

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0573

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 28, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 153806). Employer filed a timely request for hearing. On May 14, 2018, ALJ Amesbury conducted a hearing, and on May 17, 2018 issued Order No. 18-UI-109605, affirming the Department's decision. On June 6, 2018, employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employers' written argument to the extent it was relevant and based upon the hearing record.

FINDINGS OF FACT: (1) SDH Education West LLC employed claimant from December 8, 2003 until February 16, 2018, as a driver.

(2) The employer had a code of conduct policy that prohibited employees from threatening and intimidating conduct, or violent behavior towards a fellow employee on the employer's premises. The policy also required employees to comply with the employer's reasonable requests, cooperate with management, refrain from insubordination, and encouraged employees to challenge new procedures that they disagreed with. Claimant had received and read a copy of the employer's policies.

(3) As part of claimant's duties, claimant picked up bank bags containing money from schools and delivered them to the bank. Sometimes claimant had to place the bank bags in the bank's night deposit drop, during which times there was no way for claimant to obtain a receipt acknowledging the amount of money in the bank bags he deposited.

(4) Employer had recently suffered losses when two bags of money were lost. In response to the loss of money, the employer reinstated a previous, unenforced, policy that required drivers, including claimant, to sign a document acknowledging the amount of money in the bank bag when they received it and then deliver the bag to the bank, including at its night deposit drop.

(5) On February 9, 2018 claimant learned of the policy and went into his supervisor's office, he threw bank bags down on a table, in front of his supervisor, and began loudly complaining about the policy. Claimant's supervisor walked up to him and stood directly in front of him. Claimant, who is a large man, towered over his supervisor. Claimant stood up straight, raised his voice, was argumentative, was red in the face and had his fists clenched at his sides. Claimant appeared to be upset, but did not make any physical or verbal threats or use any profanity, nor did he use any inappropriate language. Claimant did not make personal attacks on his supervisor, nor did he call her names. Claimant was not trying to intimidate or threaten anyone.

(6) Claimant initially stated that he would not sign for the bags of money he received to deliver to the bank, because it could make him liable for any money that was missing during the bank's night deposit drop. However, after voicing his concerns to the supervisor, he signed for the bank bags and took them for delivery.

(7) The Employer terminated claimant on February 16, 2018, not because he questioned the reinstated policy, but because the employer felt he had displayed a threatening and aggressive demeanor towards his supervisor on February 9, 2018 and could therefore no longer be employed.

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

The ALJ concluded that the employer discharged claimant for violating their code of conduct policy that prohibited employees from threatening and intimidating conduct, or violent behavior towards another employee and for insubordination. The evidence in this record does not support the conclusion that the employer discharged claimant for insubordination. Exhibit 1, transcript at 11, 12. Therefore, we find that the employer discharged claimant for violation of its policy and not insubordination.

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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

Claimant was concerned that the employer's reinstated policy, which required him to sign for money at a school and drop it off at the bank without a receipt proving he had delivered the money, could expose him to liability if the money went missing. He went into the employers' office to discuss his concerns and became frustrated because he felt that his concerns were not adequately addressed. Transcript at 29, 30.

The employer asserted that on February 9, 2018, claimant violated its policy because claimant raised his voice, became argumentative, intimidating, and aggressive, clenched his fists at his sides, looked down at his supervisor, assumed a threatening posture and threw the items that he had in his hand onto a table. Transcript at 9, 10, 11, 12, 13, 21, 22. When asked to describe claimant's violent behavior, claimant's supervisor stated, "He threw the bank bag that he had with money onto a table right in front of me and said that he wouldn't be taking them to the bank." Transcript at 13. There was no testimony that claimant threw the bank bags at his supervisor or anyone else, or that the bags made contact with the supervisor in any way.

To prove misconduct, the employer has to show by a preponderance of the evidence that claimant engaged in a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). In this case, the evidence showed that claimant was upset, argumentative, red in the face, and used a loud voice, but it did not show that claimant behaved in a threatening or intimidating manner, nor did it show that claimant was violent or threatened to be violent towards another employee. Both of the employer's witnesses testified that claimant did not make any threats or threatening gestures, nor did he use any inappropriate language. Transcript at 11, 12, 22, 23. One of the employer's witnesses testified, "Claimant clenched his fists at his side, but he was not shaking his fists." Transcript at 21. To the extent that claimant towered over his supervisor and looked down at her, it was because the supervisor approached claimant, when claimant entered the office, and claimant was much taller than his supervisor. Transcript at 30. In sum, the record shows that claimant was visibly upset in the workplace, but fails to prove that claimant willfully or consciously engaged in the sort of violent, threatening, or intimidating behavior that would constitute a violation of the employer's code of conduct policy.

The employer therefore discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 18-UI-109605 is affirmed.

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

DATE of Service: July 10, 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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