

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1237

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 18, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 73419). The employer filed a timely request for hearing. On July 9, 2014, ALJ Murdock conducted a hearing, and on July 11, 2014, issued Hearing Decision 14-UI-21382, affirming the Department's decision. July 21, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Carl Diebold Lumber Company employed claimant as a puller in its mill from April 12, 2013 to May 29, 2014.

(2) The employer expected its employees to be respectful and subordinate to supervisors. Claimant was aware of and understood the employer's expectations.

(3) On May 28, 2014, claimant's supervisor summoned claimant over and told him he was incorrectly pulling and sorting lumber units off the green chain, the mill's internal lumber delivery system, because the 16 foot units claimant had pulled and placed on a cart were not flush with each other and he wanted to show claimant. Claimant threw up his hands and returned to his post along the chain because it had not been stopped and he was concerned the units passing along on the chain would pile up at his post. When the supervisor again approached claimant and renewed his criticism, claimant responded in a raised voice that the carts he had been given, unlike others, did not have a back stop and he could not walk to the back side of the cart and check for flushness without leaving his post. The supervisor considered claimant's actions, first in walking away while he spoke to him and then raising his voice when he responded at his post to be insubordinate. On May 29, 2014, the employer discharged claimant for that reason.

**CONCLUSIONS AND REASONS:** We agree with the Department and the ALJ. 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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectation. Here, the employer failed to satisfy that evidentiary burden.

The employer discharged claimant for being insubordinate to his supervisor by walking away from him and then raising his voice when speaking to him about the units claimant had pulled and sorted on a cart. The employer had the right to expect claimant to be respectful and subordinate to his supervisor as a matter of common sense. Although the supervisor interpreted claimant's actions on May 28 to be both disrespectful to him and insubordinate, claimant explained his actions at hearing. "The green chain doesn't stop moving. You've still got bundles getting thrown on the line. So I had to walk away...[and return to his post]...so the whole line doesn't get piled up." Audio Record ~ 12:30 to 12:45. When the supervisor came over and renewed his criticism, claimant admitted he raised his voice but asserted, "Basically I was trying to explain" that the reason the units were not flush was because there was no back stop. "I was talking loud because it's a mill and you have to talk loud or they're not going to hear you." Audio Record ~ 12:50 to 13:00.

Claimant's explanations were plausible. Moreover, the supervisor admitted that when claimant walked away he returned to his post and did not dispute that it was necessary to raise one's voice when talking in the mill. Audio Record ~ 15:10 to 15:20. Accordingly, the evidence regarding whether claimant was consciously disrespectful or insubordinate toward his supervisor in initially walking away from and later speaking to him was no more than equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. The employer failed to establish that claimant intended his actions on May 28 to be consciously insubordinate, and without willful or wanton negligence, i.e. conscious conduct, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

**DECISION:** Hearing Decision 14-UI-21382 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** August 19, 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 [court.oregon.gov](http://court.oregon.gov). Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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