

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1155**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On May 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 81150). The employer filed a timely request for hearing. On September 1, 2017, ALJ Murdock conducted a hearing, and on September 6, 2017 issued Hearing Decision 17-UI-91986, affirming the Department's decision. On September 26, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Bijou Classic, LLC employed claimant as a member of the floor staff from September 13, 2016 until April 28, 2017. The employer operated a movie theater.

(2) The employer did not have a definite policy on when employees were expected to report for work. Claimant understood she should arrive for work in sufficient time to complete her opening duties before the first movie started. The employer also expected claimant to refrain from yelling at customers or coworkers or treating them rudely. Claimant understood that expectation as a matter of common sense.

(3) On the employer's premises there was an upstairs room that had once been an office. Sometime before 2017, business use of that room was discontinued and it came to be used to store items that were not currently in use. Sometime before early February 2017, the employer's owner became aware claimant was staying overnight in that room. The owner spoke with claimant about sleeping in that room and intended to convey that claimant could stay in that room overnight only once or twice per month. In early to mid-February, the owner discovered that claimant was staying overnight in that room far more frequently and had been discarding the unused items that were in the room. The owner told claimant to stop staying in the room and to stop cleaning it out. On February 12, 2017, claimant sent the owner an email in which she apologized for using that room for overnight stays, and listed the items she had removed from the room, all of which she had donated to a local charitable organization since she thought they were abandoned. Claimant stated in the email she intended to try harder to be a good employee. Thereafter, claimant did not stay in the upstairs room or discard any items from it.

(4) In approximately early to mid-February 2017, claimant arranged for friend to repair a malfunctioning outlet in the concessions area of the theater. The friend replaced the GFI outlet cover and connected some electrical wires to the outlet replacement. When the owner discovered what claimant had done, the owner informed claimant that she did not want people making repairs in the workplace without her authorization and permission. The owner recognized that claimant had only been trying to make the concessions area more functional and had “good intentions.” Transcript at 27.

(5) On approximately February 13, 2017, the owner thought that claimant had reported late for work. On February 16, 2017, the owner sent an email to claimant in which she stated she was “disappointed” that claimant had arrived late for work so soon after stating in the February 12, 2017 email that she was going to try harder. In her email to claimant, the owner notified claimant “this is your last warning.” Transcript at 30.

(6) On approximately April 25, 2017, two customers separately reported to the owner that claimant had yelled at them for no reason. That same day, one of claimant’s coworkers reported to the owner that two different customers had recently complained to the coworker about claimant having yelled at them.

(7) On approximately April 26, 2017, claimant was working in the concessions area of the theater when she saw that two customers had entered the theater. Claimant approached the customers to inspect the tickets they should have been given before being allowed to enter the theater. The customers told claimant they had not been given any tickets. Claimant was concerned that the coworker collecting money from customers for their admission to the theater had failed to issue them tickets so that the coworker could retain the money for herself. Claimant allowed the customers to remain in the theater, but asked the coworker about the customers’ tickets. Claimant did not yell at the customers or the coworker and did not treat them rudely. On approximately April 26, 2017, the coworker whom claimant had confronted sent a text message to the owner, stating that claimant had yelled at her for no reason in front of customers.

(8) On April 28, 2017, the employer discharged claimant for yelling at four customers and a coworker in the week preceding the discharge.

**CONCLUSIONS AND REASONS:** 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. 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).

While the employer’s witness, the owner, testified that the “final straw” and the “ultimate reason” that the employer discharged claimant was the four customers’ and the coworker’s complaint about claimant having yelled at them during the last week of employment, the owner additionally testified about other incidents that factored into the employer’s discharge of claimant, including claimant staying in the upstairs room at the theater, claimant’s friend performing electrical work without the owner’s

permission and claimant's tardiness to work. Transcript at 6, 7, 52, 53. However, those events occurred months prior to the discharge, and the owner did not choose to discharge claimant after those incidents occurred. It was not until the owner received the customers' and coworker's complaints that she decided not to continue employing claimant. Those incidents are, therefore, the proximate cause of the discharge, without which the owner would likely not have discharged claimant when she did. For this reason, the four customer complaints and the coworker's complaint about claimant's behavior are properly the focus the discharge analysis.

Although the owner testified that two customers had told her that claimant had very recently yelled at them, and an employee had reported to the owner the complaints of two additional customers about claimant having recently yelled at them, the owner was unable to provide context or details about the incidents, such as the specific circumstances under which claimant allegedly shouted at the customers, what claimant was allegedly shouting about, or the words anyone said at the time. Transcript at 10, 13. In connection with the separate text message complaint from claimant's coworker about claimant having also yelled at that coworker, the owner's testimony suggested that the coworker reported that claimant yelled at the coworker about not having issued tickets to two customers. Transcript at 14. Claimant denied that she yelled at any of the four customers or the coworker or treated them rudely during the week preceding her discharge or at any time. Transcript at 32, 33, 34, 35. Claimant's credible first-hand evidence about her behavior in relation to the customers and the coworker has greater weight than the hearsay evidence that the owner presented about claimant's alleged behavior. Consequently, the preponderance of the evidence in this record does not establish that claimant treated any of the four customers or the coworker in a manner that violated the employer's standards, or that she did so willfully or with conscious indifference to the employer's expectations of her behavior. The employer did not meet its burden to show that claimant engaged in misconduct.

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

**DECISION:** Hearing Decision 17-UI-91986 is affirmed.

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

**DATE of Service:** October 27, 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](http://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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