

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0347

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75322). Claimant filed a timely request for hearing. On March 17, 2015, ALJ Seideman conducted a hearing, and on March 19, 2014 issued Hearing Decision 15-UI-35440, affirming the Department's decision. On March 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Chinook Winds Casino Resort employed claimant in its kitchen as a dish machine operator from March 17, 2008 until January 16, 2015.

(2) The employer expected claimant, who was male, to refrain from sexually harassing his coworkers, such as an unwelcome touching of them or other offensive physical contact. Claimant understood the employer's expectations.

(3) On approximately January 3, 2015, a female coworker who was leaving at the end of her shift approached claimant while he was busy in the dish pit. She told claimant that she was going home and placed her hands on his back and neck, apparently to get his attention. Audio at ~12:36, ~19:27. Claimant thought the coworker's gesture was intended to be friendly and he did not consider it offensive.

(4) On January 5, 2015, claimant approached the time clock and noticed that the coworker who had told him good-bye on January 3, 2015 was using it. Claimant walked up behind the coworker. Intending to greet her, claimant placed his hands on her shoulders to get her attention. The worker did not tell claimant that she thought his contact was offensive. Approximately one hour later, claimant and the coworker were in the lounge area and claimant asked her if she would hand him some Royal Crown bags. Claimant was near the coworker when he made his request. The coworker did not tell claimant that she thought his proximity to her was offensive.

(5) Sometime before January 15, 2015, the female coworker whom claimant had greeted at the time clock told the employer's human resources manager about her interactions with claimant on January 5, 2015. She told the manager that she had been "very scared" when claimant touched her shoulders. Audio at ~18:44. She stated that, after his initial touch, she thought that claimant had also "started to rub" her shoulders. Audio at ~8:40. She told the manager that she had been "really uncomfortable" when claimant later stood near her in the lounge area. Audio at ~9:03. The coworker did not mention to the human resources manager that she had touched claimant's neck on January 3, 2015. Based on the coworker's report, the employer decided to investigate claimant's interactions with the coworker on January 5, 2015.

(6) On January 15, 2015, the human resources manager interviewed claimant about his interactions with the female coworker on January 5, 2015. Claimant agreed that he had touched the coworker's shoulder on that day, but did not recall that he had rubbed her shoulders. Claimant also told the human resources manager that he did not realize he had made the coworker uncomfortable when he touched her shoulders and he was sorry. Audio ~10:08, ~20:12. Claimant stated that the coworker had placed her hands on his neck a few days before January 5, 2015, and that when he greeted the coworker on January 5, 2015 and touched her on the shoulder he was only being friendly and "didn't mean anything by it." Audio at ~20:03.

(7) On January 16, 2015, the employer discharged claimant for touching the shoulder of the female coworker on January 5, 2015.

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

In Hearing Decision 15-UI-35440, the ALJ concluded that when claimant touched the shoulders of his female coworker on January 5, 2015, he willfully violated the employer's policy against unwelcome physical contacts. Hearing Decision 15-UI-35440 at 4. The ALJ reasoned that claimant's testimony that he did not think that the way in which he touched the shoulder of the coworker was offensive or unwelcome since she had touched his back and neck on January 3, 2015 was not credible. Hearing Decision 15-UI-35440 at 3. We disagree.

There was no reason in the record for the ALJ to disregard, as not credible, claimant's testimony about the female coworker arguably touching him in a familiar way on January 3, 2015. Claimant was consistent in stating this had happened, both in the employer's interview of him as well as during his testimony at hearing. Although the employer's witness testified that the coworker had not volunteered to her that the incident on January 3, 2015 occurred, the witness did not state that she asked the coworker about the incident and the coworker denied that it had happened. Audio at ~21:49. The hearsay statement of the female coworker that the employer's witness provided at hearing is not probative of

whether the January 3, 2015 incident happened, and cannot be reasonably construed as a definitive hearsay rebuttal of claimant's account at hearing. Since the employer did not arrange for the coworker's testimony at hearing, and did not allude to whether there were or were not any other witnesses to claimant's interactions with the coworker on January 3 or 5, 2015, the only direct evidence on that interaction comes from claimant's testimony. The employer did not present sufficient evidence to rebut claimant's hearing testimony or to establish that the female coworker did not touch claimant in a familiar fashion on January 3, 2015.

The employer's prohibition against touching was apparently limited to unwelcome touching or other reasonably offensive physical contact. Audio at ~9:28, Exhibit 1 at 5. Based on claimant's explanation at hearing, and his interaction with the coworker on January 5, 2015, it does not appear that a relatively brief touch to the coworker's shoulders was something that claimant should have reasonably known was offensive to that coworker, particularly when claimant testified, with apparent sincerity, that he intended only to greet the coworker and did not "mean anything by it." Audio at ~19:27. Although the employer's witness testified that the female coworker told her that the manner in which claimant stood near her and touched her on January 5, 2015 made her uncomfortable or scared, the issue is not what she might or might not have subjectively felt, but whether claimant was reasonably aware that she objectively considered his brief touch unwelcome or offensive. On the facts as they exist in this record, including the coworker's previous touch to claimant's back and neck on January 3, 2015, and the fact that the coworker did not tell or indicate to claimant that she found his touch offensive, the employer did not demonstrate that claimant's reasonably understood that his touch to the shoulders of the coworker was unwelcome or would be construed as offensive. Even more to the point, the employer did not demonstrate that, when claimant touched the coworker, he had the willful or wantonly negligent mental state needed to conclude that he engaged in disqualifying misconduct. *See* OAR 471-030-0038(3)(a). The preponderance of the evidence does not establish that claimant's misconduct on January 5, 2015.

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

DECISION: Hearing Decision 15-UI-35440 is set aside, as outlined above.

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

DATE of Service: May 18, 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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