

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0359**

*Reversed*  
*No Disqualification*  
*(No Descalificación)*

**PROCEDURAL HISTORY:** On February 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 84643). Claimant filed a timely request for hearing. On March 23, 2016, ALJ Murdock conducted a hearing, and on March 28, 2016 issued Hearing Decision 16-UI-55925, affirming the Department's decision. On March 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why she was unable to present this information during the hearing, or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) The Grotto Pizzeria Company employed claimant to clean its restaurant from August 10, 2015 until December 29, 2015.

(2) The employer expected claimant to respond when it attempted to contact her. Claimant understood the employer's expectation as a matter of common sense.

(3) Although the employer's owner spoke in English when she interviewed claimant before hire, claimant had difficulties speaking and reading English. Claimant usually cleaned the restaurant between 5:30 or 6:30 a.m. and 7:30 to 8:00 a.m. The employer's owner and other staff were not at the restaurant during the hours claimant worked, except one other employee was sometime there two days per week when he prepared pizza dough.

(4) After approximately November 1, 2015, the employer's owner left three notes for claimant on three different occasions. The first note informed claimant that the vacuum cleaner she used to clean the

employer's floors was not working and requested that she bring in her own vacuum cleaner. Transcript at 14-15. The second and third notes instructed claimant not to use a particular extension cord when she operated cleaning equipment. Transcript at 15. On approximately December 21, 2015, the owner stapled a note to claimant's time card instructing her again not to use the extension cord. Transcript at 18. Claimant took the notes left for her to her daughter for translation.

(5) On approximately December 27, 2015, the employee who prepared the dough was at work at the same time as claimant and asked claimant if she had spoken to the owner. When claimant said she had not, the employee told her that the owner did not need her to clean the restaurant anymore because the cleaning would now be done by the night crew. Transcript at 15. Claimant assumed she was laid off. When the employee asked claimant if she wanted to leave her keys to the workplace with him, claimant declined, saying that she would personally give her keys to the owner. Transcript at 16. At this time, claimant did not attempt to contact the owner by telephone to clarify the owner's intentions because her English was limited and she doubted her ability to communicate in English over the telephone. Transcript at 24.

(6) The next day, on approximately December 28, 2015, claimant did not work, but went to the workplace to attempt to speak with the owner. The owner was not there. On approximately December 29, 2015, claimant again did not work, but visited the workplace to see if the owner was present. Claimant's children were in the car that claimant had driven to the workplace. On that day, the owner was at the workplace and claimant spoke with her. Claimant asked the owner why the owner did not want her to work anymore and the owner told her that business was "slow" and her cleaning was taking too long. Transcript at 16. The owner was "upset" at claimant's questions and "yelled" at claimant that she wanted claimant to turn in her keys. Transcript at 16. Claimant told the owner she would go to her car to remove the employer's keys from the key ring that was in the car's ignition. As claimant left to retrieve the work keys, the owner "yelled" at her that she was going to call the police because claimant was refusing to surrender her work keys. Transcript at 17. The owner then told claimant that she was discharged for refusing to turn in her work keys.

**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).

In Hearing Decision 16-UI-55925, the ALJ concluded the employer discharged claimant for misconduct. The ALJ reasoned that by refusing to communicate with the employer after being asked to do so in several notes, and by refusing to turn in her work keys until the owner "threatened to involve law enforcement," claimant violated the employer's reasonable standards with at least wanton negligence. Hearing Decision 16-UI-55925 at 3. We disagree.

Claimant testified that the employer's owner had left at three or four notes for her after approximately November 1, 2015, but contended that the notes gave her certain work-related instructions and did not ask her either to contact the owner or to give the owner her contact information. Transcript at 13, 14-15. Claimant also testified that she did not refuse to surrender her work keys to the owner on December 29, 2015, but simply had left them on her key ring and was going to her car to get them when the owner threatened to call the police and proceeded to discharge her. Transcript at 16, 17, 18, 24. While the ALJ ignored claimant's testimony about these facts which conflicted with that of the employer's owner, there was no basis in the record to do so. Absent a reason to find that the credibility of one party was superior to the other or that there was some other basis to prefer the testimony of one over the other, the evidence on the disputed issues was evenly balanced. When such a circumstance obtains, as it does here, the uncertainty must be resolved against the employer since it is the party who carries the burden of proof in a discharge. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). For this reason, the ALJ erred in concluding the testimony of the employer's owner, which claimant rebutted, was sufficient to establish that claimant violated the employer's standards or that she did so with wanton negligence. The employer did not meet its burden show that it discharged claimant for misconduct.

Although the employer discharged claimant, it did not show that discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-55925 is set aside, as outlined above. *Decisión de la Audiencia 16-UI-55925 se deja a un lado, de acuerdo a lo indicado arriba.*

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

**DATE of Service: April 28, 2016**

**NOTE:** 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.

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

**NOTA:** *Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records)*

Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.

**Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atención al cliente.** Para llenar este formulario, puede visitar <https://www.surveymonkey.com/s/5WQXNJH>. Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.