

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1326

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 14, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153942). Claimant filed a timely request for hearing. On October 25, 2015, ALJ Micheletti conducted a hearing, and on November 2, 2015 issued Hearing Decision 15-UI-46991, reversing the Department's decision. On November 5, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to introduce information not offered into evidence at the hearing, including written statements purporting to be from witnesses to claimant's alleged behavior on June 29, 2015 and a copy of the employer's employee handbook. While the employer stated that it was not able to provide the witnesses' statements during the hearing because they were in the "electronic possession" of the factory manager who was on vacation at that time, the employer did not explain why these statements were reasonably accessible only by the manager, why the employer reasonably could not have retrieved these statements before the manager went on vacation or why the employer could not reasonably have requested a postponement of the hearing until the statements were accessible to it. Employer's Written Argument at 1. OAR 471-041-0090(2) (October 29, 2006) allows EAB to consider information not offered into evidence during the hearing only if the party seeking to introduce it was prevented from doing so by factors or circumstances beyond its reasonable control. The employer's bare assertion that the statements were accessible only to the absent factory manager was insufficient to show that the failure of the employer to produce them during the hearing was beyond its reasonable control. For this reason, EAB considered only evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) OneBuild, Inc. employed claimant in its factory from June 9, 2011 until June 30, 2015.

(2) The employer expected claimant to refrain from threatening or harassing coworkers or managers. Claimant understood the employer's expectation as a matter of common sense.

(3) On May 1, 2015, claimant was injured in a workplace accident. Claimant thought his accident was deliberately caused by a coworker. After May 1, 2015, claimant was off work on medical leave due to his injury.

(4) On May 7, 2015, while still on medical leave, claimant visited the workplace to give the factory manager a physician's note excusing him from work until May 21, 2015. During this visit, claimant did not interact with any coworkers and did not threaten the factory manager. On May 21, 2015, claimant returned to the workplace to give the factory manager a physician's note excusing him from work until such time as he was released for light duty work. When claimant spoke with the factory manager, he complained about the behavior of his worker that he believed had caused his workplace injury. The manager was not receptive to his comments and claimant told the factory manager that he was acting like a "stupidvisor." Audio at ~15:15, ~18:30. During this visit, claimant did not interact with any coworkers and did not threaten the factory manager.

(5) On June 29, 2015, claimant visited the workplace intending to give the factory manager a physician's authorization releasing him for light duty work. The factory manager was not on the workplace premises and claimant delivered the physician's authorization to the forklift driver. During this visit, claimant did not threaten the forklift driver, the factory manager or any other coworkers. Later that day, claimant sent a text message to the factory manager inquiring if there was any light duty work available for him.

(6) On June 30, 2015, the employer discharged claimant for allegedly threatening and harassing his coworkers and the factory manager.

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

The employer's witness testified during the hearing that claimant "verbally harassed" and was "physically threatening" toward coworkers and the factory manager on at least three occasions between May 1, 2015 and June 30, 2015, while he was on medical leave but visited the workplace. Audio at ~4:30, ~5:51, ~7:16, ~8:21, ~8:50. However, the employer's witness was not present when claimant allegedly engaged in the threatening or harassing behavior. Audio at ~5:09, ~5:51. Aside from broad and conclusory allegations about claimant's behavior, the witness was unable to specifically describe at hearing what claimant supposedly did and said that was considered threatening or harassing. Audio at ~5:09, ~5:38, ~6:20, ~7:00, ~8:00, ~9:05. Throughout the hearing, claimant denied that he had harassed or threatened coworkers or the factory manager, and provided detailed evidence about his interactions during three visits he made to the workplace between May 1, 2015 and June 30, 2015. Audio at ~13:58, ~14:50, ~15:15, ~15:50, ~16:06, ~17:50, ~18:16, ~18:30, ~18:50. While claimant admitted that he

called the manager a “stupidvisor” on May 21, 2015, that term does not appear reasonably threatening or harassing, and likely was merely an expression of claimant’s irritation with his manager or supervisor. Given the plausibility of claimant’s denials and the inability of the employer’s witness to provide specific and concrete information about claimant’s alleged behavior between May 1, 2015 and June 30, 2015, the employer did not meet its burden to show that claimant engaged in misconduct by harassing and physically threatening either his coworkers or the factory manager. On this record, the employer did not establish that it discharged claimant for misconduct.

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

DECISION: Hearing Decision 15-UI-46991 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 11, 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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