

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0679

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 2, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151724). Claimant filed a timely request for hearing. On May 30, 2017, ALJ Lohr conducted a hearing, and on June 2, 2017 issued Hearing Decision 17-UI-84787, reversing the Department's decision. On June 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted separate written arguments on June 6, 2017 and June 15, 2017, the second of which contained new information in the form of written statements from claimant's coworkers about allegedly threatening comments that claimant made in the workplace. However, the employer did not explain why it did not offer this new information during the hearing and otherwise failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB considered the arguments only to the extent they were based upon information received into evidence at the hearing.

FINDINGS OF FACT: (1) MCK Management, Inc. employed claimant from April 27, 2007 until April 4, 2017, last as assistant manager in its meat department.

(2) The employer expected claimant to behave according to standards it considered "acceptable." Transcript at 12. The employer also expected claimant to avoid insubordinate behavior toward supervisors or other employer representatives in positions of authority. Claimant understood the employer's expectations as a matter of common sense.

(3) On October 22, 2015, the employer issued a written warning to claimant for allegedly confronting the assistant meat manager and making threatening statements to him. The employer warned claimant that further displays of anger or threatening behavior in the workplace would lead to disciplinary sanctions.

(4) On April 4, 2017, claimant used the store intercom and ended the message that was broadcast by hanging up a telephone handset rather than depressing the disconnect button, which caused a loud noise to broadcast over the intercom. Sometime later, claimant entered the accounting room to make copies using a computer printer. The assistant store manager was using a computer in the same room and told claimant that the store director had asked him to remind claimant after using the intercom to hang up the phone with his fingers before replacing the handset, not to “slam” the handset down and to speak more quietly when broadcasting over the intercom. Transcript at 32. The office manager was present in the accounting room and heard the ensuing interaction between the assistant manager and claimant. The assistant’s comments irritated claimant since he had not intended to yell while on the intercom or to bang it down loudly. While still at the printer making copies, claimant stated he did not need a job with the employer and asked if the store director wanted him to give his two weeks’ notice and find another job. Transcript at 32, 34, 39. At that time, claimant’s voice was elevated and he was “pretty much yelling.” Transcript at 39. The assistant store manager then told claimant, “[I]f you’re going to talk to me like that [threatening to resign], you can get your knives and clock out.” Transcript at 34, 40. The assistant store manager was not instructing claimant to clock out, but cautioning claimant that he should stop talking about quitting. Transcript at 34-35. Claimant responded “okay” and left the room. Transcript at 35, 40. Claimant resumed working; he did not leave the workplace and later went to lunch.

(5) On April 4, 2017, when claimant returned from lunch, the employer discharged him for insubordinate behavior during his earlier conversation with the assistant store manager and for an ongoing pattern of combative and threatening behavior in the workplace. Transcript at 11.

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 preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing and in its written arguments, the employer stressed that it discharged claimant on April 4, 2017 because of an ongoing pattern of insubordinate, combative and confrontational behavior, and that claimant’s behavior on April 4th should not be viewed in isolation but as the culminating event in that pattern. Transcript at 9-11, 42; June 6, 2017 Written Argument at 1; June 16, 2017 Written Argument at 1-2. However, EAB traditionally focuses on the final incident of alleged misconduct, rather than on an alleged history of misconduct, to determine if claimant is disqualified from benefits. The reason for this focus is that if the employer was aware of those prior incidents when they occurred, which in this case it was, it presumably did not consider that those incidents merited discharge since claimant’s employment continued despite them. It appears that the proximate cause of claimant’s discharge, or the event that precipitated the discharge, was the event of alleged insubordination on April 4, 2017. Accordingly, it is the proper focus of the initial discharge analysis.

Claimant and the assistant store manager presented differing accounts of their conversation on April 4, 2017. The assistant manager testified that claimant yelled at him during the conversation and repeatedly

used a foul word, which claimant denied. Transcript at 19-20, 32-33. We give more weight about the substance of that conversation to the office manager's testimony rather than that of either participant to it since she was a relatively disinterested witness. According to the office manager's recollection, claimant did not use foul language during the conversation. Transcript at 39. However, the office manager testified that claimant appeared upset at the message from the store director that the assistant store manager had relayed and was "pretty much yelling" during the very few sentences that he exchanged with the assistant manager before leaving the accounting room. Transcript at 39, 40. It is unclear on this record whether claimant's raised voice was an emotional reaction to the content of the assistant manager's statement or if he needed to raise his voice to be heard over the noise of the copy machine he was using while speaking to the assistant manager. While claimant might have raised his voice in response to the assistant's manager's delivery of a rebuke on behalf of the store director, it is not at all apparent that he was doing so as an act of insubordination, an act in defiance of the assistant manager or store director's authority, or if it was anything more than a brief, involuntary expression of frustration or irritation at the rebuke the assistant manager had just delivered. In this respect, it is significant that the entire interaction between claimant and the assistant manager was apparently quite brief, claimant did not engage in a lengthy tirade or any tirade at all, did not challenge the assistant manager's or the store director's authority and stopped talking when the assistant manager expressed displeasure that claimant had introduced the topic of quitting and promptly left the room thereafter. Finally, while the employer contended claimant glared threateningly at the assistant manager during their conversation, the office manager noted only that claimant was looking at the assistant manager "the entire time he was leaving the office," which could not have been more than for a very few seconds. Transcript at 40. Given the very brief duration of claimant's supposed stare and the vagueness of the employer's description, the evidence does not rule out that claimant was merely looking in the assistant manager's direction with no particular intention or suggest the inference that the look was necessarily intended to convey a threat. Viewing the evidence as a whole, the employer did not meet its burden to show that it is more likely than not that claimant's behavior during his conversation with the assistant manager was insubordinate, confrontational or combative, nor that it was a willful or wantonly negligent violation of the employer's standards.

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

DECISION: Hearing Decision 17-UI-84787 is affirmed.

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

DATE of Service: July 10, 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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