

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0168

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 23, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was discharged for misconduct (decision # 74338). Claimant filed a timely request for hearing. On February 3 and 6, 2015, ALJ Holmes-Swanson conducted a hearing, and on February 12, 2015, issued Hearing Decision 15-UI-33430, affirming the Department's decision. On March 4, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) The Confederated Tribes employed claimant, last as its compensation and benefits manager, from July 13, 1993 to September 10, 2014. In that position, claimant's direct supervisor was the employer's human resources director.

(2) The employer expected its employees to treat coworkers with respect and courtesy and refrain from engaging in threatening behavior toward them. Claimant was aware of the employer's expectations.

(3) On August 11, 2014, the employer hired a new human resources director (Sato). Over the next 30 days, Sato reviewed the operations of the human resources office and reportedly received information

from employees and vendors that claimant had been abrupt and rude in communicating with them during the course of performing her job and that claimant made them feel “harassed and bullied.” Exhibit 1. On September 10, 2014, Sato met with claimant and advised her that she was physically reorganizing the human resources office and demoting claimant from her manager’s position, largely based on the reports she had received from others regarding her communication style. Claimant responded that she intended to “grieve” the demotion because Sato was listening to “gossip and hearsay.” Transcript at 34. Sato asked claimant if she wanted to see the emails she had received and claimant responded that she did. Sato then told claimant, “You’re fired” for being “confrontative” and directed her to pick up her personal items and leave the premises. Transcript at 34. While removing personal items from her work area, Sato accused claimant of removing employer property, asserted claimant had “threatened” her and directed an assistant to summon the tribal police.

(4) On September 11, 2014, Sato sent claimant a letter clarifying that she terminated claimant’s employment because she “threatened the HR Director’s safety and well-being.” Exhibit 1.

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

At hearing, only Sato and claimant testified; they substantially differed in their testimony regarding the events of September 10. In Hearing Decision 15-UI-33430, without any credibility finding or analysis, the ALJ accepted the employer’s evidence and found the employer discharged claimant for unprofessional conduct which he concluded constituted misconduct. The ALJ reasoned:

Claimant willfully violated the employer’s policy against insubordination and threatening behavior on September 10 when she repeatedly refused to accept the reorganization of the desk[] and...threatened the supervisor’s job...[Claimant’s] statements were a violation of the employer’s policy and resulted in the supervisor discharging claimant.

Hearing Decision 15-UI-33430 at 1, 4. We disagree and conclude the employer failed to meet its burden of proof. Sato asserted the dispute began over “the physical movement of [claimant’s] desk”, that claimant reacted by stating, “I’m going to grieve this and have your job... I’m going to tell Tribal Council, and my family, what you’re doing. I’m coming back to get you”, and when asked by Sato if she was threatening her, claimant responded, “Take it how you want.” Transcript at 7, 50. However, claimant asserted Sato demoted her in position and compensation, stated she told Sato she intended the “grieve” those actions and requested her personnel file and the critical emails about her Sato allegedly received, but denied she threatened Sato. Transcript at 43. The employer did not offer any corroborating evidence of claimant’s communication style that made others feel “harassed and bullied” or testimony from the assistant that summoned the tribal police and presumably was present during at

least part of the dispute of September 10. Absent a reasonable basis on this record for concluding that claimant was not a credible witness, we find her sworn testimony at least as persuasive as the employer's evidence. The employer therefore failed to show by a preponderance of evidence that claimant consciously engaged in the conduct for which she was discharged.

The employer discharged claimant, but not for misconduct under ORS 657.176(2). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.¹

DECISION: Hearing Decision 15-UI-33430 is set aside, as outlined above.

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

DATE of Service: April 21, 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.

Please help us improve our service by completing an online customer service survey. 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.

¹ 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.