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
2015-EAB-1255

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 81906). The employer filed a timely request for hearing. On October 1, 2015, ALJ S. Lee conducted a hearing, and on October 8, 2015 issued Hearing Decision 15-UI-45612, affirming the Department's decision. On October 19, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that, while repeating the hearing testimony of its general manager, also included facts that did not appear in her hearing testimony. The employer did not explain why it failed to present this new information during the hearing and otherwise failed to show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. For this reason, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Helium Comedy Club employed claimant as a line cook from November 23, 2013 until May 1, 2015.

(2) The employer expected claimant to report on time for work. The employer also expected claimant to refrain from taking intoxicating substances at work or being under the influence of intoxicants when working. Claimant was aware of the employer's expectations as a matter of common sense.

(3) The general manager thought that claimant arrived late for his scheduled shifts too often. Before May 1, 2015, the employer's general manager and its kitchen manager spoke to claimant on a few occasions and told him that he needed to start his shifts at the scheduled time. Between February 7, 2014 and April 9, 2015, claimant sent twenty-five text messages to the general manager telling her that he might arrive late for a scheduled shift. On some occasions when claimant sent such text messages, he arrived in time to start his shift as scheduled.

(4) On April 20, 2015, the employer's bartender told the general manager that she had entered the walk-in cooler earlier that day when claimant was inside it and observed him inhaling gas from an aerosol can of whipping cream. The employer's general manager inspected cans of whipping cream that had been stored in the cooler since they were delivered on approximately April 19, 2015. The general manager determined that the seals on twenty-four of those cans had been broken and the gas from the cans was gone. The general manager suspected claimant had inhaled the gas from the aerosol cans because she often thought that claimant appeared "stoned" at work. Audio ~ 17:03. Before claimant went home after work, the general manager discussed with him what the bartender had reported to her. Claimant denied that he had inhaled gas from any aerosol cans of whipping cream.

(5) On May 1, 2015, the employer discharged claimant.

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 prove claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In this case, the general manager contended that that the employer discharged claimant because he inhaled gas from an aerosol can of whipping cream on April 20, 2015 and because he was "perpetually" late for work. Audio at ~11:11, ~14:24. However, the general manager also testified that the "final straw" or the "tipping point" for claimant's discharge was her belief that claimant had inhaled the gas. Audio at ~14:38. EAB customarily limits its inquiry to the final act of alleged misconduct that preceded the discharge if the alleged prior acts of misconduct were known to the employer at around the time they occurred.[1] Even were EAB to consider the issue of claimant's tardy arrivals to work as one of the precipitating factors of claimant's discharge, the employer did not demonstrate the extent of claimant's tardiness or that it was due to willful or wantonly negligent behavior. While the general manager testified generally that claimant was chronically late to work, the only specific evidence she provided was in the form of text messages claimant sent to her cautioning her on twenty-five separate occasions between February 7, 2014 and April 9, 2015 that he might be late. Of the times that claimant texted her, the general manager did not know how many of them involved claimant actually reporting for work tardy. Audio at ~30:50. Of the times that claimant was actually late for work, the employer did not rule

[1] *See Cicely J. Crapser* (Employment Appeals Board, 13-AB-0341, March 28, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Griselda Torres* (Employment Appeals Board, 13-AB-0029, February 14, 2013) (discharge analysis focuses on the proximate cause of the discharge, which is the "final straw" that precipitated the discharge); *Ryan D. Burt* (Employment Appeals Board, 12-AB-0434, March 16, 2012) (discharge analysis focuses on the proximate cause of the discharge, which is generally the last incident of alleged misconduct before the discharge occurred); *Jennifer L. Mieras* (Employment Appeals Board, 09-AB-1767, June 29, 2009) (discharge analysis focuses on the proximate cause of the discharge, which is the incident without which a discharge would not have occurred).

out that they were caused by exigencies, errors, or other factors beyond claimant's reasonable control, which would not constitute the type of willful or wantonly negligent behavior necessary to establish disqualifying misconduct. A general assertion that claimant was sometimes late is not, alone, a sufficient basis from which misconduct may be inferred. Absent more specific evidence as to the number of times claimant was late, and claimant's state of mind surrounding the occurrences of tardiness, the employer did not meet its burden to demonstrate that claimant's tardiness constituted a willful or wantonly negligent violation of its expectations.

With respect to inhaling the gas from the aerosol can of whipping cream, the employer presented only a hearsay account of what the bartender supposedly observed and claimant denied the accuracy of that statement. Audio at ~11:25, ~12:20, ~22:08, ~12:26, ~30:30. The bartender did not testify at hearing as to what she did or did not observe claimant doing in the cooler on April 20, 2015. First-hand evidence, like claimant's testimony, is entitled to greater evidentiary weight than hearsay statements about an incident observed. As well, the employer did not present evidence ruling out that people other than claimant had access to the cooler or the whipping cream cans during the time those cans were in the cooler, and that people other than claimant might plausibly have inhaled the gas from the cans. For these reasons, the employer did not show that only claimant could have inhaled the gas from the whipping cream cans or that, more likely than not, claimant was observed inhaling that gas on April 20, 2015. Thus, the employer did not meet its burden to show that claimant's behavior on April 20, 2015 was a willful or wantonly negligent violation of its standards.

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

DECISION: Hearing Decision 15-UI-45612 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: November 12, 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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