

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0372

Reversed
No Disqualification

PROCEDURAL HISTORY: On January 6, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110051). Claimant filed a timely request for hearing. On March 3, 2017, ALJ Monroe conducted a hearing, and on March 9, 2017 issued Hearing Decision 17-UI-78617, affirming the Department's decision. On March 28, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Wesco Paint & Equipment Supply employed claimant as an equipment division helper in the employer's Tangent, Oregon location from September 23, 2013 to December 2, 2016.

(2) In addition to performing office work, the employer expected claimant to perform two to four hours of warehouse work per shift checking in freight and packing lists, and organizing, ordering and billing parts. Claimant understood the employer's expectations.

(3) Claimant's supervisor prepared several written reprimands to claimant from May and August 2016 stating that claimant was not willing to work in the warehouse as directed and preferred to work only in the office. The supervisor sent copies of the reprimands to the employer's corporate office in Seattle, but did not give copies to claimant.

(4) On September 30, 2016, claimant's supervisor prepared a job evaluation for claimant that stated that the employer expected claimant to work a minimum of two to four hours per day in the warehouse, and that the employer would discharge him if he failed to comply. Claimant's supervisor read portions of the evaluation to claimant, but did not warn him that he needed to perform more warehouse work. Claimant did not receive a copy of the evaluation. The supervisor sent the evaluation to claimant's manager in the employer's corporate office.

(5) Claimant's immediate supervisor sent the employer's manager a copy of a reprimand he gave claimant on December 2, 2016 stating that claimant told the immediate supervisor that he refused to work performing warehouse duties in addition to his office duties unless he received a raise. The supervisor reported that he discharged claimant at that time because claimant allegedly failed to perform the warehouse work required by the employer.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he allegedly refused to perform his warehouse duties. Transcript at 5-6. Claimant understood that the employer expected him to perform warehouse duties each day in addition to his office duties. In Hearing Decision 17-UI-78617, the ALJ implicitly found the employer's hearsay evidence more reliable than claimant's firsthand testimony, and concluded that claimant was discharged for misconduct.¹ Misapplying the burden of proof on claimant, the ALJ stated that, "the preponderance of the evidence adduced at hearing fails to show that claimant met the employer's directive for performing at least two to four hours of work in the warehouse during each of his scheduled shifts."² At hearing, claimant objected to the employer's evidence, stating that the testimony of the employer's witnesses was "just what [the supervisor] said and not what [the witnesses] know." Transcript at 50. We agree with claimant and do not find the employer's entirely hearsay evidence, mostly taken from written documents provided by the supervisor to the witnesses, but not submitted as evidence, sufficiently reliable to outweigh claimant's firsthand testimony denying that he received warnings about his work performance or refused to work in the warehouse as required.

Claimant's supervisor sent copies of several written reprimands, a performance review, and a report of a final incident on December 2, 2016, to the employer's manager, who relied on the documents for her testimony at hearing. *See* Transcript at 7, 10, 13-14. The employer's evidence contradicted claimant's testimony. The employer's manager testified that claimant received multiple warnings in May and August 2016 because he did not perform the expected warehouse work. Transcript at 13-14. Claimant denied having received those warnings, and the warnings were never signed by claimant. Transcript at 25, 26, 44. The manager also alleged that claimant's performance review on September 30, 2016 contained a warning to claimant that he would be discharged if he refused to work in the warehouse.

¹ Hearing Decision 17-UI-78617 at 3.

² *Id.*

Transcript at 11. Claimant testified that his supervisor read the performance review to him, and that it did not contain such a warning. Transcript at 29. On November 28, 2016, the supervisor reported to the manager that claimant allegedly refused to work in the warehouse, and went home rather than work in the warehouse. Transcript at 9-10. Claimant testified that he followed his supervisor's orders in both the work he performed that day, and the time he left work on November 28. Transcript at 32-33. The report of the final incident alleged that, on December 2, 2016, claimant told his immediate supervisor that he refused to work in the warehouse unless the employer raised his hourly wage. Transcript at 6. Claimant testified that he worked two to four hours daily in the warehouse and never refused to perform work in the warehouse. Transcript at 24-25, 36. Furthermore, claimant testified that he was "shocked" when the employer discharged him, and was not given a reason for the discharge. Transcript at 40-41.

Absent a basis for concluding that claimant was not a credible witness, his firsthand testimony regarding his behavior outweighs the employer's hearsay information, and we therefore found facts in accordance with claimant's testimony. On this record, the employer failed to meet its burden to show that claimant failed to perform the work he was directed to perform in the warehouse. Because the employer failed to establish that claimant violated that expectation, the employer has not shown that claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 17-UI-78617 is set aside, as outlined above.³

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

DATE of Service: April 21, 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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³ 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.