

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1212

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 8, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 132801). Claimant filed a timely request for hearing. On October 19, 2016, ALJ Murdock conducted a hearing, and on October 20, 2016 issued Hearing Decision 16-UI-69165, reversing the Department's decision. On October 28, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that a copy of the argument was served on the other parties as required by OAR 471-041-0080 (October 29, 2006). For that reason, EAB did not consider the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Renaissance Development Corporation employed claimant as marketing coordinator from December 29, 2014 until August 15, 2016.

(2) The employer expected claimant to refrain from insubordinate behavior in her dealings with supervisors. Claimant understood the employer's expectation as a matter of common sense and as she reasonably construed it.

(3) In 2016, claimant was working with a vendor on a project to develop a website. By August 2016, claimant's supervisor, the director of sales and marketing, determined that progress in completing the website was slower than she desired.

(4) On August 12, 2016, claimant met with the director of marketing and one of the topics they discussed was the website project. The director said that she had intervened in the project to speed up its progress by contacting the vendor and had presented the website internally to the owner. Since claimant had been coordinating the vendor's work on the website, and thought that dealing with the vendor was

her responsibility, claimant asked the director why she had intervened and if she was displeased with claimant's work on the project. The director replied that she thought her intervention was appropriate because she was in charge of marketing and the website's completion was ultimately her responsibility. The director asked claimant if she understood her position. Claimant stated she did, "but I probably would have handled it differently." Audio at ~17:54. After she met with the director of marketing, claimant spoke to some of her coworkers about the meeting. Claimant told the coworkers that she and the director of marketing had a difference of opinion about the way the website had been presented. Audio at ~19:43.

(5) The marketing director perceived that claimant was insubordinate to her during their meeting on August 12, 2016 and afterward when she spoke to her coworkers about the meeting.

(6) On August 15, 2016, the employer discharged claimant for allegedly insubordinate behavior on August 12, 2016.

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 connected with work. 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 testimony of claimant and the employer's witness, the director of marketing, differed markedly on claimant's behavior in the August 12, 2016 meeting and afterward. The director contended that claimant was "extremely agitated," "accusatory," "combative" and "rebuked" her during the meeting and when she discussed the meeting with her coworkers, she "boasted" about "rebuking" the director. Audio at ~7:02, ~7:25, ~8:26, ~9:21, ~25:28. Claimant disputed the marketing director's account of the meeting and her behavior when she met with her coworkers and specifically denied the accounts the director provided. Audio at ~17:18, ~17:52, ~18:06, ~19:43, ~20:20, ~23:29. Claimant and the director were the only participants in their August 12, 2016 meeting, and no independent witnesses could corroborate either party's account. Audio at ~23:24. There is no reason in the record to doubt the accuracy of either party's description of what was said at the meeting or afterward or the credibility of either party. Where, as here, the evidence on disputed issues is evenly balanced, the uncertainty must be resolved against the employer since it is the party who carries the burden to persuasion in a discharge case. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Applying principles based on the allocation of the burden of proof, the employer did not meet its burden to show that claimant engaged in behavior on August 12, 2016 that was reasonably construed as insubordinate. The employer did not demonstrate that claimant engaged in misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-69615 is affirmed.

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

DATE of Service: November 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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