

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1231**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On September 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83431). Claimant filed a timely request for hearing. On October 13, 2016, ALJ R. Frank conducted a hearing, and on October 21, 2016 issued Hearing Decision 16-UI-69698, concluding claimant's discharge was not for misconduct. On November 3, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**EVIDENTIARY MATTER:** In Hearing Decision 16-UI-69698, the ALJ stated that no exhibits were offered or admitted into the evidence. The record shows, however, that the employer offered a packet containing 27 pages of documents into evidence, and the ALJ marked the packet as Exhibit 1 and orally stated during the hearing that Exhibit 1 was admitted into the record. Audio recording at ~ 6:45. Because Exhibit 1 was made part of the record, EAB considered its contents, the record documents, and the audio recording of the October 13, 2016 hearing when reaching a decision in this matter.

**FINDINGS OF FACT:** (1) Northwest Primary Care Group, PC employed claimant as a network administrator from March 12, 2007 to July 29, 2016.

(2) The employer expected employees to treat each other with dignity and respect, and refrain from inappropriate conduct. Claimant signed an acknowledgment of that expectation at the time of hire.

(3) On June 19, 2015, a neighboring business reported that claimant loitered around its female staff members, one of whom had reported her belief that claimant had taken a picture of her from behind after she passed him in the hallway. Claimant disagreed that he had loitered or had taken a picture of a woman. The employer discussed the complaint with claimant, warned him that the employer considered such conduct unsafe and intimidating, and instructed him to stay away from the neighboring business.

(4) After the June 2015 warning and instruction, claimant continued to use a bathroom near the neighboring business at times he believed only a male employee was present. The employer continued

to receive some reports that claimant was seen in the vicinity of the neighboring business but issued no additional warnings about that or about his behavior toward or interaction with women.

(5) On July 27, 2016, a manager observed claimant turn to look in the direction of a female staff member as she passed him and continued down the hall. The manager concluded claimant had been inappropriately looking at the female staff member. The manager spoke with the female staff member about her perception. The female staff member then reported that claimant had attempted to speak with her in the break room, and did not move out of her way when they passed in the hall; the female staff member suggested that claimant's behavior indicated that claimant had been trying to force physical contact with her. She reported that she did not feel comfortable around claimant, and did not want to interact with him.

(6) On July 29, 2016, the manager reported her conversation with the female staff member to the employer's HR director. The manager stated, "I do not feel comfortable keeping [claimant] employed here and around my younger, female employees. Unfortunately I just got 6 more young, female employees and I feel obligated to stop this pattern of behavior from continuing." Exhibit 1, July 29, 2016 email. On July 29, 2016, the employer discharged claimant.

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence; where the credible evidence is equally balanced, the employer has not proven misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The final incident that prompted the employer to discharge claimant when it did included the manager's conclusion and belief that claimant had, in essence, leered at or ogled a female employee in the workplace, coupled with that female employee's report that she believed claimant had tried to force physical contact with her. With respect to the conclusion that claimant had leered at or ogled the female employee, claimant and the manager were the only witnesses. The manager alleged it occurred, and claimant denied that it did. However, the manager did not explain what about claimant's expression or body language suggested that he was looking at the female coworker, or what about his behavior in looking at her was inappropriate (*e.g.* with an inappropriate or disrespectful purpose rather than a desire to see what she was doing or where she was going). To the extent the employer discharged claimant for looking at a female as she passed, the employer has not established that the incident occurred, or, if it did, that claimant's conduct in looking at her was inappropriate or disrespectful.

With respect to the other behavior the employer alleged claimant demonstrated toward the female coworker, the record likewise fails to show misconduct. There is nothing inherently inappropriate about trying to speak with a coworker in a break room; therefore, the allegation that claimant tried to speak with a female coworker in the break room, absent evidence that he, for example, attempted to raise unprofessional or disrespectful topics or failed to cease after she asked him, does not suggest misconduct on claimant's part. To the extent the female employee also alleged that claimant obstructed her path to force physical contact in the hallway, the record fails to show the circumstances under which any such incident(s) occurred or, specifically, what claimant was doing during the incident that suggested his purpose was to force physical contact. Although the ALJ noted in his decision that the female employee did not report any incidents with claimant to the employer until the manager suggested that claimant had looked at her in an inappropriate manner, we disagree with the implied significance of that fact and do not infer from that fact that the incidents she alleged either did or did not happen. We do find it notable, however, that all of the evidence about the employee's allegation was offered in the form of hearsay. Neither the ALJ nor claimant had the opportunity to examine the employee about what happened, what the circumstances were, or what it was about claimant's behavior in any particular incident caused the employee to feel uncomfortable and request not to interact with claimant. Absent reliable and detailed evidence tending to suggest that claimant intentionally ogled, harassed or attempted to force physical contact with the female employee, or that he engaged in those sorts of behaviors consciously and with indifference to the consequences of violating the employer's expectations that he treat coworkers professionally and with respect and dignity, the record fails to support a finding of misconduct.

We therefore conclude that the employer discharged claimant, not for misconduct, and that claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

**DECISION:** Hearing Decision 16-UI-69698 is affirmed.

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

**DATE of Service:** November 22, 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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