

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1121

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 174343). Claimant filed a timely request for hearing. On September 14, 2017, ALJ Meerdink conducted a hearing and issued Hearing Decision 17-UI-92559, concluding claimant's discharge was not for misconduct. On September 18, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) D Lux Hardware Floors, Inc. employed claimant as a floor installer from August 22, 2016 to November 2, 2016.

(2) The employer had a policy that prohibited employees from using foul language in customers' homes, required employees to report to work on time, and required employees to follow instructions from supervisors about how to do the work. The employer provided the policies to claimant upon hire.

(3) During claimant's probation the employer developed concerns about claimant's behavior and work. The owner heard claimant use foul language around the shop and other employees reported on three occasions that claimant used foul language in or just outside customers' homes. The employer believed claimant reported to work late, and had concerns about the quality of claimant's work related to the perception that claimant had failed to follow instructions with respect to how to do the work.

(4) At some point prior to November 2, 2017, the employer concluded claimant had again been late, failed to follow instructions or used foul language. The employer decided not to continue claimant's employment, and, on November 2, 2017, discharged him.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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 has the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). That means the employer must show that it is more likely than not that not only did claimant act as the employer alleged, but that he did so willfully or with wanton negligence. In this case, while the employer alleged that claimant was late to work, used foul language in front of customers, and failed to follow instructions, the evidence supporting the allegations was based primarily upon hearsay, and the employer lacked details about the dates, locations and specific conduct alleged. Claimant earnestly denied having used foul language, been late or failed to follow instructions. The evidence about claimant's alleged conduct is therefore no better than equally balanced. Absent a reason to disbelieve either party, the preponderance of the evidence does not show that claimant acted as alleged, and therefore fails to show that his discharge was for misconduct.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his discharge.

DECISION: Hearing Decision 17-UI-92559 is affirmed.

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

DATE of Service: October 16, 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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