

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0920**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On June 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72301). Claimant filed a timely request for hearing. On July 21, 2015, the Office of Administrative Hearings issued notice of a hearing scheduled for August 4, 2015. On August 4, 2015, ALJ Triana conducted a hearing, and on August 7, 2015 issued Hearing Decision 15-UI-42687, concluding the employer discharged claimant, but not for misconduct. On August 15, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument that included a statement from a witness of the May 16, 2015 argument between claimant and his manager. The document was not offered into evidence at hearing. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if it is material and relevant to EAB's determination, and the party offering the information shows that circumstances beyond the party's reasonable control prevented the party from offering the information at hearing. The statement is relevant and material because the witness, a tenant, allegedly witnessed part of the final incident that caused the employer to discharge claimant. In support of the employer's request that EAB consider the new information, the employer asserted that it did not provide this information at hearing because it was unaware there was another witness to the final incident until after the hearing. However, although the employer had advance notice of the hearing, it did not state what, if any, attempt it made to find witnesses before the hearing. The employer failed to show it was beyond its reasonable control to find the witness before the hearing. For this reason, we deny the employer's request to consider new information. Under ORS 657.275(2) and OAR 471-041-0090, we considered only information received into evidence at hearing and the employer's written argument only to the extent it was based on the record.

**FINDINGS OF FACT:** (1) Quantum Residential, Inc. employed claimant from July 1, 1995 to May 16, 2015 as a maintenance worker.

(2) The employer expected employees to refrain from engaging in intimidating or violent behavior toward other employees. Claimant understood the employer's expectation.

(3) On May 16, 2015, claimant and his manager had a discussion in the manager's office about the employer's tools missing from its apartment complex. The employer had no plans to discharge claimant before the discussion began. Claimant became agitated during the discussion because he perceived the manager's comments as an accusation that claimant had stolen the tools. At some point, the discussion became heated and claimant left the office. The manager followed claimant and the discussion continued outside the office. The manager then discharged claimant because claimant allegedly behaved in an intimidating and threatening manner toward the manager while they discussed the tools.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude the employer discharged claimant, 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 has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant because he allegedly made threatening gestures and statements to his manager on May 16, 2015. The parties presented conflicting accounts of the final incident on May 16, 2015, the employer's manager testifying that claimant behaved in a threatening manner when he pounded his fists in the manager's desk, glared at the manager, and said "let's finish this," before slamming the door and going outside the office. Transcript at 6. Claimant, however, denied threatening the manager and testified that it was the manager, not claimant, who pounded fists on the desk and approached claimant outside "with both fists clenched." Transcript at 17-18. The employer argued at hearing and in its written argument that evidence it provided of prior incidents involving claimant showed claimant had an attitude of "defiance and hostility," and should make the manager's testimony more credible than the claimant's testimony. We disagree that claimant's prior acts make him a less credible witness than the employer's manager. We therefore find the evidence as to whether claimant threatened and intended to intimidate the manager equally balanced.

Absent a preponderance of evidence showing that claimant engaged in the allegedly threatening behavior for which he was discharged, the employer failed to establish that it discharged claimant for misconduct. Claimant therefore is not disqualified from receiving benefits based on his work separation from the employer.

**DECISION:** Hearing Decision 15-UI-42687 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** September 18, 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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