EO: 700
BYE: 201735

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

613
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0013

Affirmed
No Disqualification

PROCEDURAL HISTORY: On October 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 1161118). Claimant filed a timely request for hearing. On November 29, 2016 and December 14, 2016, ALJ Wyatt conducted a hearing, and on December 15, 2016 issued Hearing Decision 16-UI-73024, reversing the Department's decision. On January 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument but did not certify that it was served on the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider that argument when reaching this decision except for the employer's contention that the ALJ deprived it of a fair hearing when he refused to continue the hearing to allow it to present evidence from additional witnesses about claimant's alleged inappropriate use of foul language in the workplace prior to August 18, 2016. Transcript of December 14, 2016 Hearing (Transcript 2) at 16-17. The employer did not make an offer of proof in the written argument as to the specific substance of the expected testimony from those additional witnesses. As well, for purposes of this decision, we have accepted the employer's contention that claimant used foul language commonly in the workplace and it is not at all clear what further finding the testimony from the additional witnesses, if allowed, would have supported. The employer did not show that testimony from the additional witnesses would be relevant to the issues before EAB or that, in fact, the employer was denied a fair hearing by the ALJ's failure to allow rebuttal testimony from those witnesses. Accordingly the ALJ did not err in refusing to schedule a further continuance of the hearing to allow testimony from the additional witnesses and his refusal did

not deprive the employer of a reasonable opportunity for a fair hearing under ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004).

FINDINGS OF FACT: (1) Marathon Enterprises, LLC, doing business as Wallowa Valley Senior Living, employed claimant as a medication aide from approximately August 2015 until September 7, 2016.

(2)The employer expected claimant not to engage inappropriately with other staff or to use vulgar language or behave offensively in the workplace. Claimant understood the employer's expectations.

(3) Sometime prior to August 18, 2016, the employer had received reports that claimant, on occasion, used foul language when speaking with coworkers and supervisors in the workplace. The employer orally counseled claimant that he was not to use inappropriate language during work-related interactions, but did not discipline him. Transcript of November 29, 2016 Hearing (Transcript 1) at 17; 18; Transcript 2 at 24.

(4) On August 22, 2016, a staff member reported to the employer's executive director that on August 18, 2016, claimant had used the word "dildo" several times during a conversation that claimant had in the workplace with a 15 year-old who was employed as a dishwasher. Transcript 1 at 5, 6; Transcript 2 at 20. The executive director decided to investigate whether claimant had said offensive things to dishwasher or any other employees.

(5) After August 22, 2016, the executive director spoke with the mother of the 15 year-old, who was also an employee, and asked the mother to speak with her son about what, if anything, claimant said to him on August 18, 2016. The 15 year-old told his mother that claimant had not used offensive language in their conversation and specifically denied that claimant had used the word "dildo." Around that time, the executive director spoke with claimant and claimant said "fuck no" he had never used the word "dildo" at any time when speaking to the 15 year-old dishwasher. Transcript at 1 at 15, 16; Transcript 2 at 23. Also around this time, the mother of the 15 year-old dishwasher reported her son's denials to the executive director. The executive director never spoke with the 15 year-old about the alleged conversation claimant had with him. On August 30, 2016, one of the nurses reported to the executive director that in response to her attempt to discuss a work-related matter with claimant, claimant had commented to her, "This is fucking bullshit." Transcript 1 at 13. The executive director then interviewed several employees as part of her investigation of claimant's behavior. Many employees and supervisors told the executive director that they had heard claimant using foul language in the workplace either with others or directed at them. Transcript 1 at 13; Transcript 2 at 27-28.

(6) On September 7, 2016, the employer discharged claimant, allegedly for using the word "dildo" when he spoke to the 15 year-old dishwasher on August 18, 2016 and for using foul language in the workplace on several occasions.

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).

Although the employer's witness contended at hearing that the employer discharged claimant for his general use of foul language in the workplace, she also appeared to testify that the precipitating cause for the discharge was claimant using the word "dildo" to the 15 year-old on August 18, 2016 "because there was a minor involved" in that incident. Transcript 2 at 24, *see also* Transcript 1 at 13, 17-18, Transcript 2 at 20, 29. The evidentiary emphasis of the testimony of the employer's witnesses at hearing also suggests that the alleged incident with the 15 year-old was, in fact, the proximate reason that the employer decided to discharge claimant when it did. Transcript 1 at 4-7, 9, 15, 16; Transcript 2 at 19-20. However, in light of the testimony of the employer's witnesses about the multiple reasons the employer discharged claimant, EAB will address those reasons.

The employer contended claimant used the word "dildo" several times when he spoke to the 15 year-old dishwasher on August 18, 2016, and called as one of its witnesses an employee who allegedly overheard claimant speaking to the dishwasher using that word. Transcript 1 at 4-7. Claimant denied he ever used the word "dildo." Transcript 2 at 5. The weight of the testimony of the employer's witness was undercut by the fact that she did not immediately report what she had allegedly overheard to the employer but waited four days to do so and while she could recall claimant saying "dildo" several times to the dishwasher, she did not recall the context in which the word was used or the substance of the conversation between claimant and the dishwasher. Transcript 1 at 4-7. To buttress its case, the employer also presented hearsay evidence that the mother of the 15 year-old had told the executive director on August 23, 2016 that her son had admitted to her that claimant had been speaking to him about "dildos." Transcript 1 at 16. However, the hearing testimony of the 15 year-old's mother, in which she contended her son never admitted to her that claimant used any foul language or the word "dildo" in their conversation and in which she contended she never told the executive director that her son told her that claimant had used inappropriate language or the term "dildo," cannot be reconciled with that of the executive director. Transcript 2 at 14-15. Given the mix of hearsay and first-hand information from the various witnesses, the weight to be assigned to that evidence cannot be reliably determined. On balance, there is no reason in the record to prefer claimant's testimony to that of the coworker who allegedly overheard the conversation between him and the dishwasher, to prefer the testimony of the coworker to that of the 15 year-old's mother or to prefer the testimony of the executive director to that of the 15 year-old's mother. When the evidence in a discharge case is evenly balanced, the uncertainty must be resolved against the employer because it carries the burden to proof. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). On this record, the employer did not demonstrate by a preponderance of the evidence that claimant used the word "dildo" or other allegedly offensive language during his conversation with the 15 year old dishwasher on August 18, 2016.

The employer's witness, the executive director mentioned that she discovered in the course of her investigation of the "dildo' statement that claimant was more frequently using foul language in the workplace than she had previously and she would have discharged him even if he had not made the alleged "dildo" comments to the 15 year-old. Transcript 2 at 2. However, the executive director readily agreed at hearing that before she started her investigation she already was aware that claimant had used

foul language "multiple times to multiple people" in the workplace, including coworkers, supervisors and to her and the employer did not apparently discipline him for that behavior. Transcript 2 at 24. Because the employer already knew claimant regularly used foul language in the workplace before it began its investigation and had not disciplined claimant for its use, it is plausible that claimant thought the employer tolerated his use of that language. On this record, the employer did not demonstrate, more likely than not, that claimant understood the employer prohibited him from using foul language in the workplace. As such, the employer did not show that claimant's use of foul language in the workplace before was a willful or wantonly negligent violation of the employer's standards.

The executive director also noted at hearing that it was reported to her in the course of her investigation of the "dildo" statement that claimant had used offensive "attention seeking behaviors" in the workplace such as "this bouncing thing with his hips." Transcript 2 at 27. However, the employer did not show that claimant consciously engaged in such behaviors. Indeed, the report that was made to the executive director mentioned that claimant appeared to lack "social filters," which would tend to suggest that claimant was not aware that such behaviors were offensive to others or that they might violate the employer's standards. Transcript 2 at 27. On this record, the employer did demonstrate that the body movements of claimant that the employer considered offensive were accompanied by the state of mind needed to establish willful or wantonly negligent behavior. The employer therefore did not meet its burden to establish that claimant's body language or movements in the workplace constituted misconduct.

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

DECISION: Hearing Decision 16-UI-73024 is affirmed.

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

DATE of Service: <u>February 1, 2017</u>

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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.