EO: 200
BYE: 201844

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0203

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 81707). Claimant filed a timely request for hearing. On January 31, 2018, ALJ Frank conducted a hearing, and on February 8, 2018 issued Hearing Decision 18-UI-102887, concluding that claimant's discharge was not for misconduct. On February 22, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it offered copies of several documents for EAB's consideration. The employer did not offer these documents as evidence at the hearing nor did it explain why it was not able to offer them at that time or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB did not consider the documents or the information contained in them when reaching this decision.

FINDINGS OF FACT: (1) GI Trucking Co. employed claimant as a dock worker from December 15, 2015 until November 6, 2017.

(2) The employer expected claimant not to take rest breaks in excess of 15 minutes while remaining clocked in to work. The employer also had a policy which stated that employees would refrain from using foul language in the workplace, although many dock workers disregarded the policy and occasionally used foul language. Claimant understood the employer's expectations as he reasonably interpreted them.

(3) On November 2, 2017, claimant began his shift at approximately 1:00 a.m. During that shift, claimant was driving a forklift and unloading or loading trailers. A software system known as e-dock was installed on the forklift that claimant drove, indicating when the forklift was operated and to whom it was signed out at the time of operation. At approximately 5:35 a.m., claimant left the dock and went to the breakroom to get some water. Claimant returned to the dock before 5:39 a.m. The e-dock system on claimant's forklift showed that the forklift was signed out to claimant and being operated at 6:02 a.m. At 6:15 a.m., claimant punched out of the time system to eat lunch in the breakroom.

(4) On November 2, 2017, at 6:20 a.m., a supervisor who had earlier observed claimant in the breakroom at around 5:35 a.m. again observed claimant in the breakroom. The observing supervisor reported to claimant's supervisor that he suspected claimant had taken an excessively long break, beginning at 5:35 a.m. Claimant's supervisor checked claimant's entries in the employer's timekeeping system and saw that claimant had clocked out for lunch at 6:15 a.m. Claimant's supervisor assumed he had been in the breakroom for 40 minutes while on the clock, from 5:35 a.m. until 6:15 a.m., when he clocked out for lunch. During that same 40 minute period, claimant's supervisor had not observed claimant entering the trailer he was assigned to unload during that period.

(5) Sometime around 6:20 a.m., claimant's supervisor confronted him and stated that it had been reported to him that claimant had been in the breakroom for 40 minutes, from 5:35 a.m. until 6:15 a.m., while still on the clock. Claimant denied that he had been the breakroom for 40 minutes before taking his lunch. During this interaction, heated words were exchanged. On that day, claimant was suspended from work pending an investigation by the employer.

(6) On November 6, 2017, the employer discharged claimant for allegedly taking an excessively long break while clocked in on November 2, 2017, and for using foul language during the November 2, 2017 interaction with his supervisor.

FINDINGS OF FACT: 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).

With respect to the employer's contention that claimant took an excessively long break on November 2, 2017, claimant denied that he had done so, suggesting that the same person who had observed him in the breakroom around 5:35 a.m. when he was getting water, and again around 6:20 a.m., after he had started his lunch, had wrongly assumed he had been uninterruptedly in the breakroom from 5:35 a.m. until his 6:15 a.m. clock-out for lunch. Transcript at 19. In support of his position, claimant presented a print out from the e-dock system on his forklift showing that the forklift was being operated when signed out to him at 6:02 a.m. that day, at the very time the employer contended he was in the breakroom taking the excessively long break. While the employer did not dispute the authenticity of the e-dock evidence that claimant offered, it suggested that someone other than claimant was actually operating the forklift at

6:02 a.m., and simply had failed to sign claimant off as operator. Transcript at 23, 28-29. However, the employer's speculation is insufficient to show that it was not claimant who was operating the forklift at 6:02 a.m. The other evidence which the employer presented at hearing to establish that claimant took an excessively long break on November 2, 2017 also was insufficient to do so. For example, the testimony of claimant's supervisor that he did not observe claimant unloading his trailer between 5:35 a.m. and 6:15 a.m., did fails to establish that claimant was not performing other work on the dock as he contended rather than taking an unauthorized break. Transcript at 30. As well, claimant's supervisor conceded that he was not in a position to, and did not observe, claimant during the time claimant was supposedly in the breakroom for an interrupted 40 minutes, and no other witnesses with first-hand evidence testified at hearing to rebut claimant's denial about the alleged excessively long break on November 2, 2017. On this record, in light of claimant's denial and the evidence that claimant presented in rebuttal, the employer did not meet its burden to show, more likely than not, that claimant took an excessively long break between approximately 5:35 a.m. and 6:15 a.m. while still clocked in on November 2, 2017.

With respect to claimant's alleged use of foul language during the interaction on November 2, 2017 with his supervisor, claimant denied it while the supervisor contended otherwise. Transcript at 20. 22, 27. Absent a reason to doubt the credibility of or to disbelieve the accuracy of testimony of either witness, the dispute in the evidence must be resolved against the employer since it is the party that carries the burden of persuasion in a discharge case such as this. *See e.g., Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In addition, given the agreement of the witnesses that it was not uncommon for dock workers to use foul language in the workplace and the testimony of the supervisor that claimant's alleged use of foul language was limited to the single expletive of "fuck," it cannot be concluded that by using that single word that claimant willfully or with wanton negligence violated the employer's expectations as he understood them based on the customs and practices of the workplace. Transcript at 27. On this record, the employer did not meet its burden to show that claimant used foul language or that, if he did, 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-102887 is affirmed.

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

DATE of Service: <u>March 23, 2018</u>

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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