

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0189

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct. Claimant filed a timely request for hearing. On January 31, 2017, ALJ Meerdink conducted a hearing and issued Hearing Decision 17-UI-75846, concluding claimant's discharge was not for misconduct. On February 16, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Green Home Construction, Inc. employed claimant as a project manager from August 2016 to November 14, 2016.

(2) Prior to working for the employer as a project manager, claimant had only had limited experience with project management as one component of her previous job. Once hired, claimant had a heavy workload and struggled to balance handling her own projects, helping another project manager with his, and helping to manage and create several programs within the employer's business.

(3) The employer's owner and project manager had concerns with claimant's work performance and attitude at work. The project manager found claimant difficult to talk to; claimant complained to the owner that she felt she was subjected to a hostile work environment in the office. One or both met with claimant on several occasions to discuss her workload and her attitude. The owner instructed claimant that she needed to complete her workload, get along with everyone and not to "backtalk." Audio recording at ~ 14:45. Claimant understood the concerns, tried to improve, and felt she showed some improvement; the owner and project manager had ongoing concerns.

(4) On November 11, 2016, claimant and the project manager disagreed during a discussion about how to schedule labor for a window installation project. The project manager felt that claimant was “pretty unprofessional” during the discussion and used several derogatory terms and phrases toward him. Audio recording at ~ 24:15. Claimant felt a lot of stress because she was overwhelmed by her workload, and she felt that the project manager was being dismissive of her because he responded “here we go again” and turned away when she tried to express her opinions. She also felt that she did not use derogatory terms and phrases in talking to him. Audio recording at ~ 35.45. At the end of their discussion, the project manager agreed to speak with claimant again the following Monday.

(5) On November 14, 2016, claimant reported to work. Instead of having the planned discussion with the project manager, the owner met with claimant and discharged her. Among other things, including concerns about claimant’s attitude and the belief that her failure to get along with the project manager was causing a hostile work environment for other employees, the owner told claimant that she had been “set up to fail” because of her heavy workload and lack of experience as a project manager. Audio recording at ~ 44:15.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant’s discharge was 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The final incident that caused the employer to discharge claimant occurred on November 11th. In that incident, the employer’s witnesses both alleged that claimant engaged in misconduct on November 11th by speaking aggressively to the project manager. One witness, the owner, did not actually witness the incident, however. Audio recording at ~ 11:00. The other witness, who was present at the time, alleged that claimant called him a “white male . . . chauvinist pig,” “control freak,” and “micromanager,” referred to the owner as his “buddy Tom,” and that her comments included the phrases “as long as I don’t have to work for you” and “you’re not the boss of me.” Audio recording at ~ 24:15. He did not, however, explain the context in which claimant allegedly made the statements. Claimant testified, on the other hand, that she was not aggressive during that incident and did not say all the things the project manager alleged. She said that she was feeling stressed and overwhelmed and trying to explain her perspective, and the project manager responded by being dismissive, stating, “here we go again,” and turning away from her. Audio recording at ~ 35:45. Although the employer’s owner testified he had documentation and witnesses to claimant’s behavior, he did not describe the documentation or identify the witnesses during the hearing, nor did he provide any information about what they saw or how it affected them.

In a discharge case, the employer has the burden to prove by a preponderance of the evidence that claimant's discharge was for misconduct. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That showing necessarily requires that the employer prove that the incident happened as alleged. In this case, the parties disagreed as to what occurred, and, absent a basis in the record to disbelieve claimant's testimony, the allegation that claimant made the statements alleged is no better than equally balanced against claimant's denial that she said them. Where the evidence is equally balanced, the party with the burden of proof, here, the employer, has failed to satisfy its burden.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 17-UI-75846 is affirmed.

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

DATE of Service: March 9, 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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