

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0705

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 10, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115355). Claimant filed a timely request for hearing. On June 7, 2016, ALJ Wyatt conducted a hearing, and on June 10, 2016 issued Hearing Decision 16-UI-61467, reversing the Department's decision. On June 15, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) C & K Market employed claimant as a bookkeeper from December 1, 2014 until April 7, 2016. Claimant sometimes worked overseeing the use of the self-service check-out or "u-scan" aisle by customers.

(2) The employer expected claimant to be courteous to customers and to avoid rudeness. Claimant understood the employer's expectation as a matter of common sense and as she reasonably interpreted it.

(3) On January 16, 2016, a customer complained to the employer that the customer had observed claimant speaking rudely and negatively about a coworker. On January 19, 2016, the employer's store manager issued a written warning to claimant based on this incident. The warning advised claimant she was required to have the "absolute best friendly and serving attitude" when she was working. Exhibit 1 at 6.

(4) On March 29, 2016, claimant was overseeing customers using the "u-scan" aisle. A customer using the "u-scan" line for the first time appeared to be having problems and claimant asked the customer to come over so she could assist. The interaction was not notable to claimant. However, the customer made a complaint about claimant, stating that she thought claimant was rude to her and needed "an attitude adjustment." Exhibit 1 at 4.

(5) On March 30, 2016, claimant again was overseeing the “u-scan” aisle to purchase a bottle of wine. The customer began to place the bottle of wine that he had purchased in an ice cream bag, a specialty bag that was smaller and better insulated than regular bags. Claimant observed the customer’s actions and told the customer that the ice cream bags were expensive, that the employer had small, regular bags of an appropriate size to package the wine bottle and to please use those bags. Claimant took a regular bag over to the customer and the customer gave claimant the ice cream bag he had intended to use. The interaction was not notable to claimant. However, the customer made a complaint about claimant, stating she had been rude during their interaction.

(6) Sometime before April 5, 2016, the employer reviewed comments from customers made online and discovered the complaints about claimant’s behavior on March 29 and 30, 2016. On April 5, 2016, the employer issued a written warning to claimant for the alleged incidents on March 29 and 30, 2016. The warning stated claimant was placed on suspension pending further investigation of those two complaints. Exhibit 1 at 2. When the assistant manager met with claimant to give her the warning, claimant stated she did not think she had been rude to either customer and she had only been “doing her job.” Audio at ~12:30. Sometime before April 7, 2016, the store manager spoke personally with both customers by telephone about their interactions with claimant.

(7) On April 7, 2016, the employer discharged claimant because customers had complained about her behavior on March 29 and March 30, 2016.

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

The employer’s witness at hearing did not appear to have observed claimant’s interactions with the two customers at issue, and had no information other than the complaints submitted by the customers. Audio at 9:06, ~14:20. It did not appear that the witness spoke personally with either customer about claimant’s alleged behavior. The customers’ complaints did not identify specifically what claimant had said and done that led to their conclusions that she was “rude.” See Exhibit 1 at 2, 4. In contrast, claimant testified with apparent sincerity that she did not think she had done or said anything rude to those customers, and speculated that they might have overly sensitive to her behavior because they were otherwise frustrated with operating the “u-scan” machines and, as result, might have been “having a bad day.” Audio at ~25:37, ~27:42. Because the employer presented no specific evidence that would allow an independent determination of whether claimant’s behavior was reasonably perceived as rude by the customers, and claimant disputed that she had been rude, her first-hand information on this matter is entitled to greater weight than the employer’s hearsay evidence, particularly when that hearsay is as conclusory as that contained in the customers’ complaints. On this record, the employer failed to meet its burden of demonstrating that claimant’s behavior on March 29 and 30, 2016 violated all reasonable interpretations of courteous behavior.

Although the employer discharged claimant, it did not establish that the discharge arose from claimant's misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-61467 is affirmed.

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

DATE of Service: August 1, 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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