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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1357

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101450). Claimant filed a timely request for hearing. On November 10, 2016, ALJ Frank conducted a hearing, and on November 18, 2016, issued Hearing Decision 16-UI-71462, affirming the Department's decision. On December 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB that presented facts not offered into evidence during the hearing. Claimant did not explain why he 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 his reasonable control prevented him from doing so. Accordingly, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Investment Property Group, Inc. employed claimant as a resident assistant mobile home park manager from July 16, 2011 to September 16, 2016.

(2) The employer expected its employees to refrain from using profane or abusive language and engaging in any form of unlawful or unwelcome harassment in the workplace. Claimant was aware of the employer's expectations.

(3) From 2011 to the beginning of 2016, claimant received positive annual performance reviews that resulted in pay increases each year. In the most recent review, dated February 1, 2016, the employer commended claimant for his positive relationships with fellow employees, supervisors and residents. Exhibit 2.

(4) On April 17, 2016, the employer received a written statement from a resident alleging that claimant sometimes knocked on the resident's door and loudly complained about the resident's violation of the park's parking rules. The resident believed claimant was being discriminatory about his complaints.

(5) On May 24, 2016, the employer received reports from individuals in the employer's mobile home park alleging that claimant had used foul language toward them and called them "wetbacks." Exhibit 1. Claimant denied the allegations when questioned by the park manager. Nonetheless, on May 25, 2016, the employer gave claimant a written warning for the alleged behavior and told him that further policy violations could lead to discipline up to and including termination.

(6) On September 16, 2016, the park manager received reports from park residents alleging that claimant had used foul language toward them and called them "wetbacks." Exhibit 1. Claimant denied the allegations when questioned by the park manager.

(7) On September 16, 2016, the employer discharged claimant based on the complaints of the unidentified residents.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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 employer had the right to expect claimant to refrain from using profane or abusive language or engaging in any form of unlawful or unwelcome harassment in its mobile home park. The employer advised claimant of its expectations at hire when it provided him with a copy of its policies handbook and claimant did not dispute that he was aware of those expectations.

The employer asserted that claimant violated its expectations by "yelling vulgarities" and calling certain residents "wetbacks" as shown by the written disciplinary and termination forms it offered at hearing and the park manager's testimony, based on second-hand reports he received from unidentified individuals. Exhibit 1. Claimant denied making the comments and none of the individuals who had made the reports either testified at hearing or were identified by the employer during the hearing. In Hearing Decision 16-UI-71462, the ALJ found that claimant made the comments in question, essentially finding that claimant's first-hand denials were outweighed by the employer's hearsay evidence,[1] and concluded that the employer discharged claimant for misconduct. Hearing Decision 16-UI-71462 at 4. The ALJ's findings and conclusions in this regard were not supported by substantial evidence.

[1] *See e.g.* OEC 801(3) (defining hearsay as a statement by other than the declarant offered in evidence to prove the truth of the matter asserted).

Claimant's denials at hearing were consistent with his previous denials to the park manager[2], and the ALJ did not explicitly find that claimant was not credible.[3] Audio Record ~ 24:20 to 24:30. The employer's written statements from unnamed residents, its disciplinary forms and the testimony of its park manager and human resources manager were its only evidence of claimant's reportedly negative comments to the residents. Because the individuals who were the source of that evidence did not testify at hearing, however, and because the employer did not identify who the complainants were, claimant was denied the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias, which he alleged at hearing, or offer relevant evidence about his relationships with the complainants by way of demonstrating the complaints were untruthful. Audio Record ~ 41:30 to 42:30. The employer had the alternative of presenting testimony to substantiate its allegations but did not do so, and the fact that claimant had the opportunity to question the two managers regarding what they had been told was insufficient to test the reliability of the statements themselves since they were made by others. Also notable is that the facts the employer sought to prove through its hearsay evidence were central to its assertion of misconduct.[4] Absent a reasonable basis for concluding that claimant was not a credible witness, we find that his first-hand testimony was not outweighed by the employer's hearsay evidence. The evidence as to whether claimant made vulgar or abusive comments to the residents was, at best, equally balanced, and the ALJ's conclusion that claimant made such comments was not supported by substantial evidence.

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 employer failed to meet its burden here. Claimant was discharged, but not for misconduct under ORS 657.176. He is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 16-UI-71462 is set aside, as outlined above.

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

DATE of Service: <u>January 5, 2017</u>

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[2] Although the employer's park manager testified that claimant responded that he was "off the clock" when asked whether he made the alleged comments on September 16, 2016, the manager also testified that claimant denied that he ever made the statements, which was consistent with claimant's testimony at hearing. Audio Record ~ 25:30 to 28:30. Claimant also denied ever stating that he was "off the clock" in response to the manager's inquiry. Audio Record ~ 40:45 to 41:30. Accordingly, because the evidence was no more than equally balanced, the park manager's testimony alleging claimant stated he was "off the clock" did not have more weight than claimant's denial.

[3] *See* ORS 657.275 (2)(EAB shall perform *de novo* review of the record, may enter its own findings and conclusions and is not required to give any weight to implied credibility findings).

[4] *See Cole/Dinsmore v. DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

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

N**OTE:** 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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