

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1058

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct and that benefit rights based on wages earned prior to the discharge may not be cancelled (decision # 145300). The employer filed a timely request for hearing. On August 28, 2017, ALJ Monroe conducted a hearing, and on September 1, 2017, issued Hearing Decision 17-UI-91840, affirming the Department's decision. On September 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Klamath Falls City Schools employed claimant as a library media specialist at Klamath Union High School from October 10, 2010 to April 14, 2017.

(2) The employer expected its employees to refrain from committing theft of school district property. Claimant understood the employer's expectation as a matter of common sense.

(3) On April 6, 2017, claimant found a ring of keys hanging from a janitorial door lock at the school. Claimant had difficulty removing the key on the ring that was in the door lock so she took the key off of the ring to facilitate her efforts. Claimant placed the key ring in her desk drawer which is where she often placed "lost and found" items submitted to her by staff and students. She attached the key removed from the key ring, which she believed was slightly bent, to the lanyard she wore around her neck and intended to report the problem with the lock and the key to the night custodian. Claimant forgot to contact the custodian.

(4) On April 7, 2017, the school secretary found the ring of keys, which belonged to the school principal, in claimant's desk drawer. On April 11, 2017, the principal looked for the key missing from the ring, which was a master key, in claimant's desk drawer but did not find it. However, at that point, claimant, who was present, reached for her lanyard and told the principal she had placed the key there. When the principal asked claimant about what had happened with the keys, she became confused and

provided information about the incident that she later corrected in subsequent discussions and correspondence.

(5) The employer conducted an investigation and ultimately concluded that claimant intentionally misappropriated the keys in question. On April 14, 2017, the employer discharged claimant for “theft of district property.” Exhibit 1; Transcript at 15.

(6) Claimant was never charged with a crime in connection with her discharge from employment nor did she admit to theft in relation thereto.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct. Claimant’s wage credits are not subject to cancellation.

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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show by a preponderance of the evidence that claimant willfully engaged in conduct that violated the standards of behavior the employer had the right to expect of her. Here, the employer has failed to satisfy that burden.

The employer discharged claimant for “theft of district property.” The employer had the right to expect claimant to refrain from stealing district property and claimant understood that expectation as a matter of common sense. However, ORS 164.015 defines theft as follows:

A person commits theft when, *with intent to deprive another of property or to appropriate property to the person or to a third person*, the person:

(1) Takes, appropriates, obtains or withholds such property from an owner thereof;

* * * (italics added)

In her letter to the employer’s Human Resources Director dated April 21, 2017, claimant offered her explanation of what had transpired between April 6 and April 11, 2017, which was consistent with her testimony at hearing. Exhibit 1. She explained that no one had sent out a general email inquiring about missing keys, which would have triggered her memory regarding her actions on April 6. She also explained that the reason she removed the key in the first place was because of the difficulty she had removing it from the lock and her observation that it was slightly bent, which she intended to talk to the custodian about, whose keys she thought she had found. She also explained the source of her confusion when talking to the principal about the keys on April 11, her ignorance that the key in question was a master key and why she had no reason to keep, i.e. commit theft, of such a key. Claimant’s explanations were both plausible and credible. Viewing the record as a whole, the evidence regarding claimant’s intent regarding her possession of the keys in question, is no more than evenly balanced. Accordingly,

the employer failed to establish by a preponderance of the evidence that claimant took or withhold the key or keys in question “with the intent to deprive”, which is essential to the crime of theft under ORS 164.015.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

Prerequisite to a finding that claimant’s benefits rights, based upon wages earned prior to the date of discharge, should be cancelled is a finding by “the authorized representative designated by the director” that the individual was “discharged for misconduct because of the individual’s commission of a felony or theft in connection with the individual’s work...” ORS 657.176(3). Having concluded that claimant’s discharge was *not* for misconduct, that condition is not met, and claimant’s wage credits are not subject to cancellation.

DECISION: Hearing Decision 17-UI-91840 is affirmed.

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

DATE of Service: October 5, 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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