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BYE: 201835

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

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<p><b>EMPLOYMENT APPEALS BOARD DECISION</b> <b>2018-EAB-0531</b></p>
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*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On November 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150539). Claimant filed a timely request for hearing. On December 6, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for December 20, 2017. On December 20, 2017, ALJ Wyatt convened a hearing, at which both parties appeared, and continued the hearing to January 9, 2018 to provide notice to the parties of additional issues. On December 21, 2017, OAH mailed notice of the continued hearing scheduled for January 9, 2018. On January 9, 2018, ALJ Wyatt conducted a hearing, at which the employer failed to appear, and on January 11, 2018 issued Order No. 18-UI-100788, concluding that the employer discharged claimant, but not for misconduct. On January 25, 2018, the employer filed a timely request to reopen the hearing held January 9. On February 9, 2018, OAH mailed notice of a hearing scheduled for February 21, 2018. On February 21, 2018, ALJ Wyatt conducted a hearing, at which both parties appeared, and issued Order No. 18-UI-103932, denying the employer's request to reopen the hearing and leaving Order No. 18-UI-100788 undisturbed. On March 6, 2018, the employer filed an application for review of Order No. 18-UI-103932 with the Employment Appeals Board (EAB). On April 4, 2018, EAB issued Appeals Board Decision 2018-EAB-0236, concluding that the employer had good cause for failing to appear at the January 9 hearing, and allowing the employer's request to reopen the hearing to address the merits of decision # 150539.

On April 11, 2018, OAH mailed notice of a hearing scheduled for April 26, 2018. On April 26 and May 11, 2018, ALJ Wyatt conducted a hearing, at which both parties appeared, and on May 18, 2018 issued Order No. 18-UI-109742 concluding that claimant was not an independent contractor under ORS 657.040 and 670.600 and that the employer discharged claimant, but not for misconduct. On May 24, 2018, the employer filed an application for review with EAB of Order No. 18-UI-109742.

**Employer’s Written Argument:** In Order No. 18-UI-109742, the ALJ concluded that claimant was not an independent contractor and the employer discharged him, but not for misconduct. The employer argues in its written argument that the employer met its burden to show that it discharged claimant for being under the influence of alcohol while working, failing to work 40 hours per week, and failing to produce a saleable crop. In a discharge case, the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The “proximate cause” of a discharge is the incident without which a discharge would not have occurred when it did and is usually the last incident of alleged misconduct preceding the discharge. The employer’s owner testified that the assessment from the experts regarding the plants’ mildew and broad mite infection within the five days before June 26, 2018 triggered his decision to discharge claimant on June 26.<sup>1</sup> Therefore, the record shows that it was that incident, and not claimant’s alleged alcohol consumption or onsite attendance that was the proximate cause of claimant’s discharge and is the proper focus of the misconduct analysis.

The record does not show by a preponderance of the evidence that the plant quality problems were attributable to claimant as misconduct. Although the owner alleged that claimant provided substandard plants and failed to care properly for the plants, claimant’s testimony attributes the plant problems to contamination by visitors to the sites and faulty equipment provided by the employer that did not meet his recommendations. Moreover, even if some of the problems resulted from claimant’s growing methods, the record does not show that it was more likely than not that claimant acted willfully, or with indifference to the consequences of his acts or failures to act with respect to his growing methods.

Even had claimant’s alleged alcohol consumption or attendance been established as the proximate cause for his discharge, the evidence was not “uncontroverted” as the employer argues regarding claimant’s alleged alcohol consumption at work. Claimant denied having consumed alcohol at work and the hearsay statements to the contrary do not outweigh claimant’s testimony.<sup>2</sup> Moreover, although claimant admitted he did not work 40 hours per week onsite, he testified as to his good faith belief that he had satisfied the employer’s attendance expectations by being on call at all times and working more than 40 hours per week when including on and off-site hours.<sup>3</sup>

The employer’s arguments that claimant was an independent contractor as defined by ORS 657.040 and ORS 670.600, or exempt from unemployment benefits pursuant to ORS 657.045 are not supported by this record.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the Order under review is **adopted**.

**DECISION:** Order No. 18-UI-109742 is affirmed.

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

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<sup>1</sup> Transcript (May 11, 2018) at 6-8, 12, 31.

<sup>2</sup> *Id.* at 46-48.

<sup>3</sup> *Id.* at 43-46, 51-53.

**DATE of Service: June 26, 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](http://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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