

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0888

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 24, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 101346). Claimant filed a timely request for hearing. On July 7, 2017, ALJ Meerdink conducted a hearing, and on July 7, 2017 issued Hearing Decision 17-UI-87523, concluding that the employer discharged claimant, but not for misconduct. On July 26, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Pathway Enterprises employed claimant as a direct support professional from November 21, 2016 until April 7, 2017. Claimant's job duties were to provide direct support to individuals with intellectual or physical disabilities in the individuals' homes and apartments.

(2) The employer expected that direct support professionals would not endanger the health, safety or wellbeing of the individuals for whom they provided support. Claimant knew about and understood that expectation.

(3) On April 6, 2017, claimant was assigned to provide support to an individual who became upset because claimant was unable to take the individual where he wanted to go due to the unavailability of company vehicles. The individual went to the employer's office and complained to claimant's supervisor; claimant's supervisor directed claimant to remain in the office, due to the threatening nature of the individual's behavior. Audio recording at 27:42. Claimant's supervisor contacted a behavioral specialist, who was able to resolve the situation. Claimant returned to the individual's apartment, intending to continue to support him, but the individual screamed through the door that he did not want support. Audio recording at 28:38.

(4) After the individual told claimant he did not want support, claimant returned to the office and told the supervisor what had occurred. The supervisor told claimant to discontinue supporting the angry individual and to move on to another individual.

(5) On April 7, 2017, the employer discharged claimant because it believed she refused to provide appropriate support to the individual on April 6.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer's witnesses and claimant presented markedly different accounts of the final incident that resulted in claimant's discharge. According to claimant's supervisor, claimant was upset by the behavior of the individual she was expected to support on April 6, and told the supervisor she would no longer support the individual. Audio recording at 16:49. The supervisor also asserted that after the incident with the individual was resolved, claimant returned to individual's apartment; at that time, the individual told claimant he did not want support. The supervisor contended that claimant violated the employer's policy by failing to remain outside the apartment door for 20 minutes, to make sure the individual did not harm himself or damage property. Audio recording at 18:11. Claimant, however, testified that her supervisor directed her to remain in the office, due to the individual's threatening behavior, and also directed her to discontinue supporting the individual, after the individual angrily told claimant that he did not want support. Audio recording at 27:42, 28:38.

On this record, we find no reason to doubt the credibility of either claimant or her supervisor. The evidence regarding claimant's conduct on April 6 is therefore equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has failed to satisfy its evidentiary burden. The employer therefore failed to demonstrate that it discharged claimant for her willful or wantonly negligent behavior.

The employer discharged claimant, but not for misconduct. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-87523 is affirmed.

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

DATE of Service: August 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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