

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0250

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 25, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92157). Claimant filed a timely request for hearing. On February 22, 2018, ALJ Wyatt conducted a hearing, and on March 2, 2018 issued Hearing Decision 18-UI-104333, concluding the employer discharged claimant, not for misconduct. On March 10, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Konell Construction and Demolition Corporation employed claimant until December 21, 2017 as a field service technician.

(2) The employer expected claimant to refrain from being rude to his coworkers. Claimant understood the employer's expectation as matter of common sense.

(3) On December 21, 2017, the employer's general manager called claimant out of the employer's shop to repair a truck at a work site. Claimant had a work-related doctor's appointment at that time, but called the doctor and canceled the appointment so he could do the truck repair. Shortly after, the general manager called claimant and told him to go to his appointment rather than do the truck repair. Claimant told the general manager he had already canceled the doctor appointment and the conversation ended. The general manager arrived at the shop and began yelling at claimant and poking him in the chest, stating that he was dissatisfied that claimant canceled the appointment without checking with the general manager first. The general manager looked at claimant's toolbox and told claimant, "I'm tired of your crap. Pack your shit up and get out." Claimant responded, "Okay, if that's the way it's going to be, then, fine." The manager asked, "So, you're out of here, then?" Claimant responded, "Yep," took his

toolbox and left. Audio Record at 16:53 to 18:00. The employer did not contact claimant to ask him to return to work.

(4) After claimant left the employer's shop on December 21, 2017, claimant called the employer's president and asked to speak with him about the incident earlier that day. The president told claimant, "Let's get together. Give me a call." Audio Record at 26:18 to 26:20. However, claimant tried to speak with the president after December 21, and the president did not answer his telephone calls. The employer did not call claimant back to work after December 21.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant not for misconduct.

Because the Department concluded that claimant voluntarily left work, the first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The employer's witness alleged that claimant "threatened the general manager with quitting" and that the general manager responded by telling claimant to "stop threatening [the employer] and just do it." Audio Record at 33:54 to 34:29. Claimant, however, denied saying anything about quitting to the general manager on December 21. Audio Record at 25:36 to 25:51. The only participants and witnesses to the December 21 conversation were claimant and the general manager. Claimant's firsthand testimony about what was said during that conversation is entitled to greater evidentiary weight than the testimony at hearing from the employer's accounting manager, who had only hearsay knowledge of what was said during the December 21 incident. On this record, the preponderance of reliable evidence shows that the general manager initiated the work separation by telling claimant to "pack [his] shit and get out," which clearly expresses that the employer would not allow claimant to continue working. Moreover, claimant attempted to discuss the incident with the employer's president on December 21, but the president did not discuss the matter with claimant on December 21 and did not respond to claimant's telephone calls after December 21, showing that claimant was willing to continue working for the employer, but the employer did not allow claimant to do so. Thus, under OAR 471-030-0038(2), the work separation was a discharge.

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) 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 show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the employer's representative alleged that the general manager told claimant on December 21 to stop threatening to quit and "just do it," in response to claimant stating he would quit. The employer's witness alleged that claimant had said he would quit repeatedly during the last two years. As

explained above, the record fails to show by a preponderance of the evidence that claimant said he would quit on December 21, and claimant denied having “threatened to quit” in the last two years. Audio Record at 22:14 to 22:26. To the extent the employer discharged claimant because claimant said he would quit, the employer failed to show claimant engaged in that conduct.

It was undisputed that there was a disagreement between claimant and the general manager just before the manager discharged claimant. The employer had the reasonable right to expect claimant to act in a courteous, respectful manner to his coworkers. Claimant knew or should have known that expectation as a matter of common sense. The employer’s witness alleged with hearsay that claimant threw his telephone, used foul language, and was “red in the face” and angry during the disagreement with the general manager. Audio Record at 37:22 to 37:50. Again, we give greater evidentiary weight to claimant’s firsthand testimony, which was to deny that he threw his telephone or otherwise acted as the employer alleged. Audio Record at 41:44 to 42:41. Thus, to the extent the employer discharged claimant for his conduct during that disagreement, the employer did not establish that claimant violated the employer’s expectations regarding workplace behavior during the final incident on December 21.

Based on the evidence at hearing, we therefore conclude that the employer discharged claimant, not for misconduct. Claimant therefore is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 18-UI-104333 is affirmed.

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

DATE of Service: April 6, 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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