

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0159

Affirmed
No Disqualification

PROCEDURAL HISTORY: On January 22, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153506). Claimant filed a timely request for hearing. On February 24, 2015, ALJ Triana conducted a hearing, and on February 25, 2015 issued Hearing Decision 15-UI-34024, concluding the employer discharged claimant, but not for misconduct. On March 3, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Consumer Cellular, Inc. employed claimant from October 23, 2006 to December 31, 2014 as a customer service supervisor.

(2) The employer expected claimant to refrain from discussing matters of a sexual nature, race, ethnicity, or sexual orientation at work. The employer also expected claimant to refrain from engaging in all forms of harassment that create an offensive working environment for an employee. Claimant received annual harassment and sexual harassment training in 2013 and on December 5, 2014, and understood the employer's expectations.

(3) On December 30, 2014, one of claimant's team members reported to the employer's manager that claimant made a comment to her in November 2014 about the team member's boyfriend being Asian, and the size of his genitals. The manager investigated the allegation and interviewed some of claimant's other team members who alleged claimant had made comments that made them feel uncomfortable. A second team member alleged that, during a daily meeting, claimant made a comment of sexual nature about her son. Transcript at 7. A third team member alleged that claimant told a homosexual employee that he should like a certain scene in a movie because the male actor was nude. A fourth team member alleged claimant spoke about sexual topics related to her "dating life." Transcript at 7. A fifth team member alleged claimant made a comment of a sexual nature about her daughter on December 29, 2014. Transcript at 8. The employer interviewed claimant about the alleged comments. Claimant told the employer the employees had inaccurately described the comments she made, and denied violating the employer's harassment policies.

(4) On December 31, 2014, the employer discharged claimant for allegedly violating its harassment and sexual harassment policies by allegedly making statements regarding sexual topics, race, ethnicity, and sexual orientation at work.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly violating the employer's harassment and sexual harassment policy. The employer provided only hearsay evidence to support its allegations. Transcript at 6, 7, 8. Claimant denied having commented about her team member's boyfriend being Asian, or about his genitals. Transcript at 16. She also denied having made statements of a sexual nature about her son, daughter, or personal life. Transcript at 17, 23-24, 21. Claimant also denied having discussed nudity in a movie, or commenting to a homosexual coworker about the movie. Transcript at 20. Absent a basis to conclude claimant was not a credible witness, the evidence about the statements claimant allegedly made was, at best, equally balanced. Thus, the employer failed to show by a preponderance of the evidence 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 her work separation.

DECISION: Hearing Decision 15-UI-34024 is affirmed.

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

DATE of Service: April 17, 2015

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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