

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0846

*Affirmed
No Disqualification*

PROCEDURAL HISTORY: On April 2, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124704). Claimant filed a timely request for hearing. On May 5, 2014, ALJ Monroe conducted a hearing, and on May 9, 2014 issued Hearing Decision 14-UI-17175, concluding claimant's discharge was not for misconduct. On May 16, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record. However, the employer's argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented the employer from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we did not consider the employer's new information.

FINDINGS OF FACT: (1) Maritime Café, Inc. employed claimant, last as a patient consultant, from October 2011 through March 16, 2014.

(2) The employer's executive director had a number of concerns about claimant's continued employment. Although the executive director had been roommates with claimant and two others associated with the employer's business, and had developed a romantic relationship with one of the employer's vendors, he considered claimant's frequent fraternization with vendors, patients and coworkers to be disruptive to the business and wanted her to discontinue those relationships and refrain from developing additional relationships with vendors, patients or coworkers. He had demoted claimant from a managerial position after she was jailed due to an incident with a vendor with whom she had a personal relationship, causing him to distrust her; however, claimant did not realize she had been demoted.

(3) On March 16, 2014, the executive director held a staff meeting. During the meeting, the executive director told staff that another employee, not claimant, would be in charge while he was on vacation.

Claimant asked permission to ask a question, and in what she thought was a polite tone, asked the executive director a question about leaving the other employee in charge. The executive director had observed that over the space of a minute claimant had, “in flustered ways,” commented to employees “can you believe that,” “I just can’t believe this,” “I thought I was the manager,” and “what happened to me being manager.” Transcript at 12. He considered claimant's behavior rude and disruptive.

(4) Claimant also commented that she had spoken with a member of the employer’s board of directors, who disagreed with putting the other employee in charge and did not know why claimant had been demoted. The executive director considered that another policy violation because, although claimant was voted into one of her positions by the board of directors and attended their meetings quarterly to give financial accountings to them, he otherwise prohibited employees and the board of directors from discussing employment-related matters together.

(5) After approximately “a minute” of claimant’s “flustered” statements, the executive director “couldn’t deal with it any longer.” Transcript at 12. He considered claimant’s comments a challenge to his authority. He told claimant to stop, then suspended her, then discharged her during the staff meeting because of the behavior she had demonstrated during the meeting.

(6) Although the executive director had planned to discharge claimant later because of his other concerns, the final incident that prompted him to discharge her when he did was claimant’s behavior during the meeting.

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 has the burden to show by a preponderance of the evidence that claimant’s discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly engaging in rude behavior that disrupted a staff meeting. When asked what those remarks were, however, the executive director testified that claimant made statements “in flustered ways” expressing disbelief that she was not the manager and that her comments lasted only about a minute, and said that one of the board members agreed with her. He did not testify that she yelled, used inappropriate or foul language, called him names, or made threats. Moreover, claimant testified, and the executive director did not deny, that before she spoke during the meeting she had asked the executive director for permission and obtained permission to ask her question. Transcript at 23. She testified that she thought she was “polite” rather than “rude or condescending.” *Id.*

The record fails to show a reason to disbelieve either witness's testimony. Given the circumstances, it is not implausible that the executive director subjectively considered claimant's comments inappropriate, while claimant, "flustered" over events, subjectively believed her behavior was polite and that she was not being rude or condescending. However, the evidence as to whether claimant's behavior was, objectively considered, so patently inappropriate to the circumstances that claimant either knew, or should have known, it would violate the employer's expectations of her was no better than equally balanced. Where the evidence is equally balanced, the party with the burden of persuasion, here the employer, has not satisfied its burden to prove the discharge was for misconduct.

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

DECISION: Hearing Decision 14-UI-17175 is affirmed.

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

DATE of Service: June 26, 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 court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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