

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0669

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70342). Claimant filed a timely request for hearing. On April 17, 2014, ALJ M. Davis conducted a hearing, and on April 18, 2014 issued Hearing Decision 14-UI-15602, concluding claimant's discharge was not for misconduct. On April 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McDonalds of Bend employed claimant from October 20, 2010 to February 3, 2014.

(2) On January 28, 2014, claimant's supervisor had claimant sign a written warning for conduct that had occurred during a previous shift. Claimant signed the warning and added, "I'm tired of feeling intemedated [*sic*] and Belitteld [*sic*] by [the supervisor] for 3 yr." Exhibit 1. Claimant left work shortly thereafter.

(3) As claimant left, a customer and personal friend of claimant's asked her why the supervisor was yelling. Claimant calmly replied that she was "in trouble and being wrote up," then left the restaurant.

(4) The employer suspended claimant after concluding that claimant had behaved inappropriately while leaving the store, averring she had been "saying stuff and yelling in front of other crew member" as she left and had to be told to leave.

(5) On February 3, 2014, the employer discharged claimant because of her alleged January 28, 2014 behavior.

CONCLUSIONS AND REASONS: 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. The employer bears the burden of proving misconduct occurred by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer failed to prove by a preponderance of the evidence that claimant acted inappropriately as she left work on January 28th. Although the employer alleged that claimant complained and yelled in front of coworkers and customers as she left, the employer did not provide any direct evidence supporting its allegation, only hearsay statements from individuals who did not testify. Claimant testified that she did not act as alleged, but instead that the supervisor was the one who was yelling and acting inappropriately. Claimant testified that she calmly responded to one customer and personal friend who asked what had happened, but denied any inappropriate actions. Weighing claimant's direct evidence against the employer's hearsay, we cannot conclude that it is more likely than not that claimant acted inappropriately. In the absence of a preponderance of the evidence that she had, claimant's discharge was not for misconduct, and she is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Hearing Decision 14-UI-15602 is affirmed.

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

DATE of Service: May 22, 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.