

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0210

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 4, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #145142). Claimant filed a timely request for hearing. On January 28, 2014, ALJ Wyatt conducted a hearing, and on January 29, 2014 issued Hearing Decision 14-UI-09353, concluding the employer discharged claimant, but not for misconduct. On February 3, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dominos employed claimant from December 7, 2011 to October 23, 2013. Claimant drove her personal vehicle while working as a delivery driver for the employer.

(2) The employer expects employees to refrain from acting in a rude manner, and from using foul language and racial slurs while working. Claimant understood that expectation.

(3) The employer had not given claimant any disciplinary warnings since approximately October 2012.

(4) On October 21, 2013, while returning to the employer's store during his shift, another driver struck claimant's back tire, causing an accident and damaging the vehicle. The other driver drove away, so claimant returned to his workplace. As claimant exited his vehicle in the employer's parking lot, the other driver involved in the accident drove into the lot. Four men got out of the vehicle, surrounded claimant and yelled at him, saying he caused the accident. The individuals then left the parking lot without giving claimant any insurance information.

(5) The incident in the parking lot upset claimant, and he went into the back room of the employer's store, and began to speak loudly and angrily about the incident. A coworker told claimant to calm down, which he did. Claimant left work about ten minutes later when the person in charge told him he could leave work to repair his car.

(6) On October 22, 2013, another employee reported to the employer's director of operations that claimant used foul language and racial slurs when he was upset in the store the previous day. The individuals in the other driver's car were Latino.

(7) On October 23, 2013, the employer discharged claimant for allegedly being rude, and using foul language and racial slurs on October 21, 2013.

CONCLUSIONS AND REASONS: We conclude that the employer discharged claimant, 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer reasonably expected claimant to refrain from acting in a rude manner or using foul language or racial slurs while working. Claimant understood that expectation. Although it is undisputed that claimant was upset about the accident and what occurred in the parking lot, the employer provided only hearsay evidence to support its allegations that claimant was rude to his coworkers or that he used foul or racist language when he was upset. Claimant asserted that he was not rude to his coworkers and that he did not use foul language or racial slurs. Transcript at 16. Absent a reason to conclude claimant was not a credible witness, claimant's firsthand testimony about the final incident is more persuasive than is hearsay about the employer's allegations. Accordingly, the employer has not met its burden of proof to show claimant violated the employer's expectations.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from the receipt of unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-09353 is affirmed.

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

DATE of Service: March 5, 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.