

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0559

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73072). Claimant filed a timely request for hearing. On April 28, 2017, ALJ Sgroi conducted a hearing, and on May 1, 2017 issued Hearing Decision 17-UI-82221, reversing the Department's decision. On May 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Yaeger's Plumbing Inc. employed claimant as a laborer from July 28, 2014 until February 13, 2017.

(2) The employer expected claimant to report for work as scheduled and to notify the employer if he was going to be absent. Claimant understood the employer's expectations as a matter of common sense.

(3) On Thursday and Friday, February 9 and 10, 2017, claimant was scheduled to work and did so. Claimant was not scheduled to work on the weekend of February 11 and 12, 2017 and did not do so. On Monday, February 13, 2017, claimant called his immediate supervisor before his shift was scheduled to begin that day at 7:30 a.m. During that call, claimant told his supervisor he was unable to report for work because he had misplaced the key to the work van. The employer regularly allowed claimant to take the van home after his shifts ended and claimant was going to use it to commute to work that day. Claimant did not have any transportation to work other than the work van. The supervisor was irritated with claimant and told him not to come in to work at all that day. Based on the supervisor's tone, claimant was unsure whether he had been discharged.

(4) On February 13, 2017, after speaking with his supervisor, claimant called and sent several text messages to the supervisor inquiring whether he was still employed and if he should report for work on Tuesday, February 14, 2017. The supervisor did not respond to any of claimant's messages. On February 14, 2017, claimant again called his supervisor to determine if he should report for work that day. The supervisor told claimant he was discharged. Later that day, claimant discovered that the employer had discontinued service to the work cell phone that was in claimant's possession.

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).

At hearing, the employer contended that it discharged claimant because he failed to report for work as scheduled or to call in to report absences on February 9 through February 12, 2017, and used the company van to travel to visit his girlfriend in another town from February 9 through February 12, 2017, despite his supervisor telling him that he was forbidden from using the van for that purpose. Audio at ~5:14, ~25:09. However, claimant contended that he worked on Friday, February 10, 2017 as scheduled, the reason he did not work on Saturday and Sunday, February 11 and 12, 2017 was that he had that weekend off and he did not use the van to visit his girlfriend over that weekend because his girlfriend picked him up and drove him to her out-of-town residence. Transcript at ~14:38, ~15:44, ~16:10, ~17:00, ~18:20. Claimant's testimony was based his first-hand knowledge of events that occurred and did not occur on the days at issue. In contrast, the testimony of the employer's witness was based solely on hearsay information that she had obtained from claimant's immediate supervisor rather than on personal knowledge. Audio at ~27:15, ~29:00, ~31:13. That the hearsay on which that witness based her testimony was not completely reliable was evidenced by her confusion and inconsistent testimony about the dates that claimant was scheduled to work, the dates that claimant worked or missed scheduled, work and the date that the supervisor told claimant he was discharged. *See* Audio at ~5:33, ~6:55, ~8:55, ~9:20 *and compare* Audio at ~25:03, ~25:23, ~26:14, ~26:24. Claimant's first-hand evidence is entitled to greater weight than the employer's hearsay evidence. Accordingly, the employer failed to establish that claimant did not report for scheduled work or did not call in on February 10 through February 12, 2017, or that he took the company van to visit his girlfriend despite his supervisor telling him he was not allowed to do so on February 9 through 12, 2017. This employer did not meet its burden to show that claimant's acts or failures to act on those days were misconduct.

Although the employer did not raise it as a ground for claimant's discharge, claimant's testimony suggested that his supervisor discharged him because he had inadvertently lost or misplaced the key to the company van. Audio at ~18:49, ~19:12. The employer did not present evidence showing or tending to show that claimant's loss of the key was anything other than an accidental misplacing of it. Accidents, inadvertent lapses, failures to pay attention, mistakes and the like are generally not accompanied by the consciously aware mental state needed to establish that they constitute willful or wantonly negligent behavior or that they rise to the level of misconduct. *See* OAR 471-030-0038(1)(c). Assuming the employer discharged claimant for losing the key, the employer failed to establish that the circumstances under which the key was lost constituted misconduct on claimant's part.

While the employer discharged claimant, there is insufficient evidence in this record to show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-82221 is affirmed.

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

DATE of Service: June 2, 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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