

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0684**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 5, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 92436). The employer filed a timely request for hearing. On April 7, 2014, ALJ Clink conducted a hearing, and on April 9, 2014 issued Hearing Decision 14-UI-14649, reversing the Department's decision. On April 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she offered new information not presented at the hearing and asked for a new hearing to allow her to present testimony from certain of her former coworkers. We construe claimant's request for a new hearing as a request that EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party shows that factors or circumstances beyond the party's reasonable control prevented the party from offering the information during the hearing. Claimant was aware before the hearing that the employer had discharged her for allegedly intimidating and bullying a coworker and she was reasonably aware that direct testimony from coworkers who had witnessed the incident was likely to be an important rebuttal to the employer's allegations. Because the evidence that claimant presented at hearing was a matter within her reasonable control, and claimant presented no explanation for her failure to call her former coworkers to testify on her behalf, claimant failed to show, as required under OAR 471-041-0090, that factors or circumstances beyond her reasonable control prevented her from presenting evidence from those witnesses at the hearing. For these reasons, under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) NW Innovations employed claimant as a food service worker from September 14, 2011 until February 10, 2014. The employer operated a hospitality and catering company for Chemeketa Community College (CCC). The workplace was on the CCC campus.

(2) The employer expected claimant to refrain from intimidating, coercing or bullying her coworkers. Claimant was aware of this expectation as a matter of common sense and interpreted it according to her what she thought was prohibited behavior.

(3) Claimant worked with several coworkers in a kitchen. The coworkers, including claimant, "joked around" with each other when working, often untied the strings of others' aprons as pranks, and made "snide comments to each other every now and then." Audio at ~27:43, ~28:05.

(4) On February 4, 2014, claimant's lead worker was absent from work. On February 5, 2014, the lead worker reported to the manager that a CCC employee had told the lead worker that she had observed the day before, "from a distance," an incident that might have involved claimant "grabbing" a coworker when both were cleaning up the kitchen. Audio at ~18:42; ~19:04. After he received this report, the manager interviewed claimant's coworkers. One coworker told the manager that, on February 4, 2014, she was mopping the kitchen floor when claimant asked her to mop another area. When the coworker told claimant she did not want to mop the other area, the coworker reported to the manager that claimant "grabbed" the bib of her apron, pulled the coworker toward claimant and told the coworker that "she needs to do what she's told." Audio at ~19:50. The manager interviewed a second coworker and that coworker told the manager she had observed claimant "grab the bib" of the first coworker's apron but did not hear what claimant might have said to the first coworker. Audio at ~20:26. Based on the accounts of both coworkers, the manager concluded that claimant had grabbed her coworker's apron "in an aggressive manner" on February 4, 2014. Audio at ~19:50.

(5) On February 10, 2014, the manager spoke with claimant about the incident on February 4, 2014, and claimant denied she had engaged in any intimidating or bullying behavior on that day. On February 10, 2014, the employer discharged claimant for intimidating and bullying her coworker on February 4, 2014.

**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 carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 14-UI-14649, the ALJ found as fact that claimant admitted to "pulling her coworker's apron" and that "claimant's own testimony that she grabbed a coworker is sufficient to be considered bullying." Hearing Decision 14-UI-14649 at 3. Based on these purported admissions, the ALJ concluded that claimant had admitted to behavior that was a wantonly negligent violation of the employer's standards and was misconduct. Hearing Decision 14-UI-14649 at 3. We disagree.

The employer's manager did not dispute claimant's characterization of the type of joking and physical behavior that was customary and accepted in the kitchen. Audio at ~27:43, ~35:02. The manager also did not dispute claimant's statement that throughout the day on February 4, 2014 the coworker had been

untying the strings of claimant's apron as an ongoing prank. Audio at ~27:43. The manager contended, however, that claimant's behavior on February 4, 2014, as reported to him, was done in an "aggressive manner" that went beyond accepted the behavior of the kitchen. Audio at ~35:02. The manager did not explain how he reasonably inferred from claimant's reported behavior that it was done with an "aggressive," rather than a joking, intention. Nor did the manager present any evidence that the coworker whom claimant allegedly bullied had actually thought she was being bullied, intimidated or threatened by claimant's reported behavior and that the coworker did not interpret claimant's behavior as consistent with the norms of the kitchen. For her part, claimant's testimony that she was unable to recall the incident on February 4, 2014 in which she allegedly "grabbed" her coworker appeared sincere and, despite the ALJ's assertion, she never admitted that she had grabbed the coworker's apron. Audio at ~26:50; ~28:39; Hearing Decision 14-UI-14649 at 3. Claimant's response that she "didn't know" if she had grabbed the coworker's apron, but that, if she had, she must have been intended it as kitchen horseplay, also appeared to be consistent with the sincere answer of a person with no recollection an incident who was trying to be completely honest about matters and was not necessarily "self-serving." Audio at ~28:14; Hearing Decision 14-UI-14649 at 3. From claimant's description of the type of behavior engaged in the kitchen, a mere grabbing of the bib of a coworker's apron, without more, would not reasonably be construed as bullying or intimidating behavior nor would a statement that a coworker needed to follow instructions be construed, without more, as a threat rather than as joking behavior intended to mimic a supervisor. In view of claimant's rebuttal evidence, the employer did not meet its burden to establish that claimant's behavior on February 4, 2014, even if it was as reported to the manager, was intended to be bullying or intimidating or was reasonably construed as such. The employer did not show that, more likely than not, claimant engaged in misconduct,

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment benefits.

**DECISION:** Hearing Decision 14-UI-14649 is set aside, as outlined above.

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

**DATE of Service:** May 29, 2014

**NOTE:** This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

**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.