

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0652

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 31, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 91021). Claimant filed a timely request for hearing. On April 19, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for May 2, 2017. On May 2, 2017, ALJ Seideman conducted a hearing, at which the employer failed to appear, and on May 3, 2017, issued Hearing Decision 17-UI-82418, concluding claimant's discharge was not for misconduct. On May 23, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer asked for a new hearing. The employer's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090(2) (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In support of its request, the employer's representative stated that its witness did not receive notice of the hearing and was unaware that it had been scheduled until the witness received the hearing decision. The employer did not assert that the notice of hearing, which was duly mailed to the employer's representative, was not received by the representative, and failed to offer any explanation as to the circumstances under which the representative did not notify the employer's witness of the date and time set for the hearing. In the absence of such an explanation, there is no basis to conclude that circumstances outside of the employer's reasonable control prevented its witness from appearing at the hearing. Consequently, the employer's request for the EAB to consider new information is denied.

FINDINGS OF FACT: (1) US Fab, LLC employed claimant as a welder, most recently from August 4, 2014 to January 5, 2017.

(2) The employer required claimant to maintain membership with the International Brotherhood of Boilermakers Union 104 as a condition of his employment. Claimant understood that he was required to

be a union member to remain employed, and he understood that he had to pay dues to the union in order to maintain his membership.

(3) Although claimant paid his union dues when required, the union repeatedly notified him that he had not paid his dues and sometimes collected his monthly dues twice. Some of claimant's coworkers had similar problems with the union failing to record that their dues had been paid.

(4) On August 5, 2016, the union requested that the employer terminate claimant for non-payment of dues. On September 23, 2016, the union again requested termination due to non-payment of dues. Claimant had already paid his August and September dues, but the employer suspended claimant from work for non-payment so he sold his car in get the money to pay his August and September dues again.

(5) On September 30, 2016, claimant paid monthly union dues in the amount of \$231.30. The union gave claimant a receipt that stated he was paid in full through September 30, 2016, with no additional balance owed. The receipt noted that the "total" amount claimant owed "to be current" was \$0.00. Exhibit 3.

(6) On December 15, 2016, the union again requested that the employer terminate claimant for non-payment of his dues. On January 5, 2017, the employer discharged claimant for failing to pay his dues.

CONCLUSIONS AND REASONS: We agree with the ALJ 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. In a discharge case the employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly failing to pay the dues necessary to maintain his union membership, which was a condition of his employment. Although the employer alleged that claimant failed to pay his union dues in August, September and December 2016, claimant established that as of September 30th he had paid his dues for August and September in full, with no balance owed. With regard to claimant's December dues, given that the employer's allegation that claimant failed to pay his August and September dues was disproved by claimant's evidence that he had paid them, and claimant provided unrefuted evidence that the union repeatedly made errors with regard to his dues payments, we conclude that it is at least as likely as not that claimant also paid his December 2016 dues. In the absence of a preponderance of the evidence showing that he did not pay them, coupled with proof that his failure to pay was the result of claimant's willful or wantonly negligent conduct rather than simply an inability to pay or failure to realize that he had not already paid them, misconduct has not been shown. Claimant's discharge was not for misconduct, and he is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-82418 is affirmed.

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

DATE of Service: June 14, 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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