

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1897

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 134344). The employer filed a timely request for hearing. On December 2, 2014, ALJ R. Davis conducted a hearing, and on December 3, 2014 issued Hearing Decision 14-UI-29782, concluding the employer discharged claimant for misconduct. On December 11, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cinemark USA, Inc. employed claimant from May 13, 2004 to September 22, 2014 as a senior assistant manager of one of its movie theaters.

(2) The employer expected claimant to refrain from engaging in unprofessional behavior, including disruptive behavior and complaining about management to someone not in a position to address the complaint. The employer also prohibited retaliation against employees who reported inappropriate workplace behavior. Claimant understood the employer's expectations.

(3) On September 20, 2014, claimant was dissatisfied with how the employer's general manager managed the theater and scheduled the movies, and complained about the general manager's decisions in front of other employees. That same day, claimant was walking down the theater hallway swinging a broom while he and other employees waited to clean a theater after a movie ended. While swinging the broom, he hit a bin in the hallway, causing a loud sound. He did not move or damage the bin, and no theater patrons witnessed the incident.

(4) Two employees who saw claimant hit the bin reported claimant's actions to the general manager, and told the general manager claimant had been complaining about him and appeared frustrated when he hit the bin with the broom. Both the employees were claimant's subordinates at work.

(5) On September 21, 2014, the general manager met with claimant and discussed the complaints the two employees made about claimant's conduct on September 20. The general manager told claimant to discuss management concerns with the general manager, and not subordinate staff.

(6) After claimant met with the general manager, he discussed the employees' complaint about claimant's conduct on September 20 with one of the employees who had complained. The employee perceived one of claimant's statements during the conversation as a threat that he would give additional work to the other employee for complaining to the general manager about claimant. The employee reported claimant's alleged threat of retaliation to the general manager.

(7) On September 22, 2014, the employer discharged claimant for allegedly stating he would retaliate against a subordinate employee for complaining about claimant's workplace conduct.

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 where the individual acting 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 for allegedly threatening to retaliate against a subordinate employee for complaining about claimant's workplace conduct. In Hearing Decision 14-UI-29782, the ALJ found in accordance with the employer's testimony that claimant threatened to retaliate against the subordinate employee, and concluded that claimant's conduct was, at best, a wantonly negligent violation of the employer's expectation that claimant refrain from engaging in retaliation at work.¹

We disagree with the ALJ and conclude the employer failed to meet its burden to establish claimant violated the employer's policy against retaliation. The ALJ was persuaded by the employer's testimony about the alleged threat of retaliation on September 21, 2014 because the testimony was "very specific as to the target of the alleged threat and the words used."² However, claimant also provided detailed testimony of his conversation with the employee, and denied having threatened retaliation for the employees' complaints. Audio Record at 34:16 to 36:00. Absent a reason to disbelieve either party, the testimony was equally balanced regarding the alleged threat of retaliation. Consequently, the employer failed to show by a preponderance of the evidence that claimant threatened to retaliate against the

¹ Hearing Decision 14-UI-29782 at 3.

² *Id.*

employee. Thus, the employer did not meet its burden to establish claimant willfully or with wanton negligence violated its expectation regarding retaliation.

We therefore conclude that the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-29782 is set aside, as outlined above.³

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

DATE of Service: January 30, 2015

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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³ 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.