

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0958

Affirmed
No Disqualification

PROCEDURAL HISTORY: On February 3, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124506). Claimant filed a timely request for hearing. On July 13, 2017, ALJ Wyatt conducted an interpreted hearing, with an interpreter certified in real time captioning, and on July 21, 2017, issued Hearing Decision 17-UI-88567, concluding the employer discharged claimant, but not for misconduct. On August 9, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Blue Mountain Hospital District employed claimant as a hospital housekeeper from November 17, 2004 to January 3, 2017.

(2) The employer expected its employees to be professional and courteous to supervisors and coworkers. Claimant was aware of and understood the employer's expectations.

(3) Claimant and other housekeepers were not happy with their lead worker/supervisor because they believed she ignored their concerns and spoke to them disrespectfully. On May 10, 2016, claimant was working in a laundry room with the lead who, at that time and place and for some unknown reason, asked claimant what her problem was. When claimant explained that the lead ignored their concerns and treated them disrespectfully, the lead called claimant a "bitch." Transcript at 27. Claimant then went to Human Resources Department (HR) to complain. The HR director then met with claimant and the lead jointly, despite claimant's objection to a joint meeting because at that moment she was uncomfortable being in the same room with the lead. During the meeting, claimant raised her voice several times, and when it became clear the HR director was siding with the lead and ignoring her concerns, she abruptly left the meeting. The next day claimant was placed on a 12-month performance improvement plan (PIP) for her behavior during the meeting. No action was taken against the lead.

(4) On December 29, 2016, claimant had an interaction with the lead in a laundry room concerning job duties during which claimant believed the lead was acting disrespectfully toward her. Claimant went to talk to the HR director, with the lead close behind, and the HR director told her that she wanted to talk

with both of them together. Claimant requested the opportunity to talk to the HR director alone; her request was refused. Claimant entered the meeting, during which the lead allegedly reported to the HR director that claimant had told her to “shut up” when she gave her a directive. Claimant became upset and raised her voice. When claimant concluded the HR director was ignoring her concerns and attempted explanations, she announced that she was intending to quit and left the room. Claimant then went to the housekeeping area and told coworkers what had occurred and what her intentions were. The HR director followed claimant to the housekeeping area, told her to go home and that she would arrange a future meeting with her. The HR director believed that at that point that claimant “flipped [] off” the lead and then left. Transcript at 7.

(5) The HR director sent claimant a letter directing her to appear at a meeting on January 3, 2017. When claimant arrived at that meeting, the employer discharged her for her behavior toward the lead on December 29, 2016.

CONCLUSIONS AND REASONS: We agree with the ALJ. 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. 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. In a discharge case, the employer bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Put another way, the employer must show, more likely than not, that claimant consciously engaged in conduct that she knew or should have known would violate the employer's expectation. Here, the employer failed to satisfy that evidentiary burden.

The employer discharged claimant for being unprofessional and discourteous toward the lead on December 29, 2016. However, the employer's evidence about the facts concerning the December 29 interactions between claimant and the lead worker, which was based on hearsay evidence, differed from the testimony of claimant, who was a participant in the interactions. Claimant denied telling the lead to “shut up” or that she “flipped her off.” Transcript at 23, 24. She also asserted that she did not get along with the lead because the lead had called her a “bitch” when claimant asked her to be respectful toward her and her coworkers. Transcript at 27. In the absence of evidence demonstrating that claimant was not a credible witness, her first hand testimony was at least as persuasive as the employer's hearsay. Accordingly, the evidence regarding whether claimant told the lead to “shut up” or later “flipped [her] off” was no more than equally balanced. Where the evidence is no more than equally balanced, the party with the burden of persuasion, here, the employer, has failed to satisfy its evidentiary burden. Accordingly, the employer failed to establish that claimant was consciously unprofessional or discourteous toward the lead, and without willful or wanton negligence, i.e. conscious conduct, misconduct has not been shown.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 17-UI-88567 is affirmed.

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 1, 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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