EO: 200
BYE: 201535

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

867
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1872

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 150301). The employer filed a timely request for hearing. On November 10, 2014, ALJ Vincent conducted a hearing, and on November 14, 2014 issued Hearing Decision 14-UI-28758, concluding that claimant's discharge was for misconduct. On December 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. In Hearing Decision 14-UI-28758, the ALJ stated that Exhibit 1 was admitted into evidence without objection.[1] However, the record shows that the ALJ excluded Exhibit 1, sustaining claimant objection to the employer's failure to provide him a copy of the exhibit prior to the hearing, as required. Audio Record at 5:45-7:00. EAB therefore did not consider Exhibit 1 when reaching this decision. Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented him 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) West Coast Classic Cougar Inc. employed claimant as a data entry worker from November 2, 2012 to September 11, 2014.

(2) On September 11, 2014, another employee told claimant he was transferring a call from a customer on hold to claimant. Claimant was frustrated with the customer, whom he had spoken to at length the previous day to determine the parts the customer needed. Claimant also was frustrated with the other employee for not assisting the customer himself. Claimant told the other employee to tell "that motherfucker" that claimant would call him back or email him. Audio Record at 28:45. The customer hung up, and the employer concluded that he heard claimant refer to him as a motherfucker.

[1] Hearing Decision 14-UI-28758 at 1.

(3) The employer discharged claimant for referring to the customer as a motherfucker.

CONCLUSIONS AND REASONS: We agree with the Department, and not the ALJ, that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-28758, the ALJ found in accordance with the employer's owner's testimony that the employer prohibited employees from using foul language in the workplace, for which claimant was counseled on several occasions, and discharged claimant for referring to a customer as a motherfucker during a conference call with the customer and another employee on September 11, 2014.[2] The ALJ concluded that claimant's conduct was, at best, wantonly negligent because, more likely than not, he knew that making such a comment would violate the employer's expectations.[3] The ALJ further concluded that claimant's conduct could not be excused as a good faith error because claimant understood the employer's expectations through repeated disciplinary counseling, and therefore did not have sincere belief, or a factual basis for believing that the employer would condone his behavior.[4]

At hearing, however, claimant testified that the employer did not prohibit the use of foul language in the work place, and that he was never counseled against the use of foul language prior to September 11. Audio Record at 26:00-29:00. We find that evidence on that issue, at best, equally balanced. Claimant also testified that he referred to the customer as a motherfucker when the other employee told claimant he was transferring a call from the customer, who was on hold, to claimant, and not during a conference call with the customer and the other employee. Audio Record at 29:00. The employer failed to show otherwise. Finally, claimant testified that he was unaware there was any possibility of the customer hearing him while on hold. Audio Record at 32:30. The employer again failed to show otherwise.

The employer therefore failed to show by a preponderance of evidence that claimant understood, knew or should have known using foul language in the workplace probably violated the employer's expectations. Nor did the employer show that claimant knew or should have known the customer could

[2] Hearing Decision 14-UI-28758 at 1-2.

[3] *Id*. at 2.

[4] *Id*.

probably hear him refer to the customer as a motherfucker. Absent such showings, the employer failed to establish that claimant's conduct was a willful or wantonly negligent violation of the employer's expectations, and not the result of a good faith error in his understanding of the employer's expectations regarding the use of foul language in the workplace, and in his belief that the customer could not hear him refer to the customer as a motherfucker.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-28758 is set aside, as outlined above.[5]

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

DATE of Service: <u>January 14, 2015</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

[5] 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.