

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0837

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 17, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 135829). Claimant filed a timely request for hearing. On July 7, 2017, ALJ Sgroi conducted a hearing, and issued Hearing Decision 17-UI-87516, reversing the Department's decision by concluding the employer discharged claimant, but not for misconduct. On July 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Florencein, Inc. employer claimant as a motel housekeeper from July 20, 2016 until April 9, 2017.

(2) The employer expected its employees to refrain from physically aggressive and intimidating behaviors in the workplace. Claimant understood the employer's expectation.

(3) Claimant did not get along with the housekeeper who inspected the motel rooms after they were cleaned. Sometime during the summer of 2016, claimant and the inspecting housekeeper had an argument. The manager told claimant and the inspecting housekeeper to stay separate from each other in the future and to avoid face-to-face interactions in the workplace. Afterward, the inspecting housekeeper generally communicated to claimant by written notes if she wanted additional housekeeping work done in rooms that were assigned to claimant.

(4) Despite the manager's instructions, claimant and the inspecting housekeeper continued to have unpleasant verbal interactions in the workplace after the summer of 2016. Claimant perceived the behavior of the inspecting housekeeper as abusive. On February 14, 2017, claimant submitted a

resignation to the manager stating that her last day of work would be March 1, 2017. After the manager asked claimant not to quit and stated she would take steps to curb the behavior of the inspecting housekeeper, claimant retracted her resignation.

(5) On April 9, 2017, claimant completed housekeeping duties in a particular room. The inspecting housekeeper inspected the room. Rather than communicating with claimant by written note, the inspecting housekeeper told claimant she needed to more thoroughly clean the room and followed claimant into the room. Once in the room, claimant began to re-clean the soap dish in the bathroom. The inspecting housekeeper told claimant, "You're going to need a fucking rag to get that off." Transcript at 16. Claimant responded, "Are you gonna watch me?" to which the inspecting housekeeper replied, "Are you gonna be an ass this whole time?" Transcript at 16-17. Their exchanged continued, with each insulting the other, until claimant started to leave the room, stating, "You guys can do my list." Transcript at 17. Claimant turned around to look behind her at the inspecting housekeeper as she was walking down the hallway from the room. Claimant saw the inspecting housekeeper running at her with her arms extended in front as if she intended to forcefully push claimant using her full body weight. When the inspecting housekeeper reached claimant, claimant deflected her body to the side, stating "Don't run up on me." Transcript at 17. The momentum accompanying the deflection caused the side of the inspecting housekeeper's head to hit the wall next to claimant. Claimant then pushed the inspecting housekeeper down to stop her from continuing to approach and attack claimant. The inspecting housekeeper got up and told another coworker to call the police. Claimant waited for the arrival of the police.

(6) When the police arrived, the responding officer interviewed both claimant and the inspecting housekeeper. The responding officer did not arrest either claimant or the inspecting housekeeper. Claimant left the workplace and did not return because she thought the employer was going to discharge her for her involvement in the altercation with the inspecting housekeeper. In fact, had claimant returned to work, the employer would have discharged her because it thought she had been the aggressor in the April 9, 2017 altercation.

(7) On April 9, 2017, the employer discharged claimant, believing that claimant had instigated the altercation that day and had been the physical aggressor.

CONCLUSIONS AND REASONS: The employer discharged claimant but not for misconduct.

The first issue this case presents is the nature of claimant's work separation. If claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

Although claimant did not return to work after the altercation on April 9, 2017, she did return because she thought the employer would discharge her due to the altercation. Transcript at 22. The testimony of the employer's witness was clear that, had claimant tried to continue working for the employer, she would not have been allowed to do so. Transcript at 5-6, 14. Because the employer was unwilling to allow claimant to return to work, claimant's work separation was a discharge on April 9, 2017.

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) 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).

According to the employer's witness, claimant was discharged on April 9, 2017 because of the "violence and assault" that claimant had engaged in against the inspecting housekeeper. Transcript at 5-6, 14. The employer's witness testified that claimant and the inspecting housekeeper were the only witnesses to their physical interaction on April 9, 2017. Transcript at 9. In support of its allegations, the employer's witness relied principally on the hearsay statement of the inspecting housekeeper, which was that claimant had "punched" and "assault[ed]" her. Transcript at 8, 10. In contrast, claimant contended that the inspecting housekeeper was the aggressor in their interaction and that claimant's actions were undertaken in self-defense and only to deflect the physical attacks of the inspecting housekeeper. Transcript at 16-18. Absent some reason to doubt claimant's first-hand testimony about the altercation, claimant's evidence is entitled to greater weight than the employer's hearsay evidence about the altercation. On this record, the employer did not meet its burden to show that claimant instigated the April 9, 2017 physical altercation, that she was the physical aggressor in it or that she did anything other than act in self-defense.

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

DECISION: Hearing Decision 17-UI-87516 is affirmed.

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

DATE of Service: August 11, 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.