EO: 300
BYE: 201347

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

2014-EAB-0150

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 17, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 134754). Claimant filed a timely request for hearing. On December 16, 2013, ALJ Clink conducted a hearing at which the employer failed to appear, and on January 7, 2014 issued Hearing Decision 14-UI-08048, affirming the Department's decision. On January 23, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted to EAB a written statement purporting to have been prepared by his former supervisor in the workplace. The former supervisor did not testify at the hearing, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the supervisor's testimony or a written statement from her during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Ashland Springs Hotel employed claimant as a banquet bartender from January 31, 2013 until September 12, 2013. As a part of their jobs, banquet staff, including claimant, often participated in setting up for banquets both indoors and outdoors, including moving tables and chairs and carrying various heavy items.

(2) In approximately July or August 2013, the employer purchased two additional hotels and hired a new manager for claimant's department. After the purchase, the employer either implemented or considered implementing various new policies. In August 2013, claimant submitted to the employer two written critiques of proposed new policies.

(3) In approximately early September 2013, claimant became aware that the employer was planning to adopt a policy prohibiting banquet staff from wearing shoes that laced up, and requiring them to wear loafers at work. Claimant thought the employer was going to implement this policy principally for aesthetic reasons, to ensure the staff "looked hip." Audio at ~11:28. Claimant spoke with other banquet

staff about the proposed new footwear requirement. The consensus among claimant and the staff was that wearing loafers at work would be unsafe because their heels could slip out of those shoes while moving or carrying heavy items and cause them to trip, fall or twist their ankles. Claimant spoke with his new manager and expressed concern over the proposed prohibition against lace-up shoes. The new manager was not receptive to claimant's concerns, and told claimant he was not going to ask the employer to change its implementation of the new footwear requirement. On approximately September 10 or 11, 2013, claimant sent an email to his new manager's supervisor stating his safety concerns about any implementation of a policy that required banquet staff to wear loafers.

(4) On September 12, 2013, claimant's new manager and the executive chef met with claimant to discuss the email he had sent to the new manager's supervisor. The executive chef told claimant, "you need to stop sending these letters [stating your concerns], you need to show you're on-board [sic], we're going in a different direction, policy is none of your business, speaking to other employees is none of your business, it's not a union place and basically we just need you to stop." Audio at ~13:31. Claimant responded to the chef that he intended to continue raising concerns he had with the employer's proposed policies. The chef asked claimant if he was "announcing" his refusal to wear the required shoes while at work. Audio at ~ 13:31. Claimant told the chef he was not going to answer that question until the employer formally adopted a footwear policy. Claimant also told the chef that he understood he had "no authority to make rules and policies or to change policies or even to disobey policies" but "I maintain I have a right to complain about [proposed] new policies." Audio at ~14:28. Claimant emphasized to the chef that he had raised only legitimate "safety concerns" about the proposed new footwear requirement. Audio at ~ 14:28. The chef presented to claimant a "write-up" for his signature which stated that, by his signature, claimant agreed to stop stating his concerns about any of the employer's proposed new policies. Audio at ~17:10. Claimant refused to sign the write-up, and the chef refused to allow claimant to leave the room until he signed. After some "back and forth," claimant took the write-up and wrote on it, "I will not change my behavior [in stating my concerns]." On September 21, 2013, the executive chef discharged claimant for refusing to sign the write-up and refusing to agree he would stop stating his concerns about the employer's proposed policies.

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

In Hearing Decision 14-UI-08048, the ALJ found, as fact, that claimant was discharged for insubordination by refusing to sign the write-up on September 12, 2013. The ALJ concluded that claimant's unwillingness to sign and his "constant complaining" violated the employer's expectations with willful or wanton negligence. Hearing Decision 14-UI-08048 at 3. We disagree.

The only evidence in the record was that claimant submitted to the employer a total of three letters stating his concerns about the proposed implementation of new policies. Audio at ~8:50. There was no

evidence that claimant barraged the employer with letters of complaint, or that the letters he submitted were other than professional in tone and content. Although there might be circumstances in which an employee's complaints to an employer might construed as violating an employer's reasonable expectation, particularly if the complaints were numerous, harassing and frivolously-based, there is no such evidence in this record about claimant's submissions to the employer. On this record, the letters claimant submitted to the employer were not shown to have been a violation of the employer's reasonable expectations.

While the ALJ concluded that claimant was insubordinate because he refused to agree that he would refrain from raising any concerns about new policies with the employer, the record did not establish that claimant willfully or with wanton negligence violated the employer's expectations solely by disagreeing with the employer's proposed new policies in the past. Claimant did not defy the employer's authority to adopt new policies, and claimant told the chef he did not believe that stating his concerns about those proposed policies allowed him to disobey those policies if they were implemented. Audio at ~14:28. On the undisputed facts, it was unreasonable for the chef to demand that claimant stop stating any concerns over the employer's proposed new policies, especially when some of those concerns involved workplace safety. It was also unreasonable for the chef to demand claimant remain silent about all the employer's proposed new policies when it was not shown that the manner in which claimant had raised his past concerns violated a reasonable employer expectation. Although claimant might have refused to sign the write up agreeing to silence all his concerns, a conscious decision not to comply with an unreasonable employer policy is not misconduct. OAR 471-030-0038(1)(d)(C). On this record, it was not shown, more likely than not, that claimant engaged in misconduct when he refused to sign the write-up on September 12, 2013.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-08048 is set aside, as outlined above.

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

DATE of Service: <u>March 4, 2014</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 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.