

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1004

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 15, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 110228). Claimant filed a timely request for hearing. On August 9, 2016, ALJ Vincent conducted a hearing, and on August 15, 2016, issued Hearing Decision 16-UI-65666, concluding that the employer discharged claimant for committing an act that disqualified him from the receipt of unemployment benefits. On August 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From July 15, 2013 until May 19, 2016, the Seaside Oceanfront Inn employed claimant as a server at its restaurant, Maggie's on the Prom.

(2) The owner's policy prohibited employees from using drugs or consuming alcohol while working. Claimant received a copy of the owner's drug and alcohol policy on March 3, 2016, and signed a form to acknowledge that he had read the policy.

(3) Sometime in early May 2016, a server who worked with claimant observed him go behind the restaurant bar, pour a dark alcoholic beverage into a plastic "to go" cup, add soda to the cup, and place the cup in a closet area adjacent to the bar. Audio recording at 24:40. The closet in which claimant placed the cup is accessible only to restaurant staff. At the employer's restaurant, alcoholic drinks are never mixed or served to guests in plastic cups. Audio recording at 24:45.

(4) On or about May 15, 2016, a server who worked with claimant¹ observed him go behind the bar, pour vodka into a cup, and place the cup in the closet area adjacent to the bar. The server saw claimant periodically sip from the cup during his work shift. Audio recording at 17:52.

¹ The server who observed claimant's actions on May 15 was a different server from the one who saw him mix a drink in early May 2016.

(5) The two servers who observed claimant pour himself alcoholic beverages reported claimant's actions to the employer's owner. On May 19, 2016, the employer discharged claimant for violating its drug and alcohol policy by consuming alcohol while working.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that the employer discharged claimant for acts which disqualified him from the receipt of unemployment benefits.

An individual commits an act that disqualifies him from the receipt of unemployment benefits if the individual fails to comply with the terms and conditions of an employer's reasonable written drug and alcohol policy. ORS 657.176(2)(h) and (9)(a)(A). An employer's drug and alcohol policy is considered reasonable if the policy prohibits the use, sale, possession or effects of drugs or alcohol in the workplace; the employer follows its policy; and the policy has been published and communicated, or provided in writing to the individual. OAR 471-030-0125(3)(a) through (c). The employer carries the burden to establish by a preponderance of the evidence that it discharged claimant for a disqualifying act. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Here, the employer discharged claimant because he violated its drug and alcohol policy by consuming alcohol while he was working. The employer's policy was reasonable because it prohibited the use of alcohol in the workplace, the policy was provided in writing to claimant, and the employer followed its policy by discharging claimant for his consumption of alcohol in the workplace.

Claimant, however, denied that he ever consumed alcohol on the job. The employer's evidence regarding claimant's alcohol consumption was provided by two witnesses, servers who worked with claimant and who testified that they observed claimant go behind the bar, pour an alcoholic drink, and place the drink in a closet. One witness testified that she saw claimant periodically sip from the drink during his shift. Although the other witness did not observe claimant drinking the alcoholic beverage after he placed it in the closet, it is reasonable to infer that he did. The witness testified that claimant poured his drink into a plastic cup, which is never used to serve a beverage to a restaurant guest, and kept the cup in an area to which only staff had access. Audio recording at 24:48, 25:30 and 25:45. The employer's evidence – two coworkers who provided detailed, specific, and eye witness accounts regarding claimant's behavior on the job – outweighs claimant's statement that he never consumed alcohol while working. The employer therefore demonstrated, by a preponderance of evidence, that claimant violated its drug and alcohol policy.

When, as here, an employer has met its evidentiary burden to demonstrate that a claimant engaged in a disqualifying act, the burden shifts to the claimant to rebut the employer's evidence. Claimant asserted that the testimony of the two employer witnesses who observed him consuming alcohol was false. He contended that they provided untruthful accounts of his behavior at work because they wanted to get him fired so they could then be assigned to work the more lucrative dinner shift that claimant customarily worked. Audio recording at 33:57. In addition, claimant testified that he believed that the two witnesses sought to retaliate against him because they believed that claimant was responsible for the discharge of a coworker that occurred about one week before claimant was discharged. Audio recording at 34:31. Both servers denied, however, that their reports to the employer about claimant's alcohol consumption were motivated by any thoughts of personal gain or retaliation. Audio recording at 39:52, 40:01. One of the servers, whom claimant alleged had a personal relationship with the coworker who was discharged a week before claimant was, testified that she agreed with the employer's decision to

discharge the coworker. Audio recording at 40:21. Finally, one of the servers testified that after claimant was discharged, she was not assigned to work only dinner shifts, but worked both morning and evening shifts. Audio recording at 41:10. The evidence regarding the reasons for the witnesses testimony about claimant's alcohol consumption s was, at best, equally balanced. We therefore conclude that claimant failed to meet his burden to rebut the employer's evidence by demonstrating that the employer's witnesses were motivated to provide false testimony by a desire for personal gain and retaliation.

The employer discharged claimant for committing acts that violated its drug and alcohol policy. Claimant is therefore disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-65666 is affirmed.

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

DATE of Service: September 29, 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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