

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1041

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104450). Claimant filed a timely request for hearing. On August 9, 2017, ALJ R. Frank conducted a hearing, and on August 11, 2017 issued Hearing Decision 17-UI-90215, concluding claimant's discharge was not for misconduct. On September 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Cannabis Nation, Incorporated employed claimant as an assistant grower from October 2016 to March 22, 2017.

(2) The employer required claimant to adhere to confidentiality agreements, including agreements that prohibited him from divulging the business location, customer lists and information, financial information, strategies, trade secrets or proprietary information. The employer also prohibited claimant from using company time or resources to engage in social media activities. Claimant understood the employer's expectations.

(3) On March 22, 2017, the employer's business was robbed. When claimant arrived to work that day, police were investigating and employees were standing around in view of the facility and investigation. Claimant used his phone and posted a message to his social media website stating that he was upset because someone had stolen from his work and he might lose his job.

(4) The employer soon discovered claimant's post, thought he was on company time when he posted it, thought it possible that suspects would have access to it and know that a crime had happened, thought the post compromised the police investigation, and considered it a breach of the confidentiality

agreements claimant had signed. That day, the employer discharged claimant for allegedly violating the employer's confidentiality policy.

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. 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 has the burden to establish by a preponderance of the evidence that claimant's discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The record as it was developed at the hearing failed to show that claimant violated the employer's confidentiality policy when he posted a message to his social media website. The record as developed at the hearing suggests that claimant posted that he was upset about the robbery and feared losing his job, but did not divulge information about the nature of the employer's business, the employer's location, its customer lists and information, financial information, strategies, trade secrets, proprietary information or other similar information. Likewise, the record as it was developed at the hearing does not establish whether or not claimant used work time when posting to his social media site. In the absence of a evidence showing that claimant's conduct probably violated the confidentiality agreements or policy, or showing that he probably violated the social media policy by posting the message on work time, misconduct has not been shown. Claimant's discharge was not for misconduct, and he is therefore not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 17-UI-90215 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 26, 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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