EO: 200
BYE: 201839

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

008
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0070

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 144805). The employer filed a timely request for hearing. On December 28, 2017, ALJ Clink conducted a hearing, and on December 29, 2017, issued Hearing Decision 17-UI-99966, affirming the Department's decision. On January 17, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

With its application for review, the employer submitted a written argument. However, although the employer's argument did not include the referenced appendices, such as emails between a co-owner and claimant, it contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the referenced information during the hearing. For example, the employer failed to show why the owner's spouse/business partner could not have testified or provided the emails exchanged between claimant and him. 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) Employment Options employed claimant as a job developer for mentally disable clients from May 31, 2017 to September 19, 2017.

(2) On or about September 12, 2017, the employer and claimant learned that one of claimant's clients, who suffered from severe autism and for whom claimant had successfully obtained employment at a fast food restaurant, was being terminated from his job, effective September 12. The client had not yet been informed by the restaurant and the employer knew that claimant was leaving for a two week out-of-town vacation on September 13. The employer's owners told claimant that he was expected to notify both the client and his parents about the job termination before he left for vacation. Claimant did so by telling the client, the client's mother and the client's vocational counselor about the termination on September 12, 2017, although the client did not appear to understand.

(3) Despite claimant's notification about the end of the job, the client reported for work on September 15, 2017. The client was informed at that time that his job had ended, which created a crisis for the client and the client's father who had brought him to work. That crisis had to be defused by the employer's owners. The employer concluded that claimant had not informed the client or his family about the client's job termination, and on September 19, 2017, while claimant was on vacation, terminated his employment for that reason.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of standards of behavior the employer has the right to expect of the employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of the 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably violate a standard of behavior the employer had the right to expect him. The employer has the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant testified that he had and made special effort to convince the client's mother that the job had ended because he knew the client might not be able to understand the situation. Audio Record ~ 36:00 to 38:00. The employer's owner presented hearsay evidence that claimant had not notified the client or his family about the client's job termination prior to leaving for his vacation. Audio Record ~ 12:00 to 16:00. On this record, we find no reasonable basis to conclude that claimant was not credible. Thus, we conclude that claimant's first-hand testimony that he had notified the appropriate parties about the client's termination is at least equal to the employer's hearsay evidence that he had not. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233(1976). Because the evidence regarding claimant's communications with the client and family was, at best, equally balanced, the employer failed to show by a preponderance of the evidence that claimant violated the employer's expectation regarding the client in question on or about September 12, 2017.

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 this work separation.

DECISION: Hearing Decision 17-UI-99966 is affirmed.

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

DATE of Service: <u>February 16, 2018</u>

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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