

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0221

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 5, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 131534). Claimant filed a timely request for hearing. On February 7, 2017, ALJ Seideman conducted a hearing, at which the employer failed to appear, and on February 9, 2017, issued Hearing Decision 17-UI-76597, concluding the employer discharged claimant, but not for misconduct. On February 21, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

In written argument, the employer's representative requested that EAB review evidence not presented at the hearing, including several witness statements, because he was "sick in bed with the flu during that time" and did not attend the hearing. Written Argument at 1. The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. In its argument, the representative did not assert or show that the employer ever requested a postponement under OAR 471-041-0021 (August 1, 2004) based on the illness in question, or if so, that the request was promptly made after the need for a postponement became apparent, who the request was made to and what was the response of the Office of Administrative Hearings (OAH). Without such supporting details, we have no basis on which to conclude that the employer's failure to present evidence at hearing was a circumstance beyond its reasonable control. The employer's request to consider the new information under OAR 471-041-0090 is, therefore, denied. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) High Definition Hydrographics LLC, a company that specialized in water transfer printing, employed claimant as a dipper from approximately November 2014 to December 1, 2016.

(2) During the course of his employment, claimant had problems with a coworker who was a painter. When claimant was not at his nearby dipping work station, the coworker accused claimant of not

working at all and told other coworkers that claimant should be fired. However, the owner often asked claimant to perform various other functions within the building and those jobs took claimant away from his work station.

(3) On or about November 30, 2016, claimant was performing a work task at a table near the painter and looked over at him. The painter suddenly rushed at claimant, hovered over him at the table, began yelling at him using foul language and told him that he wanted to fight him outside because he thought claimant was mocking him. Claimant had done nothing but look at him, but followed the painter to the door. When the painter went outside, claimant stood at the door but did not exit the building because he did not want to fight. Claimant looked at the painter and said, "Why don't you do both of us a favor and just leave?" Audio Record ~10:30 to 14:00. Claimant then headed back to his work station, but on the way he saw the owner and told him what had just occurred. The owner's only response to claimant essentially was that the two workers needed to stay away from each other. Claimant responded that he did not believe the owner was protecting him at the workplace and was going to leave for the day to avoid any further confrontation. He told the owner that he would return at the start of his shift the following day and hoped the situation would be improved.

(4) When claimant returned to work the following day, the owner told him he was being discharged, without giving him a reason, and gave him his final check.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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 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 is conscious of his (or her) conduct and knew or should have known that his conduct would probably result in violation of standards of behavior the employer had the right to expect of an employee. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that he knew or should have known would violate the employer's expectations.

The evidence at hearing consisted only of claimant's testimony. Although it is clear the owner discharged claimant, it is also clear from this record that claimant was not given a reason for his discharge. From the testimony, it appears that claimant was threatened at work by a coworker, and when he told the owner about it, he was not given any assurance that the owner would intervene to prevent additional threats to his safety. At that point, claimant left for the day to allow the situation to cool down, notifying the owner exactly why he was leaving and that he would return to work the following day. Although the owner may have been displeased that claimant left, there is no evidence that the owner told claimant not to leave or that claimant was unjustified in doing so, given the circumstances. On this record, there is no evidence that claimant consciously violated a reasonable

employer expectation for which he was discharged, and without such conscious conduct, i.e. willful or wanton negligence, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-76597 is affirmed.

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

DATE of Service: March 16, 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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