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State of Oregon  
**Employment Appeals Board**  
875 Union St. N.E.  
Salem, OR 97311

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DS 005.00

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## **EMPLOYMENT APPEALS BOARD DECISION**

**2014-EAB-0182-R**

*Affirmed  
No Disqualification*

**PROCEDURAL HISTORY:** On October 23, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #161137). Claimant filed a timely request for hearing. On December 13, 2013, ALJ Lohr conducted a hearing, and on January 21, 2014 issued Hearing Decision 14-UI-08798, concluding the employer discharged claimant, but not for misconduct. On January 28, 2014, the employer filed an application for review with the Employment Appeals Board (EAB). On February 26, 2014, EAB issued Appeals Board Decision 2014-EAB-0182, reversing Hearing Decision 14-UI-08798, and remanding this matter to the Office of Administrative Hearings (OAH) for lack of a complete record. On February 26, 2014, OAH provided a complete record and returned this matter to EAB.

EAB considered the employer's written argument when reaching this decision.

**FINDINGS OF FACT:** (1) WMK Management LLC employed claimant from May 2, 2007 to September 5, 2013 as a banquet server.

(2) The employer has a policy prohibiting employees from engaging in discourteous or inappropriate conduct towards guests or associates. Claimant understood that expectation.

(3) On August 30, 2013, one of claimant's associates told claimant she had an appointment on September 5 to participate in an upcoming blood drive. Claimant told the associate she did not believe in donating blood. The associate asked claimant questions about situations when her family and others might need blood. The associate continued to ask claimant questions, and claimant responded that she could not give blood because she had AIDS. Claimant did not have AIDS.

(4) On August 30, 2013, claimant was clearing a table after a brunch, when a guest with a goatee approached her to thank her for the breakfast. Claimant did not ask the guest about her goatee, but the

guest began to tell claimant about the community where she lived, and how she felt accepted in her community because other people there also had goatees. A supervisor accused claimant of initiating a conversation with the guest about her goatee by asking her about it. Claimant told the supervisor she did not initiate the conversation. Claimant left the banquet room to discuss the matter with her manager. As she left, the supervisor yelled that she needed to set up the coffee, and that she must not want her job. Claimant had already set up the coffee. Claimant discussed the matter with the manager, who sent claimant home for the rest of the day because she was upset.

(5) On September 5, 2013, the employer discharged claimant because it believed claimant made inappropriate remarks to a guest and an associate on August 30, 2013.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that the employer discharged claimant 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer testified that it discharged claimant for making inappropriate remarks to an associate and a guest on August 30, 2013. It also cited an earlier, unrelated incident on August 9, 2013 as the basis for its decision to discharge claimant. However, although the employer had already investigated the August 9 incident before August 30, it did not initiate the discharge process at that time. Thus, the employer must necessarily have concluded the past incident was not of sufficient gravity to merit discharge. Therefore, the August 30 incidents were the proximate cause of the work separation, and the initial focus of the misconduct analysis.<sup>1</sup>

The employer had a right to expect claimant to refrain from making inappropriate or discourteous statements to guests or other employees. Claimant understood that expectation. The employer discharged claimant, in part, because she said she could not give blood because she had AIDS. Claimant

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<sup>1</sup> In unemployment insurance benefit cases, the initial determination regarding misconduct is confined to the proximate cause of the discharge, which is usually the final instance of alleged misconduct before the discharge when the record shows the discharge would not likely have occurred but for that final incident. See *Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

admitted she made the statement when an associate was pressuring her to participate in a blood drive. Transcript at 49 to 50. Although the statement was an insensitive way to refuse to participate in the blood drive, we are not persuaded that, given the context of the remark, claimant knew or should have known that her comment violated or would be likely to violate, the employer's expectations regarding workplace behavior. Claimant did not willfully, or with wanton negligence, violate the employer's expectations when she made the comment about the blood drive.

The employer also discharged claimant, in part, because it believed claimant asked a guest an inappropriate question. The employer provided hearsay testimony that a supervisor had overheard claimant ask a guest about her goatee. Transcript at 7. Claimant provided sworn, firsthand testimony that she listened to the woman's story about her community and her goatee, but did not ask her any questions. Transcript at 29 to 30. The testimony was, at best, equally balanced between the parties. Thus, the employer failed to prove by a preponderance of the evidence that claimant made an inappropriate or discourteous statement to a guest.

The employer failed to prove it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

**DECISION:** Hearing Decision 14-UI-08798 is affirmed.

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

**DATE of Service: February 28, 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.