

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0235

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 4, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 164347). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Jarry conducted a hearing, and issued Hearing Decision 16-UI-53295, concluding that the employer discharged claimant, but not for misconduct. On February 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Quality Inn & Suites employed claimant as a property attendant from May 25 until October 3, 2015. Claimant's duties included driving guests of the motel to and from the airport, and patrolling the motel grounds and parking lot to ensure the safety and security of motel guests and their vehicles.

(2) The employer expected that claimant would take a 15 minute break after had worked two hours of his shift. Claimant knew about and understood this expectation of the employer.

(3) When claimant reported for his evening shift on October 2, 2015, the front desk attendant told claimant that he would need to pick up guests at the airport as soon as the guests had obtained their luggage from the baggage claim area. Approximately 15 minutes after he reported for his shift, claimant went outside with his cell phone to await a call regarding the airport pickup. Claimant smoked a cigarette as he awaited the call from the airport, and also kept his eye on some individuals on the motel property to make sure they were not engaging in any inappropriate activity. When he was trained for his job, claimant's supervisor told claimant he was allowed to smoke whenever he was outside performing his job duties.

(4) While outside awaiting a call regarding the airport pickup, employees of the bar adjacent to the motel where claimant worked asked claimant to come to the bar to discuss parking. When the parking lot of the motel was full and at the discretion of employees of the bar and restaurant next to the motel, motel guests were allowed to park in the parking lots designated for bar and restaurant customers. Claimant monitored the vehicles of motel guests who parked in these spaces, and often talked with the

restaurant and bar employees about parking needs for motel guests. Claimant did not enter the bar on October 2, 2015, but spoke to the bar employees outside the bar.

(5) On October 3, 2015, the employer discharged claimant because it believed he had taken an unauthorized break October 2 to smoke a cigarette and to enter the bar adjacent to the motel.

CONCLUSION AND REASONS: We agree with the ALJ and 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. 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).

The employer expected that claimant would take a 15 minute break after working two hours of his shift, an expectation of which claimant was aware. The employer discharged claimant because it believed he violated this expectation on October 2, 2015, by taking a break 15 minutes after his shift started to smoke a cigarette and enter the bar adjacent to the motel where claimant worked.

Claimant and the employer's witness, the employer's housekeeping manager, presented different accounts of claimant's conduct on October 2. The housekeeping manager testified that the front desk manager, who was stationed in the motel lobby which faces the bar, told her that she saw claimant enter the bar. Claimant, however, asserted that he never entered the bar but talked with bar employees outside the bar about parking spaces that were sometimes used by motel guests. In regard to smoking, the employer's witness agreed that claimant was permitted to smoke if he was working outside, and testified that she knew nothing about any airport pickup claimant might have been assigned to make. Audio Recording at 22:17. Absent any reason to doubt claimant's credibility (and we find none in this record), we give greater weight to claimant's first hand testimony about his conduct than to the hearsay testimony of the housekeeping manager. We therefore conclude that the employer failed to meet its burden to demonstrate that claimant engaged in misconduct by taking an unauthorized break to smoke a cigarette and enter a nearby bar on October 2, 2015.

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

DECISION: Hearing Decision 16-UI-53295 is affirmed.

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

DATE of Service: March 15, 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.