

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0361

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 163001). Claimant filed a timely request for hearing. On March 16, 2016, ALJ S. Lee conducted a hearing, and on March 24, 2016 issued Hearing Decision 16-UI-55770, concluding claimant's discharge was not for misconduct. On March 31, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dill's Star Route, Inc. employed claimant as a commercial driver from December 2, 2015 to December 23, 2015.

(2) The employer required employees to refrain from harassing or threatening coworkers. Claimant understood the employer's expectation.

(3) During claimant's employment, two employees complained to the employer about him. One employee complained that claimant refused to wait for the employee to finish a task, parked the tractor trailer so close to his vehicle that he could barely get in and refused to move the tractor trailer so the employee could get in or move his vehicle. Exhibit 1, statement of Nash. The second employee complained that, on December 18, 2015, claimant said "I will kill you if you don't move out of my way" and then continued to "harass" and insult him for several days. Exhibit 1, statement of Garcia. Claimant had never exchanged an angry word with his coworkers during his employment and was not aware that any coworkers were dissatisfied with his behavior toward them.

(4) On December 21, 2015, the employer decided to discharge claimant based on his coworkers' complaints that he harassed and threatened them. The employer did not interview claimant about the complaints before deciding to discharge him. On December 23, 2015, the employer discharged claimant.

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

The employer's evidence that claimant's discharge was for misconduct was based solely on hearsay. The written statements the employer presented were vague, and lacked information about the dates and context of the alleged incident. For example, Garcia's statement alleged that claimant "continued to harass and say harassing things" and "continued to harass me and approach me saying insulting things," but he did not say when those incidents occurred, where they took place, or what claimant was supposed to have said that he considered harassment or insulting. *See* Exhibit 1. Nash's statement described events during which claimant parked too close to Nash's vehicle, but did not provide any context to the event or explain why parking too close to Nash's vehicle constituted "harassing behavior" on claimant's part. *Id.*

The only person present at the time of the alleged allegations who testified during the hearing was claimant, and claimant testified that the incidents did not happen as the employer alleged. Absent a basis for concluding claimant was not a credible witness, his firsthand testimony has at least as much weight as the employer's vague hearsay statements. Where the evidence is equally balanced, the party with the burden of persuasion, here, the employer, has not satisfied its burden. Therefore, we conclude that the employer failed to prove that claimant's discharge was misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 16-UI-55770 is affirmed.

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

DATE of Service: April 25, 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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