

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0516

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144154). Claimant filed a timely request for hearing. On April 13, 2017, ALJ Frank conducted a hearing, and on April 14, 2017 issued Hearing Decision 17-UI-81901, reversing the Department's decision. On May 3, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which, among other things, it alleged an "irregularity in the proceedings below" because claimant was represented during the hearing by an attorney who was not licensed to practice in Oregon and who did not have permission to appear *pro hac vice* in the hearing, and citing to OAR 137-003-0550(3) (January 31, 2012). However, ORS 657.295(2) expressly provides that any person in any unemployment proceeding may be represented by counsel or "other agent authorized by such person," and OAR 137-003-0550(1) states that a party to a proceeding such as an unemployment hearing may choose to be represented by an attorney or other representative as authorized by federal or state law. Because there is no evidence as to the relationship underlying the out-of-state attorney's representation of claimant, and whether claimant retained the attorney's services in his capacity as an attorney or whether the attorney was acting in a non-professional capacity, the employer's allegation is not a basis upon which to question the validity of the proceedings before the ALJ. In addition, the employer did not assert or suggest that it suffered any harm or prejudice from the out-of-state attorney's appearance on claimant's behalf and did not suggest what, if any, remedial action it was seeking from EAB. The employer's allegations therefore do not have an effect on the outcome of

this decision. If it chooses, the employer may make a complaint to the Oregon State Bar about claimant's representative's alleged unauthorized practice of law during the hearing below.

In its written argument, the employer also offered information that it did not present at the hearing. The employer did not explain why it was unable to offer 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.

Claimant also submitted a written argument in which she offered information that she did not present at the hearing. Like the employer, claimant did not explain how factors or circumstances beyond her reasonable control prevented her from offering this information during the hearing. For the same reasons stated in connection with the employer's new information, EAB did not consider the new information that claimant sought to offer.

FINDINGS OF FACT: (1) Trailer Inns Park employed claimant as assistant manager of a recreational vehicle (RV) park it operated in Yakama, Washington from approximately October 11, 2016 until January 24, 2017.

(2) The employer expected claimant to reasonably perform her work duties and not to behave insubordinately toward supervisors. Claimant understood the employer's expectations as a matter of common sense.

(3) Claimant spoke fluent Spanish in addition to English. When claimant was hired, the manager of the park informed claimant that she would sometimes be asked to facilitate conversations between the manager and Spanish-speaking residents by interpreting from English to Spanish and vice-versa. Throughout claimant's employment, the manager made comments to claimant, residents and vendors about politics, illegal immigration, illegal immigrants and deportation that claimant considered biased and offensive.

(4) On Tuesday, January 24, 2017, the manager discussed with claimant and another employee how they had cleaned a restroom the day before. In fact, the restroom had been adequately cleaned. Later, when claimant was in the registration office, the manager mentioned that he thought the reason the RV park had so few renters was because the recently-elected United States president was "sending all the immigrants back." Transcript at 22. Claimant did not want to listen to the manager discuss one again political views that she found distasteful and insulting. Claimant told the manager that she needed a break and was going to take a walk, and left the office. Claimant did not raise her voice to the manager. The manager did tell claimant that she could not leave the registration office. Later, claimant was working and called the manager because she needed his assistance in responding to an email. After the manager answered claimant's question, claimant asked him "as a favor [to] please not discuss politics or immigration with me [again because] it makes me uncomfortable." Transcript at 24. Again, claimant did not raise her voice to the manager. In response, the manager yelled at claimant, stating that she should not tell him "how to run his business." Transcript at 24. The manager then told claimant that she was discharged and to give him her work key. The employer discharged claimant on January 24, 2017.

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).

At hearing, the manager cited a variety of events that supposedly caused him to discharge claimant. Transcript at 5, 6, 8, 11, 12, 17. Claimant disputed the manager's contentions, and testified that the manager discharged her after she requested that he stop discussing in the workplace views that she found offensive about immigrants, immigration and deportation, without citing any reason for discharge other than she had told him he "needed to change how he worded things," which he considered to be "out of line." Transcript at 12, 24. Claimant denied that the manager mentioned any other reason for discharging her, and denied that the other reasons the manager raised for the discharge had a basis in fact. Transcript at 26, 23, 24, 26, 32. No evidence on the reason(s) for the discharge was presented at hearing other than the testimony of the parties. Both parties appeared equally credible and there is no reason in the record to doubt the truthfulness of either party's testimony. Where, as here, the evidence on a disputed issue is evenly balanced, the inconsistency must be resolved against the employer since it is the party that carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, we accept claimant's account of the discharge and conclude that the reason the manager discharged claimant on January 24, 2017 was because she requested that he stop trying to discuss with her his political views on immigrants, immigration and deportation.

While claimant admitted she could be "emotional" at times, she denied that she yelled or raised her voice to the manager when she asked him to stop making political comments in the workplace. Transcript at 24. Based on burden of proof principles, we also, as above, accept claimant's testimony about her demeanor when she made the request as accurate. There was no evidence that claimant said anything in the conversation in which she made her request that the manager reasonably could construe as insubordinate, as attacking his authority to direct operations in the workplace, or as impertinent, insulting or rude. Transcript at 22, 24. Nothing in the record suggests that claimant left the registration office against the instructions of the manager. On this record, the employer did not demonstrate that claimant's behavior on January 24, 2017 that culminated in her discharge was a willful or wantonly negligent violation of the employer's reasonable standards.

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

DECISION: Hearing Decision 17-UI-81091 is affirmed.

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

DATE of Service: June 13, 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.

Please help us improve our service by completing an online customer service survey. 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.