

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0476

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 93656). The employer filed a timely request for hearing. On April 13, 2015, ALJ Shoemake conducted a hearing, and on April 17, 2015, issued Hearing Decision 15-UI-37107, affirming the Department's decision. On April 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McGrath's Publick Fish House LLC employed claimant as a bartender, server and trainer from May 20, 2006 to February 12, 2015.

(2) The employer had a written policy that prohibited any form of harassment at work, including sexual harassment, which it defined to include verbal abuse of a sexual nature, offensive sexual flirtation or innuendos, graphic comments about a person's physical appearance or anatomy, sexual gestures or any other conduct of a sexual nature that had the purpose or effect of interfering with an employee's work or creating an offensive work environment. Claimant acknowledged her receipt of the employer's policy at hire and was aware of the employer's expectations.

(3) During the week beginning February 8, 2015, five employees told the employer that claimant had made sexual comments to them. Three employees prepared statements but four of the five did not want their names used. The employer investigated but did not question claimant about the allegations before concluding its investigation.

(4) On February 12, 2015, the employer concluded claimant had made the alleged statements, and although it otherwise considered her work performance "outstanding", discharged her for violating its policy against sexual harassment. Audio Record at 16:30 to 17:00. The employer had never disciplined or warned claimant for such conduct in the past.

CONCLUSIONS AND REASONS: We agree with the Department and ALJ. 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 asserted that claimant violated its sexual harassment policy by making sexually explicit comments to five coworkers over an unspecified period of time. Her alleged statements to four coworkers were described by the employer's general manager, whose testimony at hearing was based entirely on second-hand reports he reportedly received, three of which allegedly were in writing but none of which were offered into evidence. Her alleged statement to a fifth coworker, an associate manager, was described by the manager at hearing, but the manager also testified that sexual banter of a kidding nature was common among coworkers and that when she remarked to claimant about her statement to her, claimant asserted she "was kidding." Audio Record ~ 38:00 to 39:00. Claimant generally denied making the other comments and none of the individuals in question testified at hearing, depriving claimant of the critical opportunity to question them regarding their observations, recollections, truthfulness or potential bias, which she challenged at hearing. Audio Record ~ 25:00 to 30:00. On this record, the employer had the alternative of presenting live testimony from current employees to substantiate four of its five allegations, and the facts sought to be proved were central to its assertion of misconduct.¹ The fact that claimant had the opportunity to question the general manager regarding what he had been told was insufficient to test the source of those statements, particularly where the record shows the general manager advised the ALJ he was unwilling to disclose names. Audio Record ~ 12:00 to 12:30. Absent a reasonable basis for concluding that claimant was not a credible witness, we find that her first-hand denials were not outweighed by the employer's hearsay. The evidence as to whether claimant made sexually explicit comments to coworkers, much less did so with conscious indifference to the employer's policy, was, at best, equally balanced. Where the evidence is equally balanced, we find facts against the party with the burden of proof, here the employer. Accordingly, the employer failed to establish those facts.

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). Here, although the employer apparently had its reasons for terminating claimant's employment, it failed to present sufficient evidence that it did so for reasons that constituted misconduct under ORS 657.176(2)(a).

¹ See, *Cole/Dinsmore v DMV*, 336 Or 565, 585, 87 P3d 1120 (2004) (to determine whether hearsay evidence may constitute substantial evidence in a particular case, several factors should be considered, including, (1) whether there was an alternative to the hearsay statement; (2) the importance of the facts sought to be proved by the hearsay; (3) whether there is opposing evidence to the hearsay; and (4) the importance of cross examination regarding the hearsay statements).

Accordingly, claimant is not disqualified from receiving unemployment insurance benefits on the basis of her work separation.

DECISION: Hearing Decision 15-UI-37107 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: June 19, 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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