

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0207

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 18, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 143503). The employer filed a timely request for hearing. On February 20, 2018, ALJ Frank conducted a hearing, and on February 23, 2018 issued Hearing Decision 18-UI-103901, affirming the Department's decision. On February 27, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) City of Salem employed claimant as an environmental compliance specialist from August 25, 200143 until December 14, 2017.

(2) The employer expected claimant to be honest in accounting for how he spent paid work time and to perform job duties when he was receiving pay for his time. Claimant understood the employer's expectations.

(3) Sometime before May 23, 2017, claimant was assigned the task of calibrating a pH probe on a new piece of equipment at a waste processing facility. On approximately May 23, 2017, claimant visited that waste processing facility in the morning on a matter unrelated to the pH probe and then left the facility. That afternoon, claimant returned to the facility and remained in his vehicle while reading manuals about how to perform the calibration of the pH probe. Claimant wanted to be sure that he knew how to calibrate the probe correctly on the new piece of equipment. While claimant was reviewing the manuals, his supervisor arrived at the waste processing facility. Claimant left his vehicle and interacted with his supervisor.

(4) On approximately May 24, 2017, claimant returned to the waste processing facility and performed the calibration on the pH probe. Claimant recorded in his records that he had performed the calibration on the pH probe. That day, claimant sent an email to his supervisor notifying him that he had performed the requested calibration of the pH probe.

(5) Sometime after May 24, 2017, claimant contacted the employer's human resources department and complained that his supervisor had been harassing him during the interaction that occurred at the waste processing facility on May 23, 2017. The employer commenced an investigation.

(6) In the process of its investigation, the employer determined that the electronic log maintained in the piece of equipment at the waste processing facility did not show that the pH probe had been calibrated at any time in late May 2017, as should have been recorded if claimant had performed a calibration on May 23, 2017. However, if after calibrating the pH probe, claimant had not completed the required calibration sequence by hitting an "enter" button on the probe, the electronic log would not have recorded that a calibration had occurred.

(7) Also as part of its investigation, the employer also reviewed surveillance videos at the waste processing facility from May 23, 2017. Those videos showed that claimant was at the waste processing facility twice on that day, but did not show that claimant had calibrated the pH probe that day. There was no evidence that the employer reviewed the videos from May 24, 2017 to determine if claimant calibrated the pH probe on that day. Sometime later, the employer discovered that the pH probe that claimant contended he had calibrated on May 24, 2017 was non-functional. The time at which the probe became non-functional was unknown.

(8) On November 2, 2017, the employer convened a pre-dismissal hearing for claimant. At the hearing, claimant insisted that he had performed the calibration of the pH probe despite a calibration not having been recorded in the electronic record.

(9) After the pre-dismissal hearing, the employer concluded that claimant had never calibrated the pH probe on the piece of equipment at the waste processing facility as he represented, and had been dishonest in accounting for his work time in late May 2017. On December 14, 2017, the employer discharged claimant for these reasons.

CONCLUSIONS AND REASONS: The employer discharged claimant but 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

While the employer's witness contended that claimant did not actually calibrate the pH probe at issue, claimant steadfastly maintained at hearing that he had, although the day after the employer thought that he had. Audio at ~13:50, ~15:48, ~33:17. While the employer inferred from the absence of video evidence from May 23, 2017 showing claimant performing a calibration on that day and the absence of a recorded calibration in the electronic log that claimant had not performed the assigned calibration of the pH probe in late May 2017, the employer's evidence did not persuasively rule out that claimant actually performed the calibration on May 24, 2017. Significantly, the employer did not present evidence that claimant was not observed on videos from May 24, 2017 at the waste treatment facility or in the vicinity

of the pH probe performing the calibration. The employer also did not rule out that, while claimant performed the calibration as he contended, he failed to correctly complete the calibration sequence by depressing the enter button at its conclusion, leading to the absence of a recorded calibration in the electronic log. Absent evidence ruling out an innocent explanation for either circumstance, the employer did not circumstantially rule out that claimant actually performed the calibration as he contended. On this record, the employer did not meet its burden to show that claimant dishonestly represented that he had performed the calibration when he actually had not, and that he thereby engaged in misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-103901 is affirmed.

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

DATE of Service: March 29, 2018

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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