

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0181

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 7, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #123912). Claimant filed a timely request for hearing. On December 2, 2013, ALJ M. Davis conducted a hearing, and on January 3, 2014 issued Hearing Decision 14-UI-07635, affirming the Department's decision. On January 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Sykes Enterprises, Inc. employed claimant from April 19, 2010 to October 16, 2013 as a telephone customer service agent.

(2) The employer prohibited the use of foul, inflammatory or abusive language on the call floor because customers could overhear it. Claimant understood that expectation.

(3) On October 14, 2013, claimant was talking with a coworker. Another employee approached claimant and told him, "I am tired of you complaining. Stop bitching." Transcript at 10. Claimant complained about the coworker's comment to a human resources representative. The human resources representative investigated the incident. Two employees, including the employee who had told claimant to stop complaining, provided differing statements of what claimant said during the incident, but both said they heard claimant use the word "fuck" during the incident. One of the employees who provided a statement was on the telephone with a customer during the incident.

(4) On October 16, 2013, the employer discharged claimant for allegedly using foul language while working on the call floor.

CONCLUSIONS AND REASONS: We disagree with the Department and 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 wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) (August 3, 2011) 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).

At hearing, the employer's witness alleged, and claimant denied, that claimant used foul language on the call floor on October 14, 2013. Transcript at 5-6, 15-16. In Hearing Decision 14-UI-07635, the ALJ found as fact that the employer received "multiple reports" that claimant used foul language at work on that day.¹ Based on that fact, the ALJ concluded that the preponderance of the evidence indicated that claimant used foul language.² For the following reasons, we disagree with that conclusion.

The employer's evidence consisted entirely of two hearsay statements from employees who did not testify at hearing. Furthermore, one of the statements lacks credibility because it was provided by the employee involved in the dispute with claimant, and both statements lack credibility because they differed from each other, other than to allege claimant used the word "fuck." Transcript at 5. Moreover, one of the employees who alleged claimant used foul language was on the telephone with a customer during the incident, and may not have provided an accurate account of what occurred. Absent a basis for concluding claimant was not a credible witness, the employer's hearsay evidence is insufficient to show that claimant used foul language on October 14, 2013. The employer therefore failed to meet its burden of proof to show claimant violated the employer's expectation that employees not use foul language while working.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-07635 is set aside, as outlined above.

¹ Hearing Decision 14-UI-07635 at 2-3.

² *Id.* at 3.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: February 20, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.