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BYE: 201707

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0422

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 3, 2017 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110050). Claimant filed a timely request for hearing. On March 8 and March 28, 2017, ALJ Lohr conducted a hearing, and on March 30, 2017 issued Hearing Decision 17-UI-79945, affirming the Department's decision. On April 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: During the hearing, the ALJ admitted into evidence documents that claimant submitted as Exhibit 1, but failed to mark those documents as an exhibit. Audio of March 8, 2017 Hearing at ~10:08. Although claimant stated he had received in advance of the hearing phone records and time cards that the employer offered as an exhibit and the employer stated those documents were also sent to the Office of Administrative Hearings (OAH) in advance of the hearing, the ALJ had not received those documents at the time of the March 8, 20176 hearing and they were neither marked nor admitted into evidence. Audio of March 8, 2017 Hearing at ~4:20, ~9:30. However, the ALJ stated in Hearing Decision 17-UI-79945 that two exhibits, Exhibit 1 and Exhibit 2 were admitted into evidence during the hearing, Exhibit 1 apparently being the documents that claimant offered and Exhibit 2 apparently being the documents that the employer offered. Exhibits 1 and 2 was discussed extensively by both parties during the hearing, and it appears that as of the March 28, 2017 continuation of the hearing, the ALJ had received the employer's documents, but failed to mark them as an exhibit or formally admit them into evidence at that time. Because both exhibits are readily identifiable from the testimony about them, were addressed at length during the hearing and it appears that the ALJ's failure to admit Exhibit 2 into evidence during the continuation of the hearing was an oversight, EAB has corrected the ALJ's inadvertent omissions and marked both Exhibit 1 and Exhibit 2 and recognized that the ALJ intended to enter Exhibit 2 into evidence. A copy of Exhibit 2 is mailed to the parties with this decision. Any party that objects to our marking of either exhibit or our recognition that Exhibit 2 was admitted into evidence must submit such objection to this office in writing, setting forth the basis of the

objection, within ten days of our mailing this decision. Unless such objection is received and sustained, both Exhibits 1 and 2 will remain in the record.

FINDINGS OF FACT: (1) Innovative Air, Inc. employed claimant as an HVAC installer from October 10, 2016 until December 20, 2016.

(2) Claimant regularly worked Mondays through Fridays. On Monday, December 19, 2016, claimant called his lead worker on the lead's cell phone at 6:51 a.m. to inquire about the location where he should report to work that day. The lead worker told claimant to contact the supervisor at the shop about his work assignment that day. Transcript at 29. After the call, claimant reported to the shop and the supervisor told him "there was no work and to go home." Transcript at 6. Claimant did so. Claimant's next scheduled work day was December 20, 2016.

(3) On December 20, 2016, claimant reported for work at the shop. When claimant arrived at the shop, the supervisor told him he was discharged due to lack of work.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

Claimant contended that he was discharged on December 20, 2016 while the employer contended that, for unknown reasons, claimant simply stopped reporting for work on and after December 19, 2016. In particular, the employer disputed that claimant called the lead on December 19, 2016, that he reported to work that day and was told there was no work for him and that the supervisor let him go on December 20, 2016. In contrast, claimant disputed that the employer's evidence showing that he received six calls from the supervisor on December 19, 2016 and that he voluntarily left work on December 19, 2016. In Hearing Decision 17-UI-79945, the ALJ concluded claimant's work separation was a voluntary leaving, relying principally on phone billing records purporting to be from the employer's commercial phone carrier. While claimant presented his own phone records to show that he called the lead at 6:31 a.m. on December 19, 2016 and those records did not show any incoming calls from the supervisor on December 19, 2016, claimant's records were copies of the phone log stored in his cell phone. The ALJ accepted the employer's account of the work separation and disregarded claimant's account because "cell phone records can be deleted before taking a photo [and] claimant's phone record is not as reliable as a cell phone carrier's billing records. Additionally, claimant's testimony was slightly less persuasive that his supervisor's testimony." Hearing Decision 17-UI-79945 at 2. The ALJ further concluded that claimant was disqualified from benefits because he did not show good cause for leaving work when he did. We disagree that the work separation was a voluntary leaving rather than a discharge and conclude that because claimant was discharged, but not for misconduct he is not disqualified from benefits.

At that outset, the ALJ's conclusion that the copy of the phone log stored in claimant's phone was less reliable than the phone records submitted by the employer was not sound, particularly when that ostensible reliability became dispositive on the issue of the work separation. Assuming as the ALJ did that claimant's phone log was more susceptible of fraudulent alteration than the phone records that the employer offered, there was absolutely no evidence suggesting or tending to suggest that claimant's records were actually modified in any way or that any entries were deleted from the log in his phone. Absent at least some colorable evidence that claimant's phone log was re-worked or tampered with in advance of the hearing, we will not discount entirely its evidentiary value simply on the basis that it would have been easier, and less detectible, to modify it than the phone records the employer offered, if

one had wanted to do so. Rather, we give equal weight to the phone records that both parties submitted. We resolve this case based on the evidence that neither party disputed and on the reasonable inferences to be drawn from the undisputed evidence.

At hearing, claimant and the supervisor were adamant in disputing the other's contentions about the work separation. Both acknowledged that the phone records they presented were inadequate to rebut what appeared to be shown on the other's phone records, particularly that claimant's phone record did not show any incoming calls from the supervisor and the supervisor's phone records did not show any incoming calls from claimant. Transcript at 15, 21, 23. However, both parties agreed on the lead's phone number and the lead agreed that he likely spoke by phone with claimant on December 19, 2016, as shown on claimant's phone records, when the lead agreed with claimant's testimony that he told claimant to contact the supervisor about his work assignment on that day. Transcript at 6, 18, 25, 26; Exhibit 1 at 3. Based on this corroboration, it appears most likely that claimant spoke with the lead on December 19, 2016 before the start of his shift and was directed to contact the supervisor.

However, the supervisor vigorously disputed claimant's testimony that he sent claimant home on December 19, 2016 and that he discharged claimant on December 20, 2016. Transcript at 11, 16, 17-19. The supervisor stated over and over that he did not see or send claimant home on either day. Transcript at 11, 14, 15, 17, 18-19. Although the supervisor attempted to buttress his testimony about claimant inexplicably ceasing to report for work on and after December 19, 2016 through the employer's phone records purporting to show the supervisor called claimant six times on December 19, 2016, the supervisor also testified that he was "not quite sure" why he was trying to reach claimant that day and throughout the hearing did not specify any reason why he might have been repeatedly doing so. Transcript at 21; *see also* Transcript at 14; Exhibit 2 at 5, 6. However, with the exception of the lead's testimony about speaking with claimant on December 19, 2017, the testimony of both of the employer's witnesses was vague, impressionistic, contradictory, confusing and lacked concrete detail. Transcript at 11, 12, 14, 15, 15, 17, 18, 19, 27-28, 29. In contrast, claimant's testimony, although it contradicted the employer's phone records in part, was straightforward and consistent in content. Based on detail, consistency and coherence, there is reason to prefer claimant's testimony to that of the employer's witnesses.

In resolving the nature of the work separation based on the undisputed evidence, claimant's account that he went to the shop on December 19, 2016 and spoke to the supervisor that day is corroborated by the time card records submitted by the employer. The time cards show that on December 19, 2016, claimant clocked in and out at 8:20 a.m. and show the notation "OFF TODAY" which appears to support both that the claimant was at the shop around that time on December 19, 2016 and that the supervisor told him there was no work for him that day and sent him home and contradicts the supervisor's testimony. Exhibit 2 at 12. Further review of the time cards shows that on the occasions prior to December 19, 2016 when claimant took days off, an explanation for his absences was usually shown after the OFF TODAY notation, although on December 19, 2016, no explanation appears on the time card. Exhibit 2 at 8 (10/18/16 – scheduled day off), at 9 (11/7/16 – called in sick), at 10 (11/10/16 – scheduled day off). The reasonable inference to be drawn from the time entry for December 19, 2016, and its lack of an explanation for the absence, is that that claimant did not work on December 19, 2016 due to a decision that the employer made and not claimant. As well, a second reasonable inference to be drawn from the clock in and clock out time shown is that claimant reported to the workplace on December 19, 2016 at 8:20 a.m. and he did not inexplicably stop reporting to work on December 19, 2016, as the supervisor

contended. Accordingly, the time entry for December 19, 2016 flatly contradicts the testimony of the supervisor that claimant failed to report to work on and after December 19, 2016. This contradiction seriously undermines the reliability of the supervisor's entire testimony about the events of December 19, 2016 and the nature of the work separation.

The testimony of the employer's lead and what appears on the time card for December 19, 2016 corroborates most strongly claimant's testimony about what happened on that day. The remaining evidence about the events of December 19 and 20, 2016, including the parties' respective phone records and their respective testimonies is in irreconcilable conflict. Because the supervisor's testimony was less reliable on these matters than was claimant's, we give greater weight to and accept claimant's account. As such, we conclude that claimant reported for work and the supervisor sent claimant home on December 19, 2016 and on December 20, 2016, when the supervisor discharged claimant. Claimant's work separation was a discharge on December 20, 2016 and not a voluntary leaving as of December 19, 2016.

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. 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).

While the supervisor contended that the employer would not have discharged claimant due to lack of work, claimant testified that the supervisor told him that was the reason he was being discharged. Transcript at 7, 15-16, 19. However, assuming claimant was let go due to lack of work, the basis for that discharge would not have been for any misconduct attributable to claimant. Aside from claimant's testimony there is no other discernible reason in the record for claimant's discharge. Accordingly, the employer did not meet its burden to show that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not do so for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-79945 is set aside, as outlined above.

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

DATE of Service: <u>May 12, 2017</u>

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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