

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0716

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision #13731). Claimant filed a timely request for hearing. On April 8, 2014, ALJ Monroe conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-15005, concluding the employer discharged claimant, but not for misconduct. On May 1, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Russellville Park West employed claimant from April 20, 2009 to November 22, 2013 as a dishwasher.

(2) The employer's sexual harassment policy required employees to behave in a professional and respectful manner toward others at work, and prohibited employees from making sexual advances or statements of a sexual nature to others at work. Claimant understood the employer's policy.

(3) On November 20, 2013, an employee reported to the employer that claimant had grabbed a second employee and told her he wanted to "take her down to the garage and rape her." Exhibit 1.

(4) The employer's general manager met with claimant and told him to refrain from engaging in inappropriate behavior at work, and that the employer was investigating the employee's allegations. The same employee who made the original complaint told the general manager that claimant contacted the second employee and said "your 'punta' friend told on me." The employer believed "punta" to be a derogatory Spanish word. Exhibit 1.

(5) On November 22, 2013, the employer discharged claimant for allegedly violating its sexual harassment policy by allegedly making sexual advances and statements of a sexual nature to others at work.

**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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly violating the employer's sexual harassment policy. Claimant's coworker accused him of having told another coworker he wanted to rape her, and having called the coworker a "punta" on November 20, 2013. However, the employer provided only hearsay evidence to support its allegations. Absent a basis to conclude claimant was not a credible witness, we gave his sworn, firsthand testimony more weight than the employer's hearsay testimony, and found facts in accordance with his testimony. Claimant denied having told a coworker he wanted to rape her, or having called a coworker a "punta," or otherwise violating the employer's sexual harassment policy on November 20, 2013. Transcript at 13. Thus, the employer failed to show that claimant engaged in behavior that violated the employer's expectations.

Therefore, the employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of his work separation.

**DECISION:** Hearing Decision 14-UI-15005 is affirmed.

Susan Rossiter and Tony Corcoran;  
J. S. Cromwell, not participating.

**DATE of Service:** June 4, 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>.

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