

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0525**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 101115). The employer filed a timely request for hearing. On April 10, 2017, ALJ Amesbury conducted a hearing, and on April 14, 2017 issued Hearing Decision 17-UI-81043, affirming the Department's decision. On May 4, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

We considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) Chinook Winds employed claimant from September 19, 2015 to February 2, 2017.

(2) The employer had a policy that required employees to be courteous to coworkers and refrain from being insubordinate to supervisors. Claimant understood the policy.

(3) The employer had concerns about claimant's interactions with her coworkers, particularly when she felt stressed or overburdened with work. On October 13, 2015, claimant and a coworker argued and used aggressive gestures toward each other. On May 14, 2016, claimant yelled to a coworker to be heard over noisy equipment. On August 4, 2016, claimant got into an argument with coworkers who were trying to help her. On August 11, 2016, claimant was abrupt and short with coworkers. After each of those instances the employer coached or warned claimant about her behavior. The employer warned claimant she needed to "remain calm and professional, even when under pressure" and to avoid arguing with her peers and supervisor. *See Exhibit 1.*

(4) On February 2, 2017, claimant believed she was supposed to be teaching a coworker how to perform some shift duties claimant customarily performed. Claimant and another employee agreed that the coworker had taken her lunch break at an inconvenient time. When the coworker returned from lunch, claimant told her she should be taking her break at a different time.

(5) Claimant's coworker felt claimant had "attacked her a little bit" in front of other employees, became "very upset" and cried. Transcript at 14. She complained to the executive chef, who spoke with claimant and the coworker separately. The chef thought claimant seemed upset that she had been pulled into the office, became argumentative with him, used a raised voice, and that "there was no really calming her down." Transcript at 14. Claimant thought that the chef was using an elevated tone with her, cutting her off mid-sentence, and not listening to what she had to say, and raised her voice. The chef ended the conversation, and recommended to the employer that claimant be discharged.

(6) Effective February 2, 2017, the employer discharged claimant for her interaction with the coworker and for being insubordinate to the executive chef.

**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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer has the right to expect claimant to behave in a professional manner while at work, and has the right to discharge her at-will for that, or any other lawful reason. For the circumstances of claimant's discharge to disqualify her from receiving unemployment insurance benefits, however, the conduct that resulted in her discharge, claimant's conduct on February 2, 2017, must have been a willful or wantonly negligent violation of the employer's expectations. Willful is defined, generally, as acting with the intent to violate the expectation. Wanton negligence is defined, in pertinent part, as indifference to the consequences of an individual's behavior, where the individual is both conscious of her behavior and knew or should have known that the behavior would probably result in a violation of the employer's expectations. OAR 471-030-0038(1)(c).

The employer did not allege or show that claimant acted with the intent to violate the employer's expectations that she behave in a professional manner either when she told a coworker the coworker should take a break at a different time or when she subsequently interacted with the chef. Nor did the employer prove by a preponderance of the evidence that she acted with wanton negligence. At the time claimant interacted with the coworker, she thought she was teaching the coworker how to take over claimant's duties during a shift claimant customarily worked. In that capacity, there is nothing out of the ordinary about telling the coworker what time she thought the coworker should take her lunch break. Although the employer alleged claimant "got into, you know, kind of an argument slash just trying to tell her how to do it" and "attacked her [the coworker] a little bit," the employer did not present evidence suggesting claimant said anything other than what claimant testified she said to the coworker:

All I said in a calm, casual tone of voice was that she should be taking her lunch between 9:30 and 10:00 because that's – for that . . . shift, which was the shift she was working,

that's where – when everybody takes – that's when we take the lunch. . . . I just calmly let her know that.

Transcript at 25. In the absence of evidence that claimant said something else, or used an argumentative or inflammatory tone of voice, or was discourteous to the coworker, the evidence suggests that claimant was not wantonly negligent with respect to her interaction with her coworker.

With respect to claimant's interaction with the chef, the chef testified that claimant raised her voice to him, argued with him, and "there was no really calming her down." Transcript at 14. Claimant testified that the chef spoke to her in an elevated tone, would not listen to claimant, cut her off mid-sentence, and that the only reason she raised her voice to him was so he could hear her. Transcript at 25. There were no other witnesses to their interaction. Absent a basis for concluding either witness was not credible, the evidence about whether claimant's behavior toward the chef was insubordinate, or merely responsive to the chef's tone and behavior, is no better than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, the employer, has not proven misconduct.

The employer failed to establish that claimant's discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 17-UI-81043 is affirmed.

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

**DATE of Service:** May 23, 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](http://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.