

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0432

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 9, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141933). Claimant filed a timely request for hearing. On April 12, 2018, ALJ Amesbury conducted a hearing, and on April 18, 2018, issued Order No. 18-UI-107576, concluding the employer discharged claimant, but not for misconduct. On April 30, 2018, the employer filed an application for review with the Employment Appeals Board (EAB)

In written argument, the employer presented new information that was not presented at hearing. The employer's argument is construed as a request to have EAB consider the new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing 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's argument failed to offer any explanation regarding why it could not have presented the new information at the April 12, 2018 hearing, let alone that factors or circumstances beyond its reasonable control prevented it from doing so at that time. For these reasons, the employer's request to have EAB consider the new information is denied.

FINDINGS OF FACT: (1) Infrasource Services, LLC employed claimant as a laborer from January 18, 2018 to February 26, 2018.

(2) At hire, claimant possessed a commercial driver's license (CDL), although his job duties as a laborer did not require him to operate vehicles that could only be operated by individuals who possessed a CDL. Claimant was told that it was "appreciated if [claimant] had a CDL, but it was not required" to perform his job. Audio Record ~ 25:00 to 25:30. Some laborers who worked for the employer did not have CDLs or even regular passenger driver's licenses.

(3) On February 15, 2018, claimant's supervisor told him that he was not needed to work on Friday, February 16 and that the supervisor would call him on Monday, February 19 if he was needed to work that week. However, on February 16, 2018, claimant was arrested for DUII and incarcerated until

February 21, 2018. On February 19, 2018, claimant telephoned his supervisor and told him about his arrest and incarceration. The supervisor told claimant that he was “laid off until they figured out the situation.” Audio Record ~ 22:30 to 23:30. Although claimant’s driver’s license was not suspended upon his DUII arrest, claimant told his supervisor that he was not sure about what would happen with his license but that he would probably lose it. Audio Record ~ 26:00 to 26:30.

(4) On February 26, 2018, the employer discharged claimant because he “lost his CDL.” Audio Record ~ 17:30 to 18:30. When claimant reported to the employer to pick up his belongings, he told his supervisor that his license had not been suspended and that he was available for work. The supervisor told claimant that “his hands were tied because the superintendent had already filed the paperwork.” Audio Record ~ 26:20 to 27:20.

(5) On March 16, 2018, claimant was convicted of DUII and his license was suspended.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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)(c) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of *the occupation* involved, so long as such failure is reasonably attributable to the individual. (Emphasis added.) OAR 471-030-0038(3)(a) 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. 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).

As a preliminary matter, the employer’s testimony about the facts concerning a requirement that claimant maintain a CDL as a condition of his employment, which was based on hearsay, differed from claimant’s testimony, who was a participant in the discussions referenced. In the absence of evidence demonstrating that claimant was not a credible witness, and on this record we find none, his first hand testimony was at least as persuasive as the employer’s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer – has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant’s evidence.

The employer discharged claimant because he “lost his CDL.” Oregon law prohibits the operation of certain vehicles except by individuals who hold a specific class of commercial driver’s license (CDL), which is distinguished by the size of the vehicle and the number of passengers the vehicle is designed to transport. *See* ORS 807.031. It was undisputed that claimant’s occupation was that of laborer, and although the record shows that the employer preferred its laborers to possess a CDL, on this record, the possession of a CDL was not necessary to perform the essential functions of that occupation, particularly

since other laborers at the employer did not possess CDLs or even regular passenger licenses. Therefore, the employer failed to establish that claimant's discharge because he "lost his CDL" was misconduct under OAR 471-030-0038(3)(c).

The employer also failed to establish that its discharge of claimant because he "lost his CDL" constituted misconduct under OAR 471-030-0038(3)(a). Even assuming that the employer expected claimant to maintain his CDL as a condition of his employment as a laborer, the record fails to show that claimant was made aware of that expectation. Moreover, claimant was not convicted and his license was not suspended until March 16, 2018, several weeks after the employer discharged him. Accordingly, the employer failed to show that claimant had violated the expectation for which he was discharged on February 26, 2018.

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 his work separation.

DECISION: Order No. 18-UI-107576 is affirmed.

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

DATE of Service: June 1, 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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