

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0742

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150827). Claimant filed a timely request for hearing. On June 6, 2017, ALJ Micheletti conducted a hearing, and on June 13, 2017 issued Hearing Decision 17-UI-85548, concluding claimant's discharge was not for misconduct. On June 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Willamette Building Maintenance employed claimant as a cleaner from January 23, 2017 to February 21, 2017.

(2) The employer had a variety of concerns about claimant's attendance and performance, and received several complaints about the quality of his work from the client whose building claimant was responsible for cleaning. Claimant was unaware of the employer's concerns. He considered his attendance good, and thought he had adequately reported his absences when he missed work. He received compliments from supervisors about the quality of his work, was told that he would not be transferred to another building because the employer was happy with his work where he was, and was told that he was "kicking ass" at his job. Audio recording at ~ 25:55, 41:50.

(3) On February 20, 2017, claimant sent a text message to the employer stating that he could not report to work for the first part of his split shift. The employer wanted claimant to work as scheduled, and was unhappy that claimant was missing work. Later the same day, the employer's client sent a message asking that the employer perform background checks of employees assigned to the client's building and stating, "I have unfortunately heard some disturbing things" about claimant and criminal charges. Audio recording at ~ 21:05.

(4) The employer felt after the client's message that he could no longer coach claimant on his work performance or assign claimant to clean that client's building, and although the employer thought claimant's discharge for other reasons was inevitable decided to do it "right away" without further coaching because of the client's security concern. Audio recording at ~ 19:30.

(5) On February 21, 2017, the employer discharged claimant.

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. Mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b). 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 initially suggested at the hearing that he discharged claimant for poor attendance. Audio recording at ~ 8:20. He then testified that he discharged claimant because of work performance complaints from the client along with a request that claimant not return to the client's location. Audio recording at ~ 8:40, 9:00. Later, he testified that he discharged claimant "right away" on February 21st without further coaching because of the client's "security issue" with claimant. Audio recording at ~ 18:00, 18:20, 19:30. Finally, the employer testified that claimant was "let go for performance, period," and that the other issues, including the security concern, were secondary to claimant's work performance problems. Audio recording at ~ 21:55.

We find it more likely than not, based on the employer's testimony as a whole, that the triggering event, the thing without which claimant would not have been discharged at that particular time on February 21st, was the customer's "security issue" with claimant. The employer knew about and had concerns about claimant's attendance and performance issues based upon absences and complaints the morning of February 20th and before; it was the receipt of the February 20th security complaint that the employer said made him decide to discharge claimant "right away," without waiting any longer. That issue is therefore the initial focus of the misconduct analysis.

The basis of the security issue was a concern that claimant had allegedly had conversations with one or more of the client's employees about some criminal charges, and that the client had "heard some disturbing things." Audio recording at ~ 20:30, 21:05. Beyond that, however, the record does not suggest what criminal charges were discussed, whether they were claimant's criminal charges or someone else's, what claimant said to the client's employees about the criminal charges, or what it was about claimant's words or demeanor that made the client concerned about the security of its location because of claimant's presence cleaning it, and claimant denied ever having had such a conversation while at the client's location. Audio recording at ~ 29:30. Even if we were to assume for the sake of argument that claimant did discuss criminal charges at some point, the employer did not require claimant to undergo a criminal background check or prohibit its employees from having or discussing criminal charges. In the absence of evidence of what claimant said or did, and how such conduct might have amounted to a willful or conscious violation of a known employer expectation, claimant's discharge for posing an alleged "security issue" to the employer's client was not for misconduct.

To any extent claimant's attendance and work performance were also factors in the employer's decision to discharge claimant, the discharge was also not for misconduct. The employer alleged that claimant was absent without authorization on the morning of February 20th; claimant testified, however, that he notified the employer of his absence and thought the employer had acknowledged that he would be absent and knew he planned to catch up the work later. *Compare* Audio recording at ~ 27:15, 33:25, 36:00. Neither party was more or less credible than the other; both appeared sincere, seemed confident in their recollection, and, although each purported to be basing his testimony on the content of text messages, neither presented any documentary evidence tending to prove or disprove either's testimony. The record fails to show that claimant knew or should have known notifying the employer of his absence as he did that morning was likely to result in a violation of the employer's expectations prior to the time he did it. It therefore fails to establish that claimant's February 20th attendance issue amounted to misconduct.¹

The employer also alleged that claimant had a significant history of poor work performance, and read from several client complaints listing specific deficiencies in claimant's performance including failures to clean and restock certain areas and inadequacies in cleaning and stocking other areas. *See e.g.* Audio recording at ~ 15:00, 15:45, 15:50, 16:30, 16:50. The employer alleged that claimant knew about the complaints, was coached to improve shortly after each complaint, and, thereafter, either willfully or with wanton negligence failed to adequately perform his duties. Audio recording at ~ 14:00, 17:25. The employer's witness was not present for any of the coaching incidents, though, did not personally coach or warn claimant about his work performance based on the customer complaints, and could not relate exactly what it was that the person who allegedly coached claimant had said to claimant during the alleged coaching sessions. Audio recording at ~ 17:25, 34:20. Claimant testified that he was never warned or coached about the quality of his work, and was repeatedly told by at least three people that he was "kicking ass" or doing a good job for the client.

Given that the employer did not have firsthand knowledge of whether or how claimant was informed of any performance problems, and claimant's firsthand testimony that he was never informed of problems but instead was repeatedly complimented about the quality of his work, we cannot find that it is more likely than not that claimant's ongoing work performance problems were the result of claimant's willful or wantonly negligent failure to adequately perform his duties, or a decision to ignore the coaching he received. Additionally, claimant's employment with the employer was only for a short duration, and he testified that he was never trained, was told what his job duties were via a list, and was repeatedly complimented on the quality of his work. Given those circumstances, it appears at least as likely as not that any poor work performance on claimant's part was the result either of his lack of knowledge that the employer and client were concerned about the quality of his work, or the result of mere inefficiency due to a lack of job skills or experience performing the work in the manner the employer expected, neither of which is not misconduct.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

¹ Because the employer knew about them and continued to employ claimant until the February 20th incident occurred, any attendance problems that predated the February 20th incident were not the proximate cause of the discharge and are therefore not at issue in this case. Prior incidents become pertinent to a discharge case only if necessary to establish whether or not the incident that triggered the discharge was excusable as an isolated instance of poor judgment. *See* OAR 471-030-0038(1)(d) and (3)(b).

DECISION: Hearing Decision 17-UI-85548 is affirmed.

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

DATE of Service: July 12, 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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