

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0894

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 111717). Claimant filed a timely request for hearing. On July 20, 2015, ALJ Murdock conducted a hearing, and on July 22, 2015 issued Hearing Decision 15-UI-41828, reversing the Department's decision. On July 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered new evidence in the form of notes taken by the employer's human resources manager of conversations with the two witnesses who testified at hearing about the allegedly threatening comments that claimant made in the workplace on May 12, 2015. The employer contended that the witnesses' hearsay statements were relevant for impeachment purposes because they contradicted claimant's hearing testimony about what he said on May 12, 2015. However, the first-hand hearing testimony of the two witnesses about what they heard claimant state is more reliable than someone else's notes about what they told her, particularly since the ALJ pressed both witnesses to precisely recount what they heard, neither witnesses alluded to a lack of recollection, and the accounts they provided at hearing were sworn and under oath. Audio at ~18:48, ~19:15, ~40:11. With respect impeaching the truthfulness of claimant's testimony about what he said on May 12, 2015, the hearsay statements do not add any weight in addition to the two witnesses' live hearing testimony contradicting claimant's hearing testimony. As well, the hearsay statements do not address what EAB perceives to be the principal underlying issue in this case – whether the statements that claimant made on May 12, 2015, as recounted by the employer's two witnesses, were, more likely than not, intended as threats. For these reasons, EAB did not consider the new evidence when reaching this decision.

FINDINGS OF FACT: (1) Acme Construction employed claimant as a floating worker in its warehouse from September 23, 2013 until May 13, 2015.

(2) The employer had a “zero-tolerance” policy against making threats in the workplace and expected claimant to refrain from threatening communications to supervisors or coworkers. Audio at ~12:20. Claimant understood the employer’s expectation.

(3) Sometime before May 12, 2015, claimant noticed that items he brought to work and left or stored in his coat pockets or his street shoes to consume on work breaks were being tampered or “messed with.” Audio at ~23:28. Claimant thought that his coworkers were rummaging through his apparel without permission to see what he brought to work.

(4) On May 12, 2015, claimant returned to the warehouse area after completing an errand and picked up his coat. Claimant put his hand in one of the coat pockets and discovered that a cigarette he had placed there was broken. Claimant thought that one of his coworkers had reached into the pocket and broken the cigarette as a “nasty trick.” Audio at ~32:00. Claimant was “upset.” Audio at ~33:02. Very shortly afterward, claimant’s supervisor saw claimant and asked, “How are things going?” Audio at ~29:23, ~39:30. Claimant told the supervisor that some unknown coworker had reached into his coat pocket and broken the cigarette he had placed there. Claimant told the supervisor that coworkers should not be searching pockets when they did not know beforehand what was in the pockets. Claimant also said to the supervisor, “You need to let [my coworkers] know I have needles with HIV blood [on them] in my pocket.” Audio at ~40:01. The supervisor told claimant that he should not be saying such things. However, the supervisor did not consider claimant’s comment a threat. Audio at ~39:30.

(5) After his exchange with the supervisor, claimant returned to the warehouse. One coworker was operating an engine powered machine and wearing ear plugs. Another coworker was operating a band saw. Claimant began operating a forklift. In the noise of the equipment, claimant yelled three times to a coworker that it was dangerous for any person to reach into another’s pockets when they did not know what was in them and asked how those coworkers would know that he did not have “bad” items in his pocket. Audio at ~24:30. Claimant further stated that, for all the coworkers knew when they reached in his pocket, he could be a “junkie,” could have had needles in his pockets, and the needles could have been infected with HIV positive blood. Audio at ~22:40. The coworker understood claimant to have stated, “I got needles in my pocket with [HIV] blood. Go tell everyone [of the coworkers].” Audio at ~18:48, ~19:15. The coworker did not know what claimant was talking about. The coworker told the supervisor about what he thought claimant said.

(6) The supervisor concluded claimant made a threat, and sent claimant home from work. The supervisor did not ask claimant what he actually said to the coworker or if he had intended to threaten any coworkers by his statement. Audio at 26:18, ~28:56. Before May 12, 2015, claimant had never been suspected of making threatening statements at work. Audio at ~43:22, ~44:08.

(7) On May 13, 2015, the employer discharged claimant because of his May 12th statements.

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. 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. The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer prohibited employees from making "threats" in the workplace. Audio at ~12:20. Claimant understood the prohibition. However, a "threat" means to state an intention to inflict pain, injury or harm on another or to undertake a hostile action in retribution for some other act.¹ In this case, the employer's witnesses did not assert or show that claimant intended the statements he made on May 12th as threats. Audio at ~28:14. Neither of the employer's witnesses who heard the statements claimant made on May 12, 2015 said that they interpreted them to mean that claimant intended to stab his coworkers with an HIV-tainted needle or any other type of needle in the future or that claimant was threatening to booby-trap his coat pockets with needles to injure any coworkers who reached into them. Nor did they present evidence that there was something in claimant's demeanor or behavior when he spoke with them that persuaded them that claimant's statement should reasonably be interpreted as a threat.²

From claimant's testimony at hearing, it was obvious that he disliked the thought of coworkers entering his coat pockets without his permission and interfering with the personal items he had placed in them. It is plausible that claimant made the references to "needles" and "HIV infected blood" to express his surprise that his coworkers would be reckless enough to reach into pockets without knowing whether there were harmful items there in order to aggravate him. Claimant's testimony at hearing that his references were so intended - to be advisory or cautionary about the risks of reaching into pockets without knowledge of what was inside - appeared sincere. Audio at ~23:40, ~24:00. Absent prior threatening behavior on claimant's part or some other evidence that his statements could only be interpreted to show his intent to inflict harm on his coworkers, it is equally likely that claimant's statements were made with an innocent, non-threatening intent. Because the evidence about whether claimant intended his comments innocently or as threats is no better than equally balanced, the employer did not meet its burden to show that the statements claimant made on May 12, 2015 constituted threats, or that claimant willfully or with wanton negligence violated its expectations when he made them.

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

DECISION: Hearing Decision 15-UI-41828 is affirmed.

¹ See <http://www.merriam-webster.com/dictionary/threat>; http://www.oxforddictionaries.com/definition/american_english/threat.

² While the employer's witnesses testified that claimant was "yelling" when he made the alleged statement three times to the coworker, it is just as likely as not that he did because three pieces of machinery were in operation in the area where he was trying to address the coworker, and the background level of that noise reasonably accounted both for claimant's raised voice and his repetition of the same statement to the coworker. Audio at ~17:44, ~21:06, ~21:30, ~25:11, ~38:50.

J. S. Cromwell and D. P. Hettle, *pro tempore*;
Susan Rossiter, not participating.

DATE of Service: August 31, 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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