EO: 200
BYE: 201812

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

856
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0727

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 151207). Claimant filed a timely request for hearing. On May 25, 2017, ALJ Frank conducted a hearing, and on May 26, 2017 issued Hearing Decision 17-UI-84398, concluding the employer discharged claimant, not for misconduct. On June 15, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Milwaukie Tire Company, Inc. employed claimant from October 30, 2014 to March 27, 2017 as a service writer.

(2) The employer expected claimant to refrain from driving in a reckless manner on the employer's premises. The employer's owner and employees used foul language while at work. However, the employer expected claimant to refrain from using foul language toward the owner and in front of customers. Claimant should have understood the employer's expectations as a matter of common sense.

(3) On March 22, 2017, claimant arrived to work late. That day, the owner was present while claimant explained that he was late for work because he had to assist his young minor son after a bathroom accident.

(4) On March 23, 2017, the employer's owner asked claimant regarding claimant's tardiness on March 22, "Do you have anything to talk about?" Audio Record at 24:03 to 24:06. Claimant replied, "No." Audio Record at 24:07 to 24:09. The owner was dissatisfied with claimant's response and told claimant that he was suspended from work on March 23 and 24, 2017. An employee reported to the employer that, as claimant left work on March 23, claimant allegedly stated in a loud voice in employer's shop, "Have fucking fun. I just got suspended." Audio Record at 15:48 to 16:12. Neither customers nor the owner were present. Claimant then allegedly "tore" out of the driveway, "throwing gravel," as he drove out of the gravel area where he had parked by other employees' and customers' cars in the employer's parking lot. Audio Record at 16:37 to 16:48.

(5) On Monday, March 27, 2017, the employer discharged claimant for allegedly being disrespectful by using foul language as he exited work and driving recklessly in the employer's parking lot on March 23, 2017.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant, but not for misconduct.

ORS 657.176(2) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended 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. 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 suspended claimant on March 23, 2017 because the owner was dissatisfied with claimant's response to the owner about being tardy. Because the employer did not decide to discharge claimant until after it learned of claimant's alleged use of foul language and conduct in the parking lot, claimant's conduct on March 23 is the focus of the misconduct analysis.

The employer presented hearsay evidence that claimant used foul language in the employer's shop area as he was leaving work after being suspended on March 23, 2017. Claimant denied using foul language as he left the shop that day. Audio Record at 26:19 to 26:22. However, it is undisputed that neither the employer nor customers were present to overhear the alleged foul language. We agree with the ALJ that, even were we to presume that claimant used foul language as he left the shop on March 23, the record fails to show that claimant engaged in a willful or wantonly negligent disregard of the employer's expectations. The record shows employees commonly used foul language in the shop and the employer failed to show that claimant knew or should have known, through the employer's policies, training, conduct or warnings that it expected claimant to refrain from using foul language when only employees were present. Thus, to the extent the employer discharged claimant for using foul language when he left the shop on March 23, the employer discharged claimant not for misconduct.

The employer contended that claimant drove in a reckless manner when he left the employer's parking lot, dispersing gravel as he left. Audio Record at 16:37 to 16:48. Claimant denied having done so, and testified that he merely drove out of the parking lot. Audio Record at 28:18 to 28:58. The parties' testimony differs and there is no reason in the record to find that one party is more credible than the other or to doubt the testimony of one party in preference to the other. When the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer carries the burden of proof in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Because the record fails to show that it was more likely than not that claimant drove recklessly on March 23, the record does not show claimant engaged in a willful or wantonly negligent violation of the employer's standards by driving recklessly on the employer's property. The employer did not meet its burden to demonstrate claimant's misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-84398 is affirmed.

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

DATE of Service: July 14, 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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