

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0669

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102300). Claimant filed a timely request for hearing. On May 11, 2016, ALJ Frank conducted a hearing, and on May 19, 2016 issued Hearing Decision 16-UI-59963, reversing the Department's decision. On June 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) South Coast Lumber Company employed claimant as a forklift driver from July 15, 2007 until February 17, 2016.

(2) The employer expected claimant to refrain from behavior that physically or verbally threatened or intimidated coworkers. Claimant was aware of the employer's expectation.

(3) On February 16, 2016, claimant was driving a forklift down one of the aisles in the employer's plant. Claimant noticed that a coworker who was assigned to clean-up duties was using a broom to push boards and other debris into the middle of that aisle. Claimant stopped the forklift and asked the coworker what he was doing and told him to stop pushing objects that obstructed the forklift into the aisle. The coworker threw the broom he was holding at claimant while claimant was still on the forklift. Claimant then got off the forklift and the coworker "rushed" him. Audio at ~23:56. When the coworker reached claimant, the coworker made contact with claimant by butting his chest into claimant's chest and pushing. Claimant stepped back to avoid further contact but the coworker stepped forward and continued pushing with his chest. Claimant then pushed the coworker back to enable himself to get away from the coworker and interrupt the interaction. After doing so, claimant left the area of the interaction.

(4) On February 16, 2016, sometime after the incident, claimant went to the employer's human resources representative to discuss what had happened.

(5) On February 17, 2016, the employer discharged claimant for the physical nature of the interaction with his coworker on February 16, 2016, concluding that claimant had instigated it.

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 show 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, the human resources manager, testified that the employer discharged claimant because on February 16, 2016, claimant violated the employer's policy against threatening or intimidating behavior when he got off the forklift and, without apparent provocation, began pushing his coworker. Audio at ~11:07, ~19:55. The employer's witness had no first-hand information about the alleged incident on February 16, 2016. Audio at ~12:25. The employer's evidence relied exclusively on very brief summaries of information about the incident the plant superintendent created after conversations he had with the coworker who was the alleged victim and four other coworkers who allegedly observed the incident. Audio at ~12:55, ~14:32, ~16:03, ~16:34. Claimant disputed the accuracy of those summaries, and testified that he pushed back at the coworker only to repel the coworker's attack on him and then retreated to find a supervisor. Audio at ~23:39, ~24:08, ~25:30, ~30:17, ~31:46. The plant manager's single summary of information from the four alleged witnesses appeared to synthesize the information given from all four and it was impossible to determine whether all four were in agreement on all facts presented in the summary. Exhibit 1 at 2. To the extent that the summary was consistent with the actual information provided by all four witnesses, that summary was inconsistent with the synopsis of the information provided by the alleged victim, since the witnesses supposedly observed claimant taking off his hat, glasses and, most unusually, his shirt before approaching the alleged victim while the alleged victim's synopsis did not allude to such strange behavior on claimant's part. *See and compare* Exhibit 1 at 2, 3. Such inconsistencies cast doubt on the accuracy of all of these synopses or summaries of hearsay information. Where, as here, the information claimant supplied on the relevant incident was first-hand, it is entitled to more weight than the employer's hearsay evidence, particularly when the employer's evidence was *double* hearsay, filtered through the plant manager's impression of what the alleged victim and the four witnesses supposedly said, and those hearsay synopses were inconsistent with each other in important parts. As such, the preponderance of the reliable evidence in this record shows that claimant likely did not instigate the pushing with his coworker, but was merely trying to neutralize the attack of the coworker. In conclusion, the employer did not meet its burden to show that claimant willfully or with wanton negligence violated the employer's policy against threatening or intimidating behavior when he defended himself against his coworker's alleged behavior directed at him on February 16, 2016.

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

DECISION: Hearing Decision 16-UI-59963 is affirmed.

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

DATE of Service: July 19, 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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