EO: 200
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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

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1708

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115511). Claimant filed a timely request for hearing. On October 6, 2014, ALJ Upite conducted a hearing, and on October 24, 2014 issued Hearing Decision 14-UI-26853, concluding the employer discharged claimant, but not for misconduct. On November 3, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. However, the employer's argument 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 it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Destination Eugene Management, Inc. employed claimant as a concierge attendant at the Valley River Inn from July 31, 2008 to August 22, 2014. Claimant had worked at the Valley River Inn under prior ownership since 2003.

(2) The employer expected employees to be courteous to their coworkers and conduct themselves in a professional manner. The employer also expected employees to avoid any comments that could be interpreted as harassment, including unwelcome comments of a sexual nature. Claimant was aware of those expectations.

(3) On August 27, 2013, the employer gave claimant a written warning for hanging up the phone on an employee who had put him on hold for over one minute, and arguing with a supervisor. The employer warned claimant that he was expected to be courteous to co-workers and demonstrate that he was able to maintain his composure under stressful circumstances.

(4) On November 4, 2013, the employer gave claimant a second written warning for writing a coworker a note stating that he was not her mother, and that she needed to do her job, after a supervisor had instructed claimant to address his concerns about the coworker's performance to claimant's direct supervisor. The employer warned claimant that that he was expected to be courteous, cooperative, and professional in his behavior toward co-workers.

(5) On August 18, 2014, claimant trained a female employee in the concierge lounge, who normally worked in the banquet department. Claimant asked the employee why she was wearing her banquet uniform, and explained that in the concierge department, accepted attire is "dress casual." Transcript at 20. Claimant added that some employees dressed "slutty" to get more tips, but explained that provocative attire was frowned upon and employees were expected to present a professional appearance. *Id*. Claimant commented that it was fine to wear a dress, and recommended one with pockets. The trainee did not appear to be offended by claimant's statements.

(6) During the course of the workday, claimant and the trainee joked around, and claimant did not perceive that the trainee found this objectionable. At one point, claimant pointed out that concierge attendants were welcome to eat leftover food. The trainee responded that she was not interested, and referred to herself as "a skinny little bitch." Transcript at 22.

(7) Toward the end of their shift, claimant told the trainee that he thought a young female customer who had just left was "cute." Transcript at 22. The trainee responded that the customer appeared to be just 13 years old. Claimant replied that he thought she was at least 18 years old, and the trainee disagreed. Claimant commented, "That's why I'm glad I'm married, and I'm not that age, and I'm not dating." Transcript at 22. Claimant admitted that he was not good at determining girls' ages.

(8) The employer discharged claimant for behaving in an unprofessional manner and harassing the trainee by making "inappropriate and unwelcome comments of a sexual nature." Transcript at 6.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was 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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v.*

Employment Division, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant for behaving in an unprofessional manner and harassing a trainee on August 16, 2014 by making "inappropriate and unwelcome comments of a sexual nature." However, the employer failed to show claimant knew or should have known through prior training, experience or warnings received for dissimilar behavior in 2013 that the employer or the trainee would probably consider his use of the word "slutty" or comment that a young female customer was "cute" inappropriate, unwelcome or of a sexual nature. Nor do we find claimant's conduct so obviously inappropriate that we infer he knew or should have known as a matter of common sense. Absent a showing that claimant knew or should have known his conduct probably violated the employer's expectations regarding workplace behavior, the employer failed to establish that he violated those expectations willfully or with wanton negligence.

We therefore conclude that claimant's discharge was not for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 14-UI-26853 is affirmed.

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

DATE of Service: <u>December 15, 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 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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