

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0218

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81329). Claimant filed a timely request for hearing. On January 18, 2018, the Office of Administrative Hearings (OAH) mailed a Notice of Hearing to the parties at their respective addresses of record for a hearing on January 30, 2018. On January 30, 2018, ALJ Frank conducted a hearing at which the employer failed to appear, and on February 7, 2018 issued Hearing Decision 18-UI-102747, concluding the employer discharged claimant, but not for misconduct. On February 26, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer stated that it never received the Notice of Hearing mailed January 18, 2018, and so was not aware of and failed to appear for the hearing on January 30, 2018. The employer submitted new information to EAB and requested that EAB review the new information and conduct a new hearing. The employer's request is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090(2)(b) allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer offered no circumstantial evidence to support its implied assertion that the notice of hearing, though mailed to the employer at its address of record, was not delivered to the employer. Documents sent through the U.S. Postal service are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(10) (January 31, 2012). Claimant's bare assertion of non-receipt is insufficient to overcome the presumption of receipt. The employer's request to have EAB to consider new information under OAR 471-041-0090 therefore is denied for this reason. Moreover, the employer did not certify that it provided a copy of its written argument and the new information to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason as well, we only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Inter-Con Security Systems Inc. employed claimant from June 2014 until November 3, 2017 as a security guard.

(2) Claimant worked twelve-hour shifts. Claimant's union contract provided that claimant was entitled to take two fifteen-minute rest breaks, and one thirty-minute meal break during which claimant was relieved of work-related responsibility, during each twelve-hour shift.

(3) The employer expected claimant to complete his assigned tasks during his shift. A supervisor periodically placed performance test cards in areas claimant was required to patrol during his shift to test whether claimant checked those areas. The supervisor expected claimant to find the cards while performing his duties and to complete the instructions on the cards to show the employer he had checked the areas. The employer also expected claimant to check all doors in his work area to ensure each was locked during his shift. Claimant understood the employer's expectations regarding his work duties.

(4) During the month preceding his work separation, claimant checked all the areas in his assigned patrol area during his shifts.

(5) On or about October 28, 2017, claimant left his post and went off-site for twenty minutes to get food during his thirty-minute meal break. Claimant left his post unattended for the twenty minutes he was off-site. There was no other employee to work for him at his post at that time. In the past, another employee had always been present to relieve claimant of his duties during his meal break. Claimant did not know a procedure for taking his meal period when he was working alone and no other employee was present to relieve him at his post. At the end of his shift, claimant's supervisor told claimant that he was discharged because he went off-site to get food during his shift.

(6) On November 3, 2017, the employer sent claimant a termination letter stating that it discharged claimant because claimant allegedly failed to locate two performance test cards that the employer had placed in his work area to test his performance, and failed to discover a door that was unlocked, during his shift on October 27, 2017. The letter did not state claimant was discharged for leaving work during his lunch period.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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. 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 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 result in violation of standards of behavior the employer had the right to expect of an employee. 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, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectations.

Based on claimant's testimony, it appears that the employer discharged claimant for allegedly failing to check two areas and a door during one of his final shifts. However, claimant's uncontroverted testimony was that he did not fail to check all the areas and doors while patrolling his work area during the last month preceding his discharge. Audio Record at 12:25-12:34, 15:49-16:20. On this record, where there is no evidence that claimant consciously violated the employer's reasonable expectation that he perform his work duties, including finding the performance test cards and any unsecured doors, the record does not show claimant engaged in the misconduct alleged.

To the extent the employer discharged claimant because he left the work site during his one meal period during a twelve-hour shift, the record fails to show that claimant knew or should have known that the employer expected him to remain on-site during that meal period even though no other employee took his post. Claimant understood from his union contract that he was supposed to be relieved from all work duties during his one meal per shift. Always in the past, another employee was present to relieve claimant of his duties while he took his meal break. Given that claimant did not know from the employer's policies, past practices, warnings, or common sense that he was required to stay on-site during his meal period, his failure to do so did not amount to an willful or wantonly negligent violation of the employer's expectations. His conduct in leaving the work site for lunch was, therefore, not misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 18-UI-102747 is affirmed.

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

DATE of Service: March 28, 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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