

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0011**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 31, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 141734). The employer filed a timely request for hearing. On December 16, 2014, ALJ R. Davis conducted a hearing, and on December 19, 2014 issued Hearing Decision 14-UI-30720, concluding the employer discharged claimant for misconduct. On January 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) GMRI Inc. / The Olive Garden employed claimant as a bartender from October 13, 1992 to September 15, 2014.

(2) The employer discharged claimant for allegedly telephoning the employer's manager on September 12, 2013 and repeatedly telling him he better watch his back and should be afraid, and threatening to kill the manager.

**CONCLUSIONS AND REASONS:** We agree with the Department, and not the ALJ, and conclude 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. 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).

In Hearing Decision 14-UI-30720, the ALJ, correctly noted that the parties presented conflicting accounts of the significant events at issue, the employer's manager testifying that claimant threatened

him during a telephone call on September 12, 2014, claimant denying that he had a telephone conversation with the manager that day.<sup>1</sup> The ALJ was more persuaded by the manager's testimony, asserting it was very specific as to the date and time of the call and the manager's subsequent actions, whereas claimant presented a "flat denial" that the call occurred, and presented other testimony which "appeared" less credible.<sup>2</sup> However, the fact that claimant presented a "flat denial," and did not provide specific details regarding a telephone call he asserted never occurred, does not make his testimony less persuasive than the manager's testimony, or claimant a less credible witness. The ALJ failed to specify what other testimony presented by claimant "appeared" less credible, let alone why it appeared so, and after reviewing the record in its entirety, we find no reasonable basis for concluding that claimant was a less credible witness than the employer's manager. We therefore find the evidence as to whether claimant threatened the manager equally balanced.

Absent a preponderance of evidence showing that claimant engaged in the conduct for which he was discharged, the employer failed to establish that it discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 14-UI-30720 is set aside, as outlined above.

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

**DATE of Service:** February 20, 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](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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<sup>1</sup> Hearing Decision 14-UI-30720 at 3.

<sup>2</sup> *Id.*