

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0017

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73126). Claimant filed a timely request for hearing. On December 27, 2017, ALJ M. Davis conducted a hearing, and on December 29, 2017 issued Hearing Decision 17-UI-99957, concluding the employer discharged claimant, but not for misconduct. On January 5, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Baker County YMCA employed claimant as a membership specialist from August 26, 2015 until October 30, 2017.

(2) The employer expected that employees would not mistreat or neglect coworkers, members, guests or program participants, would not fail to carry out management's instructions, would not use abusive or foul language, would not behave in a manner that was contrary to commonly accepted standards of responsible personal behavior, and would not engage or act in ways that did not support the employer's purposes and values. Claimant understood the employer's expectations as she reasonably interpreted them.

(3) Before October 2017, claimant had on several occasions spoken with or left notes for the employer's membership and fitness center director about the evening crew's failure to perform required cleaning duties during their shift, which inconvenienced members and increased claimant's workload during the day shift. The fitness center director told claimant that since the evening crew was relatively young, he did not expect them to perform work as responsibly and thoroughly as claimant did. Claimant told the fitness center director that she thought his different expectations for her and the evening crew based on age was discriminatory. Around this same time, the fitness center director told claimant that if she disagreed with his practices, she should not bring up those disagreements with the employer's management, who were superior to him in authority. The fitness center director instructed claimant to make any complaints only to him.

(4) Also before October 2017, claimant needed to deal with members who were upset when the fitness center director failed to return phone calls they had made to him or failed to perform tasks that he had agreed he would. On occasion, some of the employer's instructors and program directors complained to claimant about how the fitness center director performed his duties.

(5) On October 5, 2017, the fitness center director overheard claimant tell a member that he was "unreliable." Transcript at 8. On October 6, 2017, the fitness center director called claimant to his office. The fitness center director told claimant that she should not refer to him in that manner, and that she should not speak about personal matters with members when she was on duty. Claimant had recently been grieving the death of her dog. Claimant told the fitness center director that she would not discuss her dog or other matters of personal concern at work. At the conclusion of their conversation, the fitness center director told claimant he would follow up with her on a later date.

(6) On October 15, 2017, the employer's chief executive officer (CEO) learned that claimant had mentioned to a coworker that she was displeased that the fitness center director had scheduled a mandatory meeting for a time when she could not attend. On October 16, 2017, the CEO met with claimant to determine, among other things, the basis for claimant's displeasure. Claimant and the CEO had a lengthy meeting in which claimant raised many concerns she had about the fitness center director. The CEO thought the meeting was "great," and claimant told the CEO that she was "committed to work[ing] things out" with the fitness center director. Transcript at 20, 36.

(7) On Friday, October 27, 2017, the fitness center director met with claimant as a follow up to their meeting on October 6, 2017. The fitness center director told claimant that the employer was going to reduce her hours as punishment for the behavior that led to the October 6, 2017 meeting. Claimant "pleaded" with the fitness center director not to reduce her hours since she had fixed living expenses to meet. Claimant became "very emotional" and was "crying" when the meeting concluded. After the meeting was over, claimant called the CEO, who was out of the office at the time. After hearing what had transpired at the meeting and claimant's reaction, the CEO urged claimant to contact the fitness center director for a fuller explanation. The CEO also called the fitness center director and requested that he meet again with claimant.

(8) On October 27, 2017, the fitness center director and claimant met for the second time. Claimant perceived that the fitness center director's attitude had changed, which she assumed was caused by the CEO informing the fitness director that claimant had contacted the CEO about her earlier interaction with the fitness center director. During their conversation, claimant told the fitness center director that "we can work things out and be a team." Transcript at 20. However, the fitness center director replied that he "just had it," that he "no longer wanted to do anything [with claimant]" and that the "conversation was over." Transcript at 20. Claimant went home that day after her shift was over.

(9) On Monday, October 30, 2017, when claimant arrived at work, the employer informed her that she was discharged. The employer discharged claimant, for allegedly becoming "belligerent" and having shown "extreme disrespect" toward the fitness director on October 27, 2017. Exhibit 1 at 2; Transcript at 6.

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).

The employer contended claimant "blew up," used the foul word "bullshit" and displayed "extreme disrespect" when she interacted with the fitness center director on October 27, 2017. Transcript at 6, 8. In contrast, claimant testified she did not use the word "bullshit" or any other foul language when speaking with the fitness director on October 27, 2017, was not disrespectful and, while she was upset and crying, her behavior that day was not blatantly inappropriate. Transcript at 20, 21. Claimant and the fitness center director were the only witnesses to their interaction that day. There is nothing in this record that causes us to doubt the credibility of either party or suggests that we should prefer the testimony of one party over the other. As such, the evidence is evenly balanced on the issue of claimant's behavior on October 27, 2017. When the evidence in a discharge case is of equal weight on a disputed issue, the uncertainty must be resolved against the employer since it carries the burden of persuasion. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, the employer did not show that claimant acted inappropriately, used foul language or otherwise showed disrespect toward the fitness center director during either of their two interactions on October 27, 2017. On this record the employer did not meet its burden to prove that claimant engaged in misconduct.

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

DECISION: Hearing Decision 17-UI-99957 is affirmed.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: February 8, 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. 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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