EO: 990
BYE: 201738

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-1420

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On October 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 72240). Claimant filed a timely request for hearing. On November 15, 2016, ALJ Vincent convened a hearing which he then continued. On November 28, 2016, the ALJ conducted a hearing, and on December 2, 2016 issued Hearing Decision 16-UI-72195, concluding the employer discharged claimant, but not for misconduct. On December 20, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it argued that since claimant stated at the November 15, 2016 hearing that his wife was not going to be a witness on his behalf, and then later called her to testify at the continued hearing on November 28, 2016, her testimony was not credible. However, despite the employer's contention, claimant did not state on November 15, 2016 that his wife had not witnessed any facts that might be relevant to his position on the work separation, but merely that he did not anticipate calling her as a witness. Audio of November 15, 2016 Hearing at ~0:30. Claimant's single statement on November 15, 2016, without a clear indication that his wife lacked any relevant personal knowledge, was not sufficient to discount the entirety of her testimony at the hearing on November 28, 2016, and was not grounds to strike it from the record, particularly since the employer had an opportunity at the later hearing to cross-examine claimant's wife and impeach her testimony but chose not to do so.

The employer's written argument also presented new information that was not offered into evidence during the hearing. The employer did not explain why it was unable to present this information during the hearing or otherwise show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider the new information that the employer sought to present by way of its written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

**FINDINGS OF FACT:** (1) Eclipse Security Professionals, LLC employed claimant as a security officer from November 25, 2014 until September 22, 2016.

(2) The employer expected claimant to refrain from making statements threatening violence in the workplace. Claimant understood the employer's expectations.

(3) On September 21, 2016, the employer issued to claimant a corrective action notice for the grammatical composition of his written reports. Claimant received the notice when he was in the employer's Portland office around the end of his shift. Claimant was irritated by the notice and dropped it to the office floor and stepped on it. At that time, claimant and another security officer were the only people present in the office. Claimant then left the office to respond to an alarm at a client's site.

(4) The next day, September 22, 2016, the security officer who had been in the office when claimant received the corrective action notice orally reported to the employer's owner that claimant had thrown the notice on the floor, "stomped on it" and stated angrily, "I'm going to kill every motherfucker around here." Transcript at 6. The security officer did not write a report about the incident, did not immediately inform the owner of it, and did not report it to the police.

(5) On September 22, 2016, the employer discharged claimant for allegedly making a threat of violence in the workplace on September 21, 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 employer relied on the hearsay statement of another security officer to establish that claimant threatened violence in the workplace on September 21, 2016. Transcript at 5. Claimant agreed he threw the corrective action notice to the office floor in the presence of that security officer but denied he made statements about killing anyone, or made any threats at all. Transcript at 18, 19, 23. The employer presented evidence in an apparent attempt to discredit claimant's testimony by showing that claimant had a propensity to fabricate information when it was expedient for him to do so. Transcript at 14-17. Despite the employer's attempt to impeach claimant's credibility, there are reasons in the record to doubt the reliability of the hearsay account of the other security officer about the threat that claimant allegedly made on September 21, 2016. First, if the other security officer had actually witnessed claimant making a threat that day, and was concerned for his own safety or that of his coworkers as the employer's witness contended, he likely would have reported it immediately to the employer or the police instead of waiting until the following day. Transcript at 5, 8. Under the circumstances of the security officer's oral account, it also is unlikely that the security officer would not have prepared a written report memorializing the incident and claimant's alleged threat because he "did not want to get involved," when it appears from the employer's exhibits that the employer routinely expected officers to prepare reports about all notable occurrences. Exhibit 1 at 14, 16, 20, 23, 28, 54, 55. It is further incongruous that the employer would have permitted the security officer to decline to write a report

about what he had witnessed, since it appears that it typically required such reports. Given the state of this record and the reasons to doubt both parties' testimony and exhibits, the evidence on whether claimant did or did not make the threat the other security officer alleged is, at best, evenly balanced. When the evidence on a disputed issue is evenly balanced, the uncertainty in a discharge case must be resolved against the employer's position because it is the party who has the burden of persuasion. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer did not meet its burden to show more likely than not that claimant threatened to engage in workplace violence on September 21, 2016.

The employer did not show that claimant engaged in misconduct on September 21, 2016. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-72195 is affirmed.

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

**DATE of Service: January 23, 2017**

**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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