

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0099

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 71949). Claimant filed a timely request for hearing. On January 11, 2018, ALJ Janzen conducted a hearing, and on January 16, 2018 issued Hearing Decision 18-UI-100919, affirming the Department's decision. On January 30, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Chinook Winds Casino employed claimant as a revenue audit supervisor from December 12, 2016 until October 25, 2017.

(2) The employer expected claimant to refrain from insubordinate and discourteous behavior toward supervisors and to follow the directions of supervisors. Claimant understood the employer's expectations.

(3) Sometime in approximately July or August 2017, claimant and other employer representatives interviewed applicants for a position over which claimant would have supervisory responsibilities. Claimant recommended that a particular applicant be hired for that position. At that time, the employer did not take action to hire any applicant for the open position.

(4) As of September 2017, claimant's supervisor allowed claimant to work about five hours of overtime each week without the supervisor's prior express permission. In September 2017, a new supervisor was

appointed for claimant's department and claimant. Claimant and the new supervisor developed a poor working relationship. Claimant did not seek the new supervisor's express authorization before working approximately two hours of overtime. On September 27, 2017, the new supervisor verbally warned claimant that she was not allowed to work overtime hours without the supervisor's prior approval. After September 27, 2017, claimant did not work any overtime without having prior approval from her new supervisor.

(5) On September 29, 2017, the employer instructed claimant to complete a professional writing course in a week, or by October 6, 2017. The department that claimant supervised was understaffed, and she did not have time to complete that training. On October 9, 2017, claimant's supervisor issued a verbal warning to claimant for having failed to complete the writing course. After claimant was warned, she still did not have time to complete the writing course, but provided to the employer certificates for continuing professional education (CPE) courses she had completed to retain an active certified public accountant (CPA) license in Oregon. Claimant wanted the employer to accept the CPE certificates in lieu of her completing the writing course. On October 16, 2017, the employer issued a written warning to claimant for having failed to complete the professional writing course.

(6) On approximately October 24, 2017, claimant observed that the applicant she had recommended for hire in July or August was on the workplace premises. Claimant learned that the employer had decided to hire that applicant for the position for which claimant had interviewed the applicant. That day, claimant met with the newly hired employee, discussed her work duties with her and informed her of her work schedule.

(7) On approximately October 25, 2017, claimant reported for work at 8:00 a.m. After claimant clocked in and while sitting at her desk to begin working, claimant's supervisor came up behind claimant and just stood there. The supervisor's actions made claimant uncomfortable and claimant asked the supervisor to "back off." Transcript at 23. The supervisor told claimant that she wanted to meet with claimant in her office. Claimant replied, "I'll be there in just a minute." Transcript at 23. Before claimant was able to leave for the supervisor's office, the supervisor came up and told claimant, "I've got security here." Transcript at 23. Claimant then asked the supervisor if she was being fired and the supervisor told claimant that she was. Claimant thought that she was being discharged for having failed to complete the professional writing course. Claimant left the workplace and did not return.

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).

In Hearing Decision 18-UI-100919, the ALJ correctly concluded that the proximate cause for claimant's discharge was allegedly insubordinate behavior that the employer contended claimant displayed toward her supervisor on the morning of October 25, 2017. Hearing Decision 18-UI-100919 at 3. The ALJ also

correctly concluded that the testimony of claimant's supervisor and claimant about what happened during the interaction between them was in irreconcilable conflict, with the claimant's supervisor testifying the claimant became "maniacal," "combative," "yelled" at her, told her that she was "unprofessional" and told her to "go away," and claimant denying that she had said any of those things. Hearing Decision 18-UI-100919 at 2, 3; Transcript at 7-9, 22-23, 30. No other witnesses were called to testify as to the events on October 25, 2017, with the result that neither party's account was corroborated or impeached. However, the ALJ determined that he would accept the account of claimant's supervisor as to what was said and done during the interaction on October 25, 2017 and not claimant's account, reasoning that the supervisor's testimony was more reliable than claimant's since it was "internally consistent, logical, and detailed as to the events leading to discharge." Hearing Decision 18-UI-100919 at 3. We disagree.

Having reviewed the transcript of the hearing, we do not discern that the internal consistency and logic of the supervisor's testimony was superior to that of claimant, or that the supervisor's testimony was more detailed than that of claimant about what was said and done on October 25, 2017. While the ALJ appeared to express skepticism about claimant's account of what happened on October 25, 2017 since he seemed not to believe that security personnel would not have been present during that interaction unless claimant was acting out, claimant offered the plausible explanation that the supervisor apparently planned to discharge her when they met and had arranged in advance for the presence of security to escort claimant from the premises post-discharge. Transcript at 30. Absent persuasive evidence in this record to prefer the credibility of one party over the other, the facts in dispute must be resolved in claimant's favor since the employer carries the burden of persuasion in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Based on burden to proof principles, the employer did not meet its burden to show that claimant's behavior on October 25, 2017 was discourteous or insubordinate, and that it constituted misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 18-UI-100919 is set aside, as outlined above.

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

DATE of Service: March 1, 2018

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete

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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