EO: 200
BYE: 201740

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
# 2017-EAB-0430

*Affirmed*
*No Disqualification*

**PROCEDURAL HISTORY:** On November 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged, but not for misconduct (decision # 145826). The employer filed a timely request for hearing. On February 15, 2017, ALJ Vaughn conducted a hearing at which claimant failed to appear and issued Hearing Decision 17-UI-77019, concluding that the employer discharged claimant for misconduct. Claimant filed a timely request to reopen. On March 28, 2017, ALJ Vaughn conducted a hearing and issued Hearing Decision 17-UI-79761, granting claimant request to reopen and concluding that claimant's discharge was not for misconduct. On April 11, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** At the March 28, 2017 hearing, ALJ Vaughn admitted documents into the record as Exhibits 1 through 3. The exhibits admitted were not marked, however. Accordingly we have marked Exhibits 1 through 3 based on the ALJ's description. Exhibit 1 is the notice of the February 15, 2017 hearing issued by the Office of Administrative Hearings; Exhibit 2 is Hearing Decision 17-UI-77019; and Exhibit 3 is claimant's request to reopen.

**FINDINGS OF FACT:** (1) Ocean Grown Cannabis Company employed claimant as a buds tender from March 8, 2016 to September 9, 2016.

(2) Sometime in approximately July 2016, claimant and her boyfriend had a disagreement with the employer over the price of marijuana they purchased from the employer. On July 29, 2016, claimant's boyfriend sent the employer an angry Facebook message about the purchase.

(3) The employer expected that employees would arrive five minutes before the time their shifts were scheduled to start, and prepare themselves for their shift by washing their hands. The employer did not pay employees for any time spent at work prior to the start of scheduled shifts, however.

(4) On September 16, 2016, claimant arrived at approximately 9:59 a.m.; her shift was scheduled to begin at 10:00 a.m. After she began her shift, claimant ate breakfast at her desk. When the employer's

owner and manager orally reprimanded claimant for her late arrival and for eating breakfast during her work hours, they concluded she was not sufficiently apologetic. At approximately 11 a.m., the manager sent claimant home for the day because she had been tardy to work and had not been ready to work when her scheduled shift began.

(5) When claimant returned home on September 16, she told her boyfriend, with whom she was living, about what had happened at her job. Claimant's boyfriend then sent the employer's owner an angry private message on Facebook, in which he used foul language, and spoke harshly and negatively about the employer. Claimant never directed her boyfriend to send this message. The owner and manager were frightened and threatened by the message, and concluded that claimant had directed her boyfriend to send the message, or at least was aware of or present when the message was sent.

(6) On September 17, 2017, at approximately 8:44 a.m., the manager called claimant, told claimant she was discharged, and read her a "Justification for Fire" letter. The letter stated, in pertinent part:

> [The employer] operates on a 3 strikes Write Up system. On 9/16/16 [claimant] received 3 Write Ups which according to the Write Up System, means that she must be terminated from the job.....Arriving late is cause for a write up. One must arrive at least 5 minutes before we open to clock in and begin the opening process.
>
> The second write up was due to [claimant] not being prepared for work. Eating breakfast is the responsibility of the employee to do before they arrive for work.
>
> The third Write Up on 9/16/16 was because [claimant's] attitude was not at all apologetic, which it should have been, after showing up late and unprepared for work. Exhibit 4.

The manager did not tell claimant that an additional reason for her discharge was the private Facebook message her boyfriend had sent the owner. Because the manager and owner felt threatened by this message, they believed it was "not a safe option to bring her back to work." They also believed it would expose them to further threats if they told the claimant that this was one of the reasons for her discharge. Transcript at 27.

**CONCLUSION AND REASONS:** We agree 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. 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 employer discharged claimant because, on September 16, 2016, she reported late for work, ate breakfast during her work hours, was not sufficiently apologetic when she was orally reprimanded for her conduct, and because the employer's owner felt threatened by a Facebook message claimant's boyfriend sent him. We consider each of these reasons in turn, to determine if any constitute misconduct.

In regard to the claimant's tardiness, claimant's supervisor testified that the employer expected employees to arrive at least five minutes before the start of their scheduled shifts, but did not pay employees for this time. According to the employer, claimant failed to comply with this expectation on September 16, when she arrived at 9:59 a.m. for her 10 a.m. shift. The employer's expectation – that employees spend time in the workplace during which they prepared for their workday but did not perform job duties, and for which they were not paid, was unreasonable because it was probably illegal. ORS 653.010(11) provide that " '[w]ork time' includes both time worked and time of authorized attendance." [1] The Oregon Bureau of Labor and Industries has interpreted this law to mean that if an employer requires an employee to report any time before a scheduled shift, the employer must pay the employee for this time.[2] Claimant's failure to comply with an unreasonable expectation did not constitute willful or wanton negligence.

In regard to the employer's allegations that claimant violated its rule by eating breakfast during her work hours, and that claimant was not sufficiently apologetic when the employer's owner and manager reprimanded her for tardiness and eating on the job on September 16, the parties presented contradictory evidence regarding these matters. The employer testified that employees were told that they could not eat at their desks at "multiple mandatory meetings" which claimant attended, [3] and that when reprimanded, for her tardiness, claimant displayed "annoyance, irritation and attitude."[4] Claimant, however, asserted that she had eaten breakfast at her desk "pretty regularly" and had never been reprimanded for doing so, and that she attempted to apologize for her tardiness, but was not allowed to do so by the owner, who yelled at her loudly and "aggressively." Exhibit 3. Where the evidence is no more than equally balanced, the party with the burden of persuasion –here, the employer – has failed to satisfy its evidentiary burden. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). The employer therefore did not demonstrate that it imposed a rule prohibiting employees from eating during their scheduled work hours, and also did not demonstrate that claimant behaved inappropriately when reprimanded about her tardiness and eating on the job.

In regard to claimant's connection to the threatening message sent by her boyfriend on a social media platform, the owner provided only speculative evidence of claimant's involvement in this message. When the ALJ asked the employer's manager why she believed that claimant was involved in or contributed to the September 16 message claimant's boyfriend sent, the manager responded that "[b]ecause I know that she was sitting right next to him and participating in the whole thing. She was –

[1] *See also* OAR 839-020-0043(1) (January 9, 2002) (preparatory activities are considered hours worked, if the activities performed "are an integral and indispensable part of a principal activity for which the employee is employed.")

[2] www.oregon.gov/boli/TA/pages/t_faq_waitim.aspx.

[3] Transcript at 23.

[4] Transcript at 25.

she lives with him…" Transcript at 30. When questioned further about her knowledge of claimant's involvement in the message, the manager testified that she thought the messages "might have said that [claimant] is right here." Transcript at 31. Claimant, on the other hand, testified that she never told her boyfriend to send the message the employer found disturbing, and that she never intended for her boyfriend to threaten the employer. Transcript at 40-42. We find claimant's direct first hand testimony outweighs the speculative testimony of the employer's manager. The employer therefore failed to meet its burden to demonstrate that claimant was involved or participated in, or contributed to the September 16 message her boyfriend sent to the employer's owner. As a result, the employer did not demonstrate that the boyfriend's messages constituted misconduct on the part of claimant.

The employer discharged claimant, but not for misconduct. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

**DECISION:** Hearing Decision 17-UI-79761 is affirmed.

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

**DATE of Service: May 2, 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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