

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0785

Reversed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On June 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111740). Claimant filed a timely request for hearing. On June 15, 2018, the Office of Administrative Hearings (OAH) served, by mail, notice of a hearing scheduled for June 29, 2018, at which time claimant failed to appear. On June 29, 2018, ALJ Shoemake issued Order No. 18-UI-112494, dismissing claimant's request for hearing based on his failure to appear.

On July 6, 2018, claimant filed a request to reopen the June 29, 2018 hearing. On July 13, 2018, OAH mailed to the parties notice of a hearing scheduled for July 26, 2018 to address claimant's reopen request, and if granted, conduct a hearing on the merits of decision # 111740. On July 26, 2018, ALJ Scott conducted an interpreted hearing on both claimant's reopen request and the merits of decision # 111740, and on August 2, 2018 issued Order No. 18-UI-114260, granting claimant's request to reopen and then affirming the Department's decision.

On August 8, 2018, claimant filed an application for review of Order No. 18-UI-114260 with the Employment Appeals Board (EAB). With its application for review, claimant submitted a written argument. However, claimant failed to certify that it provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). For this reason, EAB did not consider claimant's argument or any information not received into evidence at the hearing when reaching this decision.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the ALJ's conclusion that claimant demonstrated good cause for his failure to appear at, and reopen, the hearing originally held on June 29, 2018 are **adopted**.

FINDINGS OF FACT: (1) Walmart Associates employed claimant as an overnight stocker from October 15, 2016 to April 24, 2018.

(2) Claimant was a foreign national and when he began his employment in 2016, he had a valid two-year work permit that was scheduled to expire on April 21, 2018. In April 2017, claimant employed an attorney and applied for a “green card”, or permanent resident card, which, if granted, allows a foreign national to live and work permanently in the United States. Transcript at 12-14.

(3) Claimant’s attorney notified Walmart that his application had been approved and that the only step that remained was for the relevant government agency to issue the permanent resident card.

(4) On April 24, 2018, the employer discharged claimant because of his failure to produce a document that gave him permission to work in the United States after April 21, 2018.

(5) Claimant received his “green card” in May 2018 after which the employer rehired him.

CONCLUSIONS AND REASONS: We disagree 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)(a) (January 11, 2018) 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. OAR 471-030-0038(3)(c) provides that the willful or wantonly negligent failure to maintain a license necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual. 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 expectation.

In Order No. 18-UI-114260, the ALJ concluded that the employer discharged claimant for misconduct under OAR 471-030-0038(3)(c), reasoning:

The evidence indicated that the failure to maintain authorization to work in the United States was reasonably attributable to claimant. It was his responsibility to keep his authorization current and he neglected to do so. I infer that claimant needed to initiate the process of renewal in a more timely manner and if he had done so...could have been secured prior to April 21, 2018.

Order No. 18-UI-114260 at 4. We disagree and conclude the employer failed to meet its burden of proof.

The employer had the right to expect claimant to maintain his authorization to work in the United States as a condition of his employment. Claimant was aware of and understood that expectation as a matter of common sense. However, there is nothing in the record that supports the ALJ’s inference that if

claimant had initiated the process of obtaining a valid work permit that would have extended his ability to work beyond April 21, 2018 sooner than one year prior to that date, he would have been successful in doing so. The delay in obtaining the authorization he eventually obtained in May prior to April 21, 2018 might have been entirely attributable to circumstances beyond his reasonable control.

In the absence of a preponderance of the evidence showing that claimant willfully or with wanton negligence engaged in conduct that violated the employer's expectation, misconduct has not been shown. 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-114260 is set aside, as outlined above.¹ *La Orden de la Audiencia 18-UI-114260 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: September 10, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en courts.oregon.gov. En este sitio web, hay información disponible en español.

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente. Para llenar este formulario, puede visitar

¹ This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

Esta Orden revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios días a dos semanas para pagar los beneficios atrasados.

<https://www.surveymonkey.com/s/5WQXNJH>. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*