

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0736

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On March 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 91245). The employer filed a timely request for hearing. On April 17, 2014, ALJ Wipperman conducted a hearing, and on April 18, 2014 issued Hearing Decision 14-UI-15449, affirming the Department's decision. On May 2, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) McMenamins, Inc. employed claimant as an assistant manager in a bar from March 22, 2007 until December 10, 2013.

(2) When claimant worked the closing shift, the employer expected claimant to exit the bar immediately after he completed his closing duties and to clock out from his shift. The employer's written policies stated that "lingering after hours is against our policy and is prohibited." Exhibit 1 at 4, 7. Claimant was aware of the employer's expectations.

(3) On weeknights, the employer anticipated that the bar would close at 1:30 a.m. However, if customers remained in the bar at 1:30 a.m., a manager had the discretion to keep the bar open until 2:30 a.m.

(4) Before December 9, 2013, the front of the house manager had observed that claimant took longer to close the bar than other managers. That manager never told claimant that he needed to perform his closing duties more rapidly or that she expected him to clock out earlier.

(5) On December 9, 2013, claimant was the sole employee working the closing shift. At 1:30 a.m., customers remained in the bar and claimant kept the bar open until 2:30 a.m. After claimant closed the bar at 2:30 a.m., he started performing closing duties. At some point after 2:30 a.m., claimant left the

bar and went outside, intending to take a break and smoke a cigarette. A customer who had left the bar at closing was outside and claimant spoke with him while smoking the cigarette. At some point around 2:45 a.m., the front of house manager and the property manager arrived at the bar and claimant was not there. The managers waited in the bar 10 to 15 minutes for claimant to return, and then went outside to find claimant. Exhibit 1 at 2, 3; Transcript at 20, 21, 24. One of the managers told claimant to complete his closing duties and then to clock out and leave the bar. At the time the manager spoke to claimant, claimant still needed to wipe down the tables, put the chairs up on the tables and put the mats behind the bar to finish his closing duties. Claimant returned to the bar and completed the closing tasks. Claimant clocked out from work at 3:37 a.m.

(6) On December 10, 2013, the employer discharged claimant for violating its prohibition against "lingering after hours" in the bar on December 9, 2013. Transcript at 5, 6.

**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. 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 carries the burden to demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In this case, the employer's witness was very clear that that the employer discharged claimant for violating its prohibition against "lingering" in the bar after it was closed. Transcript at 5, 6. However, the actual policy prohibited staying at the workplace after closing duties had been completed. See Exhibit 1 at 4, 7; Transcript at 6. It was not disputed that claimant did not remain at the workplace on December 9, 2013 after he had performed the closing duties. The employer did not contend that, on December 9, 2013, it should not reasonably have required claimant to remain in the bar approximately an hour after he closed it to perform the closing tasks. On this record, the most the employer established was that claimant might have interrupted his closing tasks to take a fifteen minute break to smoke a cigarette. However, the employer did not suggest that claimant was not allowed at that point in his shift to take a break or that, for some reason, taking such a break was an act that willfully or with wanton negligence violated the employer's standards. The employer has not met its burden to demonstrate claimant's misconduct.

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

**DECISION:** Hearing Decision 14-UI-15449 is affirmed.

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

**DATE of Service: June 9, 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.