

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0335**

*Reversed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104016). Claimant filed a timely request for hearing. On January 16 and February 26, 2015, ALJ Vincent conducted a hearing, and on March 6, 2015 issued Hearing Decision 15-UI-34773, affirming the Department's decision. On March 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. However, claimant's 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 her 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) Marion County Housing Authority employed claimant as a resident site manager from January 1, 2014 to November 4, 2014.

(2) The employer prohibited employees from making statements to residents and treating them in a different manner based on ethnicity, national origin, race, color age and other protected class status. In March, 2014, claimant sent the employer's executive director two emails in which she referred to some of the employer's residents as "Russians." The executive director told claimant she was prohibited from referring to residents, coworkers or others by their ethnicity. Claimant agreed to stop doing so.

(3) On June 10, 2014, two employees reported to the employer that on May 1, 2014, claimant repeatedly referred to residents as "Russian," "Mexican," or "whites."

(4) In July 2014, a resident complained to the employer that claimant discriminated, harassed and intimidated her. From July through October 2014, the executive conducted an investigation into claimant's treatment of that and other residents, including an interview with claimant. On October 8,

2014, the executive director determined that there was factual evidence to support the resident's discrimination and harassment complaint.

(5) On or about October 29, 2014, the employer determined that claimant continued to refer to residents by their ethnicity and national origin, and made statements indicating a desire not to rent to Russians or Mexicans, and that Russians and Mexicans should move back to their own country if they wanted to grow berries or practice their customs. The employer discharged claimant based on those determinations.

**CONCLUSIONS AND REASONS:** We disagree with 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. 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).

In Hearing Decision 15-UI-34773, the ALJ concluded that the employer discharged claimant for misconduct because claimant continued to refer to residents by their ethnicity after have been warned in March 2014 to stop doing so.<sup>1</sup> However, the allegations that claimant continued to refer to residents by their ethnicity, and made statements indicating a desire not to rent to Russians or Mexicans, and that Russians and Mexicans should move back to their own country if they wanted to grow berries or practice their customs, consisted entirely of hearsay. Claimant denied the allegations. Audio Record (February 26, 2015) at 28:00-31:15. Although the employer's executive director testified that claimant admitted she continued using ethnic terms to refer to residents, claimant denied doing so. Audio Record (February 26, 2015) at 32:00-34:15. The evidence as to whether claimant continued to refer to residents by their ethnicity, and made statements indicating a desire not to rent to Russians or Mexicans, and that Russians and Mexicans should move back to their own country if they wanted to grow berries or practice their customs is, at best, equally balanced. The employer therefore failed to show by a preponderance of evidence that claimant engaged in the conduct for which she was discharged.

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

**DECISION:** Hearing Decision 15-UI-34773 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;

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<sup>1</sup> Hearing Decision 15-UI-34773 at 2.

J. S. Cromwell, not participating.

**DATE of Service: May 13, 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](http://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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