

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-1432**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On October 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 135059). The employer filed a timely request for hearing. On November 28, 2017, ALJ Amesbury conducted a hearing, and on November 30, 2017 issued Hearing Decision 17-UI-97898, affirming the Department's decision. On December 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Klamath Falls Grocery Outlet employed claimant from May 2016 until October 5, 2017 to perform cashier and freight crew work.

(2) The employer expected claimant to refrain from engaging in insubordinate conduct at work, including refusing to perform her cashier duties and yelling at managers. Claimant understood the employer's expectations.

(3) On October 3, 2017, claimant worked as a cashier, but experienced difficulties communicating as necessary for her job because she had laryngitis and was unable to speak by the end of her shift.

(4) On October 4, 2017, claimant complained to the store manager about having to work as a cashier that day. The store manager warned claimant that he expected her to refrain from complaining about having to work as a cashier. Claimant was upset about having to work as a cashier that day, but did not argue further about her work assignment that day and performed her cashier duties. Exhibit 1 at 2-3.

(5) On October 5, 2017, claimant met with the employer's office manager in her office to discuss her shift that day. Claimant advised the office manager that she was still having difficulties speaking and that she would tell the manager if she lost her voice again. Claimant went to her cash register to begin her shift. The office manager went to the cash register and discharged claimant for allegedly refusing to perform cashier duties and yelling at the office manager in her office that day.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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).

The employer did not discharge claimant until after it concluded that she had been insubordinate on October 5, 2017. Claimant's alleged insubordination was therefore the proximate cause of her discharge and the appropriate focus of our misconduct analysis. The employer's store manager testified that it discharged claimant because, on October 5, claimant refused to work as a cashier when directed to do so by the office manager and yelled at the office manager. Transcript at 7. To support its allegations regarding the final incident, the employer's store manager provided a written declaration and testified regarding what the office manager told him about the incident. Transcript at 7, Exhibit 1 at 2-3. The employer also provided written declarations from the office manager and an employee who was allegedly waiting near the office when the alleged final incident occurred. Exhibit 1 at 11, 12. Claimant was the only witness at hearing with firsthand knowledge of what occurred and what she stated to the office manager on October 5. A person testifying under oath is presumed to be truthful unless it can be demonstrated otherwise. *See* ORS 44.370. The record does not overcome that presumption. Although the store manager testified, his testimony regarding the final incident was hearsay, based on statements made to him by the office manager, who did not testify. Claimant's testimony directly contradicted and challenged the accuracy and credibility of the office manager and the other employee's written declarations because claimant testified that she was unable to yell due to laryngitis and that the employee allegedly waiting outside the office did not have the opportunity to overhear claimant's conversation with the office manager. Transcript at 22, 26. Although the hearsay evidence is admissible in administrative hearings, claimant did not have the opportunity to question the authors of the written declarations to test and challenge the accuracy and credibility of their declarations, and we therefore find claimant's firsthand testimony more persuasive than the hearsay evidence.

Claimant testified that she went into the office on October 5 to tell the office manager that she was losing her voice again due to laryngitis, would cash as long as she could, and would tell the office manager when she lost her voice. Transcript at 22-23. Claimant testified that she did not refuse to cash, but rather, began doing her cashier job until the office manager came and told her to go home. Transcript at 23. Claimant denied that she yelled at the manager. Transcript at 22. The employer did not show that claimant's act of forewarning the office manager, without yelling, that she might have difficulty performing her cashier duties due to illness was insubordinate or was otherwise a willful or wantonly negligent disregard of the employer's interest. The employer discharged claimant for refusing to work as a cashier and yelling at the office manager but failed to prove by a preponderance of the evidence that claimant did either.

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

**DECISION:** Hearing Decision 17-UI-97898 is affirmed.

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

**DATE of Service: January 12, 2018**

**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.

**Please help us improve our service by completing an online customer service survey.** To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.