

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0170

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 162837). The employer filed a timely request for hearing. On January 27, 2016, ALJ Murdock conducted a hearing, and on January 29, 2016 issued Hearing Decision 16-UI-51971, affirming the Department's decision. On February 11, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer filed a written argument containing information that was not part of the hearing record, and failed to show that factors or circumstances beyond its reasonable control prevented it from offering that information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) 9th Street Alterations employed claimant from December 2, 2014 until October 22, 2015, last as a seamstress.

(2) Starting sometime before September 1, 2015, the employer's owner began to dislike claimant's workplace behavior. The owner thought that claimant was disruptive and disrespectful and did not follow her instructions. Claimant thought that the owner was "moody" and that she and the owner had a "personality thing." Audio at ~18:50, ~19:30.

(3) On September 1, 2015, the owner issued a written warning to the claimant, advising her that she was expected not to misuse the employer's equipment, to be respectful, to follow instructions and not to go to the front counter to discuss matters with customers unless she was asked to do so. Claimant read and signed the warning.

(4) On September 22, 2015, claimant worked and then left the workplace.

(5) On September 23, 2015, the employer discharged claimant, alleging that she had not complied with the September 1, 2015 warning because she had gone to the front counter on September 22, 2015. The employer's owner notified claimant of her discharge on September 24, 2015.

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

The testimony at hearing of the employer's owner portrayed claimant as a manipulative and disruptive employee who did not listen to or follow the owner's instructions. Audio at ~7:49, ~8:44, ~9:00, ~12:07, ~12:27. In contrast, claimant presented an image of the owner as mercurial, subject to mood swings, easily and inexplicably "exasperated" and unreasonably disliking claimant's personality. Audio at ~13:50, ~16:05, ~17:09, ~18:00, ~18:50, ~19:10, ~19:30. These are starkly contrasting and irreconcilable impressions. The owner's testimony was clear that she discharged claimant because claimant allegedly went to the front counter and spoke with a customer on September 22, 2015, in violation of the expectations set out in the September 1, 2015 warning. Audio at ~7:49, ~9:20, ~11:49, ~30:25. Claimant's testimony was equally clear that she was not at the front counter on September 22, 2015, but spent the work day at her sewing machine except for walking past the front counter when she left the workplace during her break. Audio at ~17:09, ~21:53, ~22:56, ~23:22. There were no other witnesses at the hearing, and no basis in the record for concluding that the owner was a more credible witness than claimant. Where, as here, the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved against the employer, who carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not demonstrate that claimant went to the front counter on September 22, 2015 in violation of the September 1, 2015 warning. The employer did not meet its evidentiary burden to demonstrate claimant's misconduct by a preponderance of the evidence.

The employer did not establish that it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-51971 is affirmed.

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

DATE of Service: March 7, 2016

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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