

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1202

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81907). Claimant filed a timely request for hearing. On October 9, 2017, ALJ S. Lee conducted a hearing, and on October 11, 2017 issued Hearing Decision 17-UI-94347, concluding the employer discharged claimant, but not for misconduct. On October 17, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McDonalds of CO employed claimant from April 1, 2010 to August 4, 2017.

(2) On July 28, 2017, the shift manager on duty assigned two employees to assist claimant in the employer's kitchen. The employer discharged claimant for allegedly complaining to the employees that she was getting "pushed out of the way for two little bitches," and allegedly calling the employees "little bitches on more than one occasion" that day. Exhibit 1 at 2; Transcript at 25.

CONCLUSIONS AND REASONS: We agree with the ALJ that the employer failed to establish claimant's discharge was 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).

In the present case, the employer discharged claimant for allegedly complaining to two employees that she was getting “pushed out of the way for two little bitches,” and allegedly calling the employees “little bitches on more than one occasion.” However, the employer provided only hearsay information to support that allegation. None of the employees who allegedly witnessed claimant’s behavior testified at the hearing, and the employer did not offer their written statements regarding the incident into evidence at the hearing. Nor did the employer’s general manager, who investigated the incident, testify at the hearing. Nor did the employer’s director of operations, who discharged claimant based on the general manager’s “recap” of his investigation and her review of the employees’ written statements, testify at the hearing. Exhibit 1 at 3. Claimant denied calling or referring to the employees as “little bitches” and, absent a basis for concluding that she was not a credible witness, we find the evidence as to whether she engaged in the conduct for which she was discharged, at best, equally balanced.

The employer therefore failed to establish by a preponderance of evidence that claimant’s discharge was for misconduct. Claimant is not disqualified from receiving benefits based on this work separation.

DECISION: Hearing Decision 17-UI-94347 is affirmed.

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

DATE of Service: November 15, 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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