

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1346

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131435). Claimant filed a timely request for hearing. On August 8, 2014, ALJ Vincent conducted a hearing, and on August 11, 2014 issued Hearing Decision 14-UI-23126, affirming the Department's decision. On August 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Emeritus Senior Living employed claimant from July 27, 2011 to June 12, 2014 as a prep cook.

(2) The employer expected employees to follow its code of conduct, which prohibited employees from engaging in unprofessional, disruptive, disrespectful, abusive, rude, aggressive, or improper conduct toward coworkers. Claimant understood the employer's expectations.

(3) On June 2, 2014, the employer's dining services director sent claimant and other employees a group text message directing them to correct their time cards, or they would not get paid. Audio Record at 20:02 to 20:34. The text message was sent to claimant's personal telephone number.

(4) On approximately June 2, 2014, claimant spoke privately with the dining services director, and stated to her that he believed the way she stated the text message was rude and disrespectful toward him, and that he was dissatisfied because she sent the message as a group text message, disclosing claimant's personal telephone number to his coworkers. The dining services director perceived claimant's comments as rude and aggressive.

(5) On June 12, 2014, the employer discharged claimant after concluding claimant violated its code of conduct by allegedly yelling at the dining services director when he complained to her on June 2, 2014 about the group text message.

CONCLUSIONS AND REASONS: We disagree with ALJ and conclude 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) 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. The employer bears the burden to establish misconduct by a preponderance of the evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because claimant allegedly yelled at the dining services director when he complained to her on June 2, 2014. Claimant does not dispute that he complained to the dining services director about the text message she sent him on June 2, 2014. Claimant testified that he told the dining services director that the “way she stated her text message was rude and disrespectful to [him],” and that he felt it was rude to disclose his telephone number to his coworkers in a group text. Audio Record at 21:00 to 21:36. Viewed objectively, it was not unreasonable for claimant to be offended by the threat of nonpayment or the employer’s disclosure of his personal telephone number to his coworkers. The employer did not show that it expected employees to refrain from complaining to its directors, or that claimant knew or should have known that his complaints would be interpreted by the dining services director as rude or aggressive.

The remaining issue is whether the manner in which claimant complained was a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. The employer has a right to expect employees to refrain from engaging in rude and aggressive conduct, such as yelling, toward coworkers. In Hearing Decision 14-UI-23126, the ALJ found in accordance with the employer’s testimony, finding as fact that claimant “became angry at [the dining services director] and began yelling at her,” and that “claimant’s tone was very angry and his voice was very loud (yelling).”¹ The ALJ concluded that claimant’s discharge was for misconduct, reasoning that “the employer established that the claimant acted as the employer alleged” and “yelled in an angry and inappropriate tone at his manager” on June 2, 2014.

However, claimant testified that he spoke to the director of dining services in a regular tone, and did not “raise his voice” or yell at her. Audio Record at 21:39 to 21:52. Thus, the parties’ testimony is irreconcilably different regarding the tone and manner in which claimant complained to the dining services director. The ALJ did not make an express finding regarding the credibility of claimant or the employer’s witness, and the record fails to show an objective reason to disbelieve either witness. Absent a reason to disbelieve either witness, the evidence as to claimant’s behavior during the final incident is

¹ Hearing Decision 14-UI-23126 at 1, 2.

equally balanced. When the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its evidentiary burden.

The employer failed to show by a preponderance of evidence that claimant violated the employer's code of conduct. We therefore conclude claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-23126 is set aside, as outlined above.

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

DATE of Service: September 16, 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. 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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