

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0077

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 6, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144642). Claimant filed a timely request for hearing. On December 18, 2013, ALJ Shoemake conducted a hearing, and on January 2, 2014 issued Hearing Decision 14-UI-07564, affirming the Department's decision. On January 13, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented her 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) Seven Feathers Hotel & Casino Resort employed claimant as a slot attendant from June 27, 2005 to September 9, 2013.

(2) The employer had a written policy regarding workplace behavior. The policy prohibited employee from engaging in poor coworker relations, failing to get along with, assist, and show courtesy and respect to other employees, demonstrating an unwillingness to carry out reasonable orders and requests, failing to contribute to good morale, and focusing behavior toward themselves rather than toward group cohesion. Claimant was aware of the employer's policy.

(3) The employer also had a policy stating that employees were required to "display" their security badges for the security dispatcher on duty when entering the workplace. Transcript at 26. From June 27, 2005 through September 5, 2013, claimant carried her security badge and showed it to the security dispatcher when entering the workplace. On September 6, 2013, claimant carried her badge and placed it against the security dispatch window to show the security dispatcher. The security dispatcher believed claimant was being rude, and told claimant the employer's policy required her to wear her badge when entering the workplace. Claimant asserted that the policy only required her to display her badge. The

security dispatcher instructed claimant to repeat the policy out loud to the security dispatcher. Claimant did so, did not want to argue with the security dispatcher, and went to the employee locker room.

(4) The security dispatcher reported to her assistant supervisor that claimant had argued, become “belligerent,” and yelled loudly. When claimant exited the employee locker room, the assistant supervisor confronted her and instructed her to wear her badge. Claimant complied.

(5) The employer discharged claimant for allegedly violating its policy regarding workplace behavior.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant’s discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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. 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).

In Hearing Decision 14-UI-07564, the ALJ found in accordance with the employer’s hearsay evidence that claimant became argumentative when told she was required to wear her employee badge when entering the workplace, and then “aggressively” placed the badge against the security dispatch window so that the assistant supervisor heard the “noise (loud smack)” and “became involved.”¹ The ALJ found claimant’s testimony that she did not argue with the security dispatcher or aggressively place her badge on the window “unpersuasive,” asserting that it was unlikely the assistant manager would have become involved if he had not heard the “loud smack” noise, or that a complaint would have been made if claimant had merely questioned the need to wear her badge.²

At hearing, however, the parties agreed that claimant placed her badge against the security window before the security dispatcher told her she was required to wear her badge, and that the assistant supervisor became involved only because the security dispatcher “alerted” him to the situation. Transcript at 8, 26-27. We therefore do not find unpersuasive claimant’s testimony that she did not aggressively place her badge against the security dispatch window, and merely questioned whether she was required to wear her badge when entering the workplace. Absent a basis for concluding that claimant was not a credible witness, her testimony on those issues outweighs the employer’s hearsay evidence to the contrary. The employer therefore failed to show by a preponderance of evidence that claimant consciously engaged in conduct she knew or should have known probably violated the

¹ Hearing Decision 14-UI-07564 at 2.

² *Id.* at 3.

employer's expectations regarding workplace behavior. Absent such a showing, we cannot find misconduct.

We therefore conclude the employer discharged claimant, not for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-07564 is set aside, as outlined above.

Susan Rossiter and D. E. Larson;
Tony Corcoran, not participating.

DATE of Service: February 11, 2014

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 website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.