

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0200

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 21, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 74854). The employer filed a timely request for hearing. On February 5, 2018, ALJ Seideman conducted a hearing, and on February 8, 2018 issued Hearing Decision 18-UI-102884, affirming the Department’s decision. On February 23, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Winco Foods, Inc. employed claimant from February 8, 2016 until August 23, 2017 as a nighttime freight clerk.

(2) The employer expected claimant to refrain from committing acts of “gross misconduct” including “acts of disrespect towards . . . fellow employees or management; insubordination with management; any act of intimidation; and/or any threat of violence or act of violence of any kind.” Exhibit 1, Company Personnel Policies at 2.

(3) On August 23, 2017, an assistant manager saw claimant at work for the first time since she had attempted to discharge him in March 2017 when he returned from medical leave to undergo treatment for a hand injury. Claimant had contested the discharge through the corporate office and the employer did not discharge him. The assistant manager approached claimant and asked him, “How are you doing, Marquis?” Claimant responded, “I’m doing good and I’m sorry I can’t say the same for you.” Audio Record 39:28-39:32. The assistant manager was displeased with claimant’s response and had claimant and an employee witness meet with her in her office.

(4) During the meeting, claimant asked the manager if she was going to discharge him or give him a warning. The manager was dissatisfied with claimant’s tone and demeanor during the meeting. She reported to the store manager that claimant had been insubordinate and intimidating towards her during the meeting.

(5) On August 23, 2017, the employer discharged claimant for allegedly being “disrespectful, threatening and insubordinate” towards an assistant manager. Exhibit 3, Change of Status Form at 1.

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

The employer discharged claimant for his conduct toward the assistant manager on August 23, 2017. To the extent the employer discharged claimant for his response when his assistant manager greeted him, claimant’s response was not warm, but it was not so rude that it violated the employer’s expectation that claimant refrain from engaging in disrespectful behavior toward management. To the extent the employer discharged claimant for his conduct during the meeting between him and the assistant manager, we are likewise not persuaded that claimant violated the employer’s reasonable expectation against disrespectful, threatening and insubordinate conduct. At hearing, the assistant manager described claimant’s conduct during the meeting with claimant and the coworker as “aggressive,” “irate,” “insubordinate,” and “hostile.” Audio Record at 20:28-21:18. However, claimant disagreed with the assistant manager’s account and testified that he did not say anything disrespectful or threatening during the meeting. Audio Record at 40:15-40:38. The testimony from the coworker witness who was also present at the final meeting corroborates claimant’s testimony that he was not threatening towards the manager. The coworker testified that claimant was “defensive,” during the meeting, but that he “had pretty much control of his temper at the time.” Audio Record at 46:32-46:47. The evidence at hearing favored claimant’s account of the meeting and, therefore, failed to show by a preponderance of the evidence that claimant was disrespectful, threatening or insubordinate during the meeting. We thus conclude that claimant’s discharge was not based on a willful or wantonly negligent violation of the employer’s expectations and was not, therefore, misconduct.

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

DECISION: Hearing Decision 18-UI-102884 is affirmed.

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

DATE of Service: March 23, 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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