

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0100

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123205). Claimant filed a timely request for hearing. On January 22, 2015, ALJ Wyatt conducted a hearing and issued Hearing Decision 15-UI-32594, reversing the Department's decision. On February 4, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Medolac Laboratories employed claimant from July 21, 2014 until October 14, 2014, last as a production worker.

(2) The employer expected claimant to refrain from bullying, which included threatening other employees through verbal and non-verbal communications, and excluding other employees from activities in the workplace. Claimant was aware of the employer's expectations as a matter of common sense.

(3) When claimant was hired, she was acquainted with an employee who worked in the employer's front office. At that time, claimant was a production worker. Claimant was initially friendly with her acquaintance in the front office. Later, after claimant had worked for a time on the production floor, she became friendly with the production workers and did not interact as often with the front office employee. Sometime before October 6, 2014, claimant was promoted to a position working in the front office. After her transfer, claimant continued her friendships with the production workers. Claimant perceived that the front office employee with whom she had been acquainted when she was hired was displeased that she remained friendly with the production workers. Claimant became uncertain how to interact with the front office employee when that employee appeared to resent her continued friendships with the production workers.

(4) On October 6, 2014, the employer's human resources manager and claimant's supervisor met with claimant to issue a warning to her. They told claimant that some employees had complained that she

was bullying them by being "rude" and "disrespectful" in their interactions. Transcript at 6. The employer representatives also told claimant that the employees had reported that she had spoken poorly about the employer's management and "undermined" management's authority and displayed a negative behavior by repeating to the production employees the contents of some management conversations that claimant overheard in the front office. Transcript at 6, 7, 15. Claimant denied that she had engaged in any such behaviors. When claimant asked the employer's representatives to identify the employee or employees who had made the complaints about her, they refused and also refused to specify the details of the incidents giving rise to the complaints and to the warning. Lacking any specifics, claimant accepted the warning and agreed to improve her workplace behaviors because she did not want to jeopardize her job. As a sanction for the October 6, 2014 warning, the employer demoted claimant and transferred her back to the production department.

(5) After claimant received the October 6, 2014 warning, she was reluctant to interact with other employees in the workplace since she did not know which employee or employees had made the complaints about her behavior. Claimant thought it was possible that the front office employee with whom she was acquainted when she was hired had made the complaints. To forestall any future accusations, claimant avoided further contact with the front office employee. On one occasion between October 6, 2014 and October 14, 2014, the front office employee was in the break room eating her lunch when claimant entered it. Because claimant "felt like if I had interacted with her at all, maybe it [would be] taken in the wrong way," claimant turned around and left the break room. Transcript at 30.

(6) On October 14, 2014, the employer discharged claimant after concluding that claimant had violated the October 6, 2014 warning by continuing to engage in the types of behaviors that give rise to it.

CONCLUSIONS AND REASONS: 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 wantonly negligent disregard of an employer's interest. The employer carries the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer's witnesses made several allegations about claimant's behaviors, the focus of the discharge analysis is whether claimant engaged in such behaviors after she was issued the October 6, 2014 and, if so, whether those behaviors were misconduct. Transcript at 7, 8, 12, 15. The specific behaviors that the employer's witnesses contended that claimant engaged in after October 6, 2014, and which constituted misconduct, were claimant's allegedly rude comment to and bullying treatment of the front office employee and claimant's alleged statement that the employer's chief operating office was "fat and lazy" and "getting a paycheck for no reason," as recounted by claimant's supervisor based on the hearsay statement of an unidentified employee. Transcript at 13, 17. The front office employee testified at hearing that claimant had entered the break room after October 6, 2014 and, when claimant saw her, claimant stated "oh, she's there" and turned around and immediately left the break room, which that employee interpreted as bullying behavior specifically directed at her. Transcript at 20. The front office employee also testified that other, unidentified employees told her that claimant was speaking badly

about her sometime after October 6, 2014. Transcript at 20, 21. Although claimant agreed that she abruptly left the break room on one lunch break when she saw the front office employee, she denied making any comment when she did so and plausibly explained that she wanted to limit her interactions with that employee to avoid the possibility that they might be misinterpreted and lead to a subsequent disciplinary warning. Transcript at 29, 30. Claimant also denied making any rude or "backstabbing" comments about the front office employee to other employees at any time. Transcript 30, 31, 32, 33. On this record, there is no reason to believe the testimony of the front office employee over that of claimant. When the evidence on a disputed issue in a discharge case is evenly balanced, the issue must be resolved in claimant's favor since the employer carries the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In addition, claimant's first-hand testimony about any comments she did or did not make to other employees is entitled to more weight than the hearsay evidence of both the front office employee and the employer that claimant had spoken "badly" or "rudely" about that employee or about other employees. Transcript at 16, 20, 21. Based on principles governing the allocation of the burden of proof and the preference for direct evidence over hearsay evidence, the employer failed to establish that claimant bullied the front office employee either by nonverbal behavior or by any comments she made to that employee or about that employee to other employees. Claimant also denied making any unflattering comments about the employer's chief operating office to rebut the employer's hearsay testimony from other, unidentified employees that she had. Transcript at 30, 32. For reasons identical to those stated above, claimant's first-hand testimony carries more weight than the employer's hearsay evidence, and the employer did not meet its burden to establish that claimant made the statements that it alleged about the chief operating officer. The other allegations that the employer made about claimant's alleged bullying behavior were conclusory contentions that were not supported by any evidentiary detail and were not shown to have occurred between October 6, 2014 and October 14, 2014. With respect to them, the employer did not meet its burden to establish, more likely than not, that the specific behavior underlying those contentions were misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-32594 is affirmed.

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

DATE of Service: March 19, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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