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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0382

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115920). Claimant filed a timely request for hearing. On February 26, 2015, ALJ Shoemake conducted a hearing, and on February 27, 2015 issued Hearing Decision 15-UI-35919, reversing the Department's decision. On April 4, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that included statements from alleged witnesses to the December 17, 2014 argument between claimant and his supervisor. Those documents were not offered into evidence at the hearing. OAR 471-041-0080(2)(a) (October 29, 2006) states that a party's written argument will not be considered unless it contains a certification that the argument was provided to the other parties. The employer's argument did not contain that certification. OAR 471-041- 0090(2)(b) (October 29, 2006) requires that, for new information to be considered by EAB, the party offering it must show that factors or circumstances beyond its reasonable control prevented it from offering that information into evidence at the hearing. The employer did not explain why it did not offer the new information at the hearing, and otherwise failed to show that there were any factors or circumstances beyond its reasonable control that hindered it from doing so. For these reasons, EAB did not consider the employer's written argument or the new information it presented in the form of witnesses' statements when reaching this decision. EAB considered only information in the record. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Key Manufacturing & Rentals, Inc. employed claimant as a tent cleaner from June 16, 2014 until December 19, 2014.

(2) The employer expected claimant to refrain from actions that reasonably violated the employer's objective of a "safe and secure work environment," including physical threatening coworkers or supervisors. Audio at ~6:18. Claimant understood the employer's expectation as a matter of common sense and as he reasonably interpreted it.

(3) Claimant and his supervisor had a poor working relationship. They did not get along, and disagreed on occasion about work-related matters. Claimant thought that the supervisor was inconsistent, sometimes criticizing his work and sometimes praising it. Claimant thought that the supervisor sometimes went out of his way to show disrespect for him or his work ethic. Audio at ~15:11, ~25:56. On occasion, the supervisor told claimant that he was going to have claimant fired. Audio at ~26:38. Before December 17, 2014, claimant received no disciplinary warnings for the manner in which he interacted with his supervisor in the workplace.

(4) On December 17, 2014, claimant and his coworkers were working very hard and rushing to complete the cleaning of a large tent order by the time it needed to be shipped. Sometime in the afternoon, the supervisor criticized claimant for using clean towels to perform some of the cleaning. The supervisor also told claimant that he was not working as hard or as quickly as he usually worked. The supervisor told claimant to "pick it up." Audio at ~22:15. Claimant was irritated because the supervisor had told him the day before that he was "doing a great job" and mentioned this to the supervisor. Audio at 22:28. The supervisor told claimant to "shut up." Audio at ~22:38. Claimant told the supervisor "don't tell me to shut up." Audio at ~22:43. Sometime after claimant and the supervisor exchanged these words, the supervisor left and claimant went back to work. Claimant then went to lunch.

(5) Still on December 17, 2014, claimant returned to the work area after his lunch. The supervisor was going back and forth from his office to the work area repeatedly checking on the status of the order his subordinates were trying to complete. The supervisor came up to claimant and said "we've got to get this [the order] done." Audio ~23:16. Claimant stated, "I understand that" and the supervisor left. Audio at ~23:22. Claimant and his coworkers continued to work at a rapid pace. Sometime later, the supervisor came up to claimant and said, "What the fuck is your problem?," which claimant interpreted as another criticism of the speed or proficiency with which he was working. Audio at ~23: 41. Claimant responded to the supervisor by stating, "What the fuck is your problem?" Audio at 23:48. Claimant and the supervisor became more angry with each other. The supervisor said to claimant, "I told you I've fucking had it with you. This is bullshit." Audio at ~24:12. Claimant said, "Who the fuck are you talking to?," "What the fuck is this all about?," repeated that the supervisor had told him just the day before that he was performing well at work and said, "Get off my ass. I'm doing what I can [and I'm working] as fast as I can go." Audio at ~24:20. The supervisor responded, "What the fuck. You fucking lazy ass." Audio at ~24:28. The supervisor then told claimant to report to the employer's manager the next day and told claimant, "I've fucking had it with you on my shift. You'll be working days or you're out of here." Audio at ~26:00. The supervisor also told claimant to leave the workplace and go home. Audio at ~ 12:35. Claimant did not leave but worked for the remainder of his shift.

(6) Sometime between December 17, 2014 and December 19, 2014, the supervisor told the employer's manager that claimant had threatened him physically during their interaction on December 17, 2014.

(7) On December 19, 2014, the employer discharged claimant for physically threatening his supervisor on December 17, 2014.

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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Based on claimant's lack of a history of making threats in the workplace, or becoming involved in angry disputes and using excessive foul language, it appears most likely that claimant's behavior during the December 17, 2014 interaction was provoked by the behavior and language of his supervisor. While claimant denied that he made any physical threats directed at this supervisor, the employer's witness testified that claimant's supervisor contended that claimant said to him during the heat of the argument on December 17, 2014, "If we were not on the clock now, I [would] hit you right away." Audio at ~9:48, ~25:43. The employer's witness also testified that one of claimant's coworkers told him that claimant said to his supervisor during their interaction, "If you talk to me like that off the clock, I will fuck you up." Audio at ~10:50. According to the employer's witness, other of the alleged witnesses to the interaction between claimant and his supervisor referred to the "bad words" that claimant had used. Audio at ~9:30. ~11:40. However, the employer's witness was very clear that the employer discharged claimant not for using foul language, but for supposedly physically threatening supervisor on December 17, 2014. Audio at ~5:42. In this respect, the language that the employer's hearsay witnesses attributed to claimant, which the employer interpreted as a physical threat to the supervisor, was conditional and hypothetical language, referring to what claimant would do *if* the supervisor made such statements to him outside of the workplace. Claimant's words as recounted by these supposed witnesses were not reasonably construed as a statement that claimant was going to physically attack the supervisor in the workplace or that claimant was going to attack the supervisor when the supervisor was outside the workplace. None of the alleged statements from the supposed witnesses to the interactions alluded to claimant making any threatening physical gestures toward the supervisor or like behavior that would indicate that, in context, the words uttered by claimant were tantamount to a concrete threat of physical action against the supervisor. Indeed since the supervisor presumably stayed and worked in the same area as claimant after their encounter, it does not appear that the supervisor took seriously the words that he claimed that claimant had stated as an active threat to his safety. Given the context to the dispute as recounted by claimant at hearing, if claimant used the words that the alleged witnesses to the dispute stated that he had, that he might have is understandable and it is not at all clear that his reaction was unreasonably disproportionate given the supervisor's provocation or was inconsistent with the employer's expectation that he refrain from jeopardizing the physical safety or security of the workplace.

As well, even though the statements that the employer obtained were from the supervisor and other alleged direct witnesses to the interaction on December 17, 2014, they were nonetheless hearsay evidence because the employees who gave them were not available at the hearing and could not be examined or cross examined to rest the truth of the statements. Moreover, the witnesses could not be examined to determine whether or not they were physically at a location where they could actually observe and hear the interaction to which their statement related. For this reason, hearsay evidence is customarily given less weight than direct evidence when, as here, issues at hearing are disputed. Claimant was the only direct witness who could be examined at hearing about the context of the dispute between himself and the supervisor, what both said and did during the interaction, and whether or not what he said was or was not a reasonably proportionate response to the supervisor's behavior. Accordingly, in light of the detailed evidence that claimant provided at hearing about the dispute, and

his consistent denials that he made any threats of physical reprisal against his supervisor, the employer did not meet its burden to establish that, more likely than not, claimant physically threated his supervisor on December 17, 2014. Moreover, in light of the backdrop claimant supplied about the interactions leading to the dispute with his supervisor, the employer also did not establish that what claimant did and said during the dispute was an unreasonably disproportionate response or reaction to what the supervisor did and said. The employer did not establish that claimant engaged in misconduct on December 17, 2014.

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

DECISION: Hearing Decision 15-UI-35919 is affirmed.

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

DATE of Service: May 27, 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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