

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0212

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150347). Claimant filed a timely request for hearing. On February 16, 2016, ALJ M. Davis conducted a hearing, and on February 18, 2016 issued Hearing Decision 16-UI-53256, affirming the Department's decision. On February 22, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB, but failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Package Containers, Inc. employed claimant from May 19, 2014 to October 16, 2015 as an operations support specialist.

(2) The employer expected claimant to refrain from threatening physical violence and using threatening and abusive language toward other employees, including management. Claimant understood the employer's expectations.

(3) On October 16, 2015, the employer discharged claimant for allegedly telephoning the employer's vice president of sales on October 15, 2015 and referring to several managers and other employees as "fucking employees," "fucking pussies," and stating he would "love to kill" them. Transcript at 12.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude that 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 parties presented conflicting accounts of what claimant stated to the vice president of sales during the telephone call on October 15, 2015. Both participants in the October 15 conversation testified at hearing. The vice president alleged claimant described several coworkers, including managers, using foul names, and stated he wanted to kill them. Transcript at 12. Claimant denied having used foul names to describe coworkers and making threatening statements. Transcript at 16-18.

In Hearing Decision 16-UI-53256, the ALJ noted that claimant denied making the particular statements alleged by the employer, but found in accordance with the employer's testimony regarding those statements. The ALJ was more persuaded by the employer's vice president of sales' testimony, asserting that claimant was frustrated during the October 15 call and did not remember if he used foul language.¹ However, the fact that claimant was frustrated during the call, and may have used foul language during the call, did not make his testimony denying having threatened or called managers and coworkers foul names less persuasive than the vice president's testimony, or claimant a less credible witness. The ALJ failed to specify other reasons to find the vice president's testimony more persuasive, and the record does not show claimant was a less credible witness than the employer's vice president. Absent a reason to disbelieve either party, we find the evidence as to whether claimant used foul names to describe his coworkers or threatened them equally balanced.

Absent a preponderance of evidence showing that claimant engaged in the conduct 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 16-UI-53256 is set aside, as outlined above.²

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

DATE of Service: March 15, 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.

¹ In Hearing Decision 16-UI-53256 at 3.

² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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