

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0377

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 115804). The employer filed a timely request for hearing. On March 16, 2017, ALJ Murdock conducted a hearing, and on March 20, 2017, issued Hearing Decision 17-UI-79236, concluding the employer discharged claimant for misconduct. On March 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's application for review included a written argument. However, claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a)(October 29, 2006). Therefore, although we considered the entire hearing record, we did not consider claimant's written argument when reaching this decision.

EVIDENTIARY MATTER: In Hearing Decision 17-UI-79236, the ALJ made an evidentiary ruling in which she stated, in part, that no exhibits were offered into evidence in this matter. The hearing record shows, however, that the employer offered an exhibit into evidence, consisting of a timeline of claimant's alleged attendance issues, and that the ALJ marked that exhibit as Exhibit 1 before excluding it from evidence. Audio recording at ~ 3:00. Although we don't disagree with the ALJ's decision to exclude the exhibit, for the reasons she stated, we write to clarify that the employer did offer the exhibit into evidence, contrary to the ALJ's ruling.

FINDINGS OF FACT: (1) Fieldstone Services, LLC employed claimant as an office manager from January 7, 2016 to December 28, 2016.

(2) The employer expected claimant to report for work as scheduled or notify the owner or her husband if she would be late or absent from work. Claimant was aware of the employer's expectations.

(3) From late November through the end of her employment, claimant was often absent or late to log in at work due to problems with her vehicle, inclement weather or transportation issues regarding her child. On many such occasions, the notice claimant provided to the employer about being absent or late was

given after her scheduled start time of 9:00 a.m. On December 14, 2016, an owner personally spoke to claimant about the importance of providing timely notice when she would be absent or late to work. On December 23, 2016, claimant was absent from work due to transmission problems with her car and notified an owner at approximately 9:45 am that she would not be in. Afterward that owner sent claimant a text message that read, “please let me know in advance when you will not be into work so we can make plans to have someone else work. Late notice and no notice is not good.” Audio Record ~ 9:45 to 10:15. Claimant responded by text, “I understand. It’s a situation that I wasn’t able to control. I apologize. A lot of things hitting all at once...extremely bad timing. Sorry.” Audio Record ~ 34:30 to 35:00.

(4) On December 28, 2016, an owner believed claimant had reported late to work, at 10:21 a.m., without providing notice that she would be late prior to her shift. However, claimant had arrived to work at 9:00 a.m. At the end of the day, claimant met with the owner’s husband, the other owner, at a locksmith shop regarding some work duties after which he informed her that she was being discharged for “vulgar language” and “attendance issues” including “punctuality.” Audio Record ~ 28:20 to 29:00.

CONCLUSIONS AND REASONS: We disagree with the ALJ. 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. 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.

As a preliminary matter, claimant’s first-hand testimony about the facts that led to her discharge differed from the testimony of the employer’s co-owner, which was based, in part, on hearsay regarding her husband’s contacts with claimant. In the absence of evidence demonstrating that claimant was not a credible witness, her first hand testimony was at least as credible as the employer’s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion - here, the employer - has failed to satisfy its evidentiary burden. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Consequently, on matters in dispute, we based our findings on claimant’s evidence.

In Hearing Decision 17-UI-79236, after finding that on December 27 and 28, 2016, claimant was “late to work...without notice to the employer” after which the employer discharged her on December 28, 2016, the ALJ concluded the employer discharged claimant for misconduct, reasoning, “claimant repeatedly and inexplicably failed to notify the employer when she would be absent or late to work” after being twice warned about the importance of notice. Hearing Decision 17-UI-79236 at 3. We disagree because we are not persuaded the employer met its burden of proof concerning the final incident.

The employer's witness asserted that the final incident that led to claimant's discharge was her belief that claimant had reported late to work on December 28 without providing notice to the employer prior to the start of her 9:00 a.m. shift. Audio Record ~ 6:30 to 8:25. However, claimant asserted that she was at work at 9:00 a.m. that day and that the owner's husband discharged her later that afternoon for "vulgar language" and "attendance issues" including "punctuality." The owner's husband did not testify at hearing and he and claimant were the only ones present when she was discharged. Moreover the employer's witness did not assert or show that she had first-hand knowledge that claimant was actually late that day and did not dispute claimant's assertion that the employer's computer did not accurately record her log in times at the start of her shift. Audio Record ~ 27:30 to 28:15. Although there is no dispute that claimant was often not punctual when reporting for work due to a variety of reasons, on this record, we cannot find that claimant was late to work on December 28, 2016, let alone she was late without notice to the employer. Accordingly, the evidence on that issue being no more than evenly balanced, the employer failed to meet its burden of proof.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-79236 is set aside, as outlined above.¹

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

DATE of Service: April 24, 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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¹ 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.