

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1540

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114829). Claimant filed a timely request for hearing. On June 30, 2015, ALJ Wyatt conducted a hearing, and on July 8, 2015 issued Hearing Decision 15-UI-41226, reversing the Department's decision. On July 24, 2015, the employer filed an application for review with the Employment Appeals Board (EAB). On September 10, 2015, EAB issued Appeals Board Decision 2015-EAB-0893 in which it reversed Hearing Decision 15-UI-41226 and remanded the matter to the Office of Administrative Hearings (OAH) for further development of the record.

On September 28, 2015, ALJ Wyatt conducted a hearing in which the claimant did not participate, and on October 7, 2015, issued Hearing Decision 15-UI-45549, concluding that the employer discharged claimant for misconduct. On October 23, 2015, claimant filed an application for review with EAB. On October 29, 2015, EAB issued Appeals Board Decision 2015-EAB-1259, reversing and remanding Hearing Decision 15-UI-45549.

On December 2, 2015, ALJ Frank conducted a hearing, and on December 10, 2015, issued Hearing Decision 15-UI-49168, concluding that the employer discharged claimant for misconduct. On December 30, 2015, claimant failed an application for review with EAB.

FINDINGS OF FACT: (1) Shari's Management, Inc. employed claimant as a server from January 23, 2008 until March 13, 2015.

(2) The employer expected claimant to refrain from fighting with coworkers, and to avoid arguing with coworkers in front of restaurant guests. Claimant understood the employer's expectation as a matter of common sense. Claimant knew that one of her coworkers, with whom she was personal friends, had slapped another coworker; the coworker regularly joked about this incident.

(3) On May 9, 2014, the employer issued warnings to claimant for arguing with coworkers in front of guests on May 1, 2 and 4, 2014. In the May 4 warning, claimant's manager told her that arguments were best dealt with in the back of the house, *i.e.*, in an area away from guests. Exhibit 1 at 7 and 8.

(4) On December 24, 2014, restaurant guests complained about the food and the cost of the food to claimant and the employer's managers. The general manager believed that claimant had been rude to the guests and documented her observations in an incident report. Exhibit 1 at 11. The general manager did not issue a warning to claimant for her behavior on December 24, 2014. Transcript at 15.

(5) On March 10, 2015, when claimant arrived at work, she was assigned to station one. The coworker with whom claimant was personal friends reported for work some time later and argued with claimant about claimant's assignment to station one, which the coworker thought would generate more in tips than the station to which she was assigned. Claimant asked the employer's day manager to help resolve the dispute, and the day manager directed claimant to go the employee break room. The coworker and the employer's day and evening managers also went to the break room. The coworker stood in front of claimant, who was seated at a table, and angrily yelled at claimant. The two managers stood beside claimant. Claimant yelled back at the coworker, telling her to stop. 12/2/15 Hearing, Audio Recording at 25:06. Because claimant knew that the coworker had slapped another coworker, she was concerned about what the coworker might do to her. Claimant put out her hand to stop the coworker from getting close to her; the coworker then grabbed claimant's wrist and claimant attempted to shake her hand off. Claimant also tried to get up from her chair, but the coworker pushed claimant down. The evening manager put herself between claimant and the coworker, and the day manager yelled that both servers should go home. 12/2/15 Hearing, Audio Recording at 29:36 and 29:49.

(6) On March 11, 2015, the employer issued a warning to claimant for her behavior during the argument with the coworker on March 10, 2015. On March 13, 2015, the employer discharged claimant for arguing and fighting with the coworker on March 10, 2015.

CONCLUSION AND REASONS: We conclude that 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b).

Claimant knew and understood the employer's expectation that she refrain from fighting or arguing with her coworkers, particularly in front of restaurant guests, both as a matter of common sense and because she had been warned to refrain from these behaviors in May 2014. The employer discharged claimant

for arguing with a coworker on March 10, 2015. According to the employer, claimant and the coworker engaged in an angry shouting match over their work assignments, and pushed and shoved one another.

Claimant, however, contends that she never instigated the fight with her coworker. Claimant asserted that after the coworker began the argument in the restaurant and the manager directed claimant to go to the employee break room, claimant ended up in a position – seated at a table in the break room with the angry coworker standing in front of her – from which she could not extricate herself. Claimant further asserted that the only physical contact she had with the coworker occurred when claimant put her hand out to stop the coworker from getting closer to her and the coworker grabbed her wrist, and that the only pushing that occurred happened when claimant tried to get out of her chair and the coworker pushed her down.

The employer's evidence consisted of written statements prepared by the two managers who witnessed the March 10 dispute between claimant and the coworker. In these statements, the managers provided contradictory accounts of what happened: the evening manager asserted that the coworker pointed her finger at claimant who then "batted it away," and the day manager asserted that claimant pointed her finger at the coworker who then pushed the coworker's finger away. Exhibit 1 at 5 and 6. Claimant's description of the incident that resulted in her discharge was relatively consistent at both the June 30 and December 2, 2015 hearings. We also note that the employer's witness – the day manager who witnessed the March 10 altercation – provided no testimony at the December 2 hearing to rebut claimant's account of the events. Thus, after considering the entire record in this case and weighing all the evidence, we conclude that claimant's version of the events of March 10 was the most believable. Where facts were in dispute, we resolved them in favor of claimant's evidence. We conclude it more likely than not that claimant did not violate the employer's expectations by arguing with a coworker in front of guests. Instead, claimant obeyed her manager's directive to take the argument to the back of the house by moving to the employee break room. We also conclude that claimant did not physically fight her coworker. Claimant's reactions to her coworker, whom she knew had slapped another coworker, were defensive and taken in response to a threatening situation in which she had been placed. We therefore find that claimant's actions during the March 10 altercation did not constitute a willful or wantonly negligent violation of the employer's expectations.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 15-UI-49168 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: January 20, 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. 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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