

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0313

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 100410). The employer filed a timely request for hearing. On March 19, 2018, ALJ Messecar conducted a hearing, and on March 21, 2018, issued Order No. 18-UI-105639, concluding the employer discharged claimant for misconduct. On March 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Lowe's Home Centers LLC employed claimant as a delivery driver from July 20, 2015 to January 16, 2018.

(2) The employer expected its employees to work their scheduled hours and refrain from using foul language around coworkers and customers. Claimant was aware of and understood the employer's expectations.

(3) On January 7, 2018, claimant came into work ill but intended to work delivering multiple heavy appliances to customers because he would be assisted by his experienced helper. However, after the two of them prepared the appliances for delivery, claimant's helper told him that he was leaving because his wife was sick. Claimant notified the assistant store manager that he too was ill and needed an experienced helper to get through his deliveries. After initially agreeing to assign one, the assistant manager changed his mind, after which claimant told him that he was going home sick. The assistant manager notified the store manager that claimant was leaving and the manager then spoke to claimant over the intercom. After claimant explained what had transpired and told him he was leaving due to illness, the store manager told him he did not believe him and needed claimant to stay. Nonetheless, claimant left work because he was ill.

(4) Claimant worked the next day and then took his next four work days off. On January 16, 2018, when claimant reported for work the employer discharged him for leaving work for no reason after allegedly cursing at the manager on January 7, 2018.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude 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. Absence due to illness or other physical or mental disabilities is not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant on January 16, 2018 because on January 7, 2018, claimant allegedly refused to do his job for no reason and left work after cursing at the store manager. Exhibit E-1. Claimant denied using foul language and admitted that he left work that day, but explained that he did so because he was ill and could not deliver heavy appliances without the assistance of an experienced helper. Audio Record ~ 30:00 to 33:45; 39:00 to 40:00. In Order No. 18-UI-105639, after accepting the employer's version of the facts as "persuasive" without any explanation, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

Claimant's conduct on January 7, 2018 was a wantonly negligent violation of the employer's reasonable expectations...Although claimant denied using foul language, I found [the employer's] testimony more persuasive...Regarding the allegation of insubordination, I am also persuaded that the employer has established that claimant's conduct was wantonly negligent...At hearing, claimant asserted that he went home because he was sick; however, I found [the employer's] testimony [that claimant left only because he was unhappy with the assigned delivery person] more persuasive.

Order No. 18-UI-105639 at 3. We disagree and conclude the employer failed to meet its burden to establish misconduct by a preponderance of the evidence.

At hearing, although the employer asserted that claimant left work solely because he was upset with the employer's failure to assign him an experienced helper, the employer did not dispute claimant's testimony that he told the assistant manager several times that he was ill, and the store manager that if he did not believe claimant was ill, he could check the garbage can where claimant had vomited. Although the employer asserted that claimant used foul language when speaking to the store manager, claimant denied doing so. Viewed objectively, the parties' evidence on those issues is no more than equally balanced, and there is no reason in the record to find that one party is more credible than the other as to what transpired on January 7, 2018. In a discharge case, when the evidence on a disputed issue or issues is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer has the burden of proof. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, we find that the employer failed to establish by a preponderance of evidence that claimant cursed at the store manager and left work for no reason, rather than due to illness, which is not misconduct.

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation from the employer.

DECISION: Order No. 18-UI-105639 is set aside, as outlined above.¹

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

DATE of Service: April 27, 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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¹ This decision reverses a hearing order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.