

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-1410**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152423). Claimant filed a timely request for hearing. On November 9, 2015, ALJ Dorr conducted a hearing and issued Hearing Decision 15-UI-47409, concluding the employer discharged claimant, but not for misconduct. On November 30, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB, but failed to certify that it provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we considered the entire record, but did not consider the employer's argument when reaching this decision.

**FINDINGS OF FACT:** (1) Comfort Inn Cottage Grove employed claimant as a housekeeper from March 16, 2015 to September 3, 2015.

(2) The employer expected claimant to refrain from making false allegations concerning sexual harassment in the workplace. Claimant understood the employer's expectations.

(3) At the end of June 2015, claimant told one of the employer's owners that she did not like the sexual comments a coworker was making to her, and asked the owner to "please make [the coworker] stop." Audio Record at 24:26 to 24:36. The owner told claimant the employer would "take care of it." Audio Record at 24:49 to 24:58.

(4) Claimant did not work with the coworker again until August 29, 2015, because the coworker had been on vacation. On August 29, 2015, as she was leaving work, claimant told one of the owners that she was tired of the coworker still sexually harassing her, and left work. The owner asked the employer's general manager to investigate claimant's allegations. The manager contacted an independent investigator to conduct an investigation.

(5) On August 30, 2015, the investigator interviewed all the employees at claimant's workplace about the coworker claimant had accused of harassing her. The employees all denied having witnessed the coworker engaging in any "sexual misconduct." Audio Record at 15:02 to 15:22. Two employees did report that claimant had begun "drudging up stories" the prior week. Audio Record at 15:40 to 15:48. The coworker accused of harassing claimant denied having seen claimant in a hotel room where he was working on August 29, 2015.

(6) When the investigator spoke with claimant several days later, claimant reported that, on August 29, the coworker had gone into a room where claimant was working, and had asked her to quickly engage in a sexual act with him before the owner arrived. Claimant told the investigator she refused the coworker's advance.

(7) The employer reviewed videotape of the area where it understood the August 29 incident occurred, but the videotape did not show what occurred or was said inside any of the hotel rooms, and did not confirm claimant's allegations.

(8) Based on its investigation, the employer concluded that claimant made false statements about the coworker's conduct. On September 3, 2015, the employer discharged claimant for allegedly making false allegations of sexual harassment by a coworker.

**CONCLUSIONS AND REASONS:** We agree with the ALJ and conclude 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 standards of behavior the 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 the 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 bears the burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Here, the employer failed to satisfy that evidentiary burden.

The employer's manager testified that it discharged claimant based on "previous conduct" and the employer's belief that claimant had made false allegations of sexual harassment by a coworker. Audio Record at 9:47 to 10:05. Because the employer chose not to discharge claimant until after it concluded its investigation about claimant's allegations of sexual harassment at work, we focus the discharge analysis initially on the proximate cause of the discharge, or the incident without which a discharge would not have occurred when it did. *See e.g. Appeals Board Decision 13-AB-0341*, March 28, 2013 (discharge analysis focuses on the proximate cause of the discharge, which is the event that "triggered" the discharge); *Appeals Board Decision 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); *Appeals Board Decision 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); *Appeals Board Decision 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 when it did). Here, the initial analysis of whether claimant's discharge disqualifies her from unemployment benefits is, therefore, properly limited to whether claimant made false allegations that her coworker sexually harassed her.

The employer interviewed all the employees in claimant's workplace and viewed video of the area where it understood the August 29 incident occurred. The employer determined that none of the evidence it had collected corroborated claimant's allegations that a coworker had engaged in sexually harassing behavior toward claimant. The coworker himself denied claimant's allegations. However, although the results of the employer's investigation did not corroborate claimant's allegations, the accused coworker's denial and the lack of witnesses and video corroborating claimant's allegations fail to establish by a preponderance of the evidence that claimant made false allegations about her coworker. Because claimant did not assert that there were any witnesses to the incidents, the fact that the other employees said they had not witnessed any sexual misconduct did not contradict claimant's allegations. Similarly, the video viewed by the employer did not show inside or provide audio for the hotel room where the alleged August 29 incident occurred. Finally, where the employer has the burden to show claimant engaged in misconduct, the entirely hearsay evidence of the accused coworker's denial is outweighed by claimant's sworn, firsthand testimony of her coworker's behavior. Taken as a whole, the evidence fails to show that, more likely than not, claimant's reports to the employer were false.

Absent a showing claimant engaged in the conduct for which she was discharged, the employer failed to establish that it discharged her for misconduct. Claimant is not disqualified from receipt of unemployment insurance benefits on the basis of her separation from employment.

**DECISION:** Hearing Decision 15-UI-47409 is affirmed.

Susan Rossiter and J. S. Cromwell.

**DATE of Service:** January 6, 2016

**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](http://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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