

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0665

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 13, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #112850). Claimant filed a timely request for hearing. On April 2, 2014, ALJ Micheletti conducted a hearing, and on April 4, 2014 issued Hearing Decision 14-UI-14311, concluding the employer discharged claimant, but not for misconduct. On April 22, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) PTIGlobal employed claimant from February 1, 2006 to December 9, 2013 as a quality assurance lead.

(2) The employer expected claimant to communicate with coworkers in a professional and polite manner on all occasions. Claimant understood the employer's expectation.

(3) On December 6, 2013, an employee complained to a manager that claimant, while giving direction to the employee, had implied that the employee had used drugs by smiling and saying to him, "You must be smoking." Exhibit 1. Claimant denied having made any statement to the employee implying that he had used drugs.

(4) On December 13, 2013, the employer discharged claimant for allegedly communicating with a coworker in an unprofessional and impolite manner by making a statement implying that he had used drugs.

CONCLUSIONS AND REASONS: We agree with the ALJ 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 the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant because she allegedly raised her voice while giving direction to an employee she was supervising, and made a comment implying that the employee had used drugs. Transcript I at 5. There was no evidence in the record that claimant raised her voice while speaking to an employee during the alleged final incident on December 6, 2013. The only evidence provided at hearing that claimant made statements implying that the employee had used drugs was hearsay testimony from the employer's manager, and an unsigned, undated letter, allegedly from the employee, who did not testify at hearing. Claimant denied having said to the employee that he was smoking or using drugs. Transcript II at 33, 37. Absent a basis for concluding that claimant was not a credible witness, her first-hand testimony outweighs the employer's hearsay evidence to the contrary. We therefore found in accordance with claimant's testimony that she did not make a statement to an employee she was supervising that implied he had been using drugs. The employer therefore failed to show claimant violated the employer's expectation that she communicate with coworkers in a professional and polite manner on all occasions.

The employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14311 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, J.S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 21, 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.