessary to demonstrate willful or wantonly negligent behavior. *See* OAR 471-030-0038(3)(a). On this record, the employer did not meet its burden to show either that claimant deleted the emails or that, if he did so, his behavior constituted misconduct.

Although the employer discharged claimant it did not show that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 17-UI-74726 is affirmed.

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

DATE of Service: February 17, 2017

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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